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468	Rajeswara Muthuramalinga v. Mahalinga Raju	...	9 L W 287; (1919) M W N 365.
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569	Chengalraya Chetti v. Raghava Ramanuja Doss ...	37 M L J 100.
574	Mangat Rai v. Alia ...	92 P R 1919.
575	Bijoya Kanta Lahiry Chowdhury v. Kailash Chandra Bhowmik ...	23 C W N 567; 46 C 771.
580	Durga Devi v. Ram Nath ...	85 P R 1919.
582	Pramatha Nath Roy v. W. A. Lee ...	23 C W N 553.
587	Husain Bibi v. Hakim ...	86 P R 1919.
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597	Abu Hasan v. Emperor ...	21 Bom L R 747; 20 Cr L J 677.
599	Bir Kishore Roy v. Emperor ...	4 P L J 423; 20 Cr L J 679.
601	Hira Gobar v. Emperor ...	21 Bom L R 724. 20 Cr L J 681.
604	Emperor v. Asghar Ali ...	27 P R 1919 Cr; 20 Cr L J 684.
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631	Hammakke Hengsu v. Kochappa Rai ...	26 M L T 245.
632	Alayar Khan v. Bibi Kunwar ...	17 A L J 1025.

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655	Nrianjan Singh v. Knndan Singh	...	17 A L J 1015.
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659	Sripal Singh v. Emperor	...	22 O C 130; 20 Cr L J 691; 1 U P L R (J. C.) 61.
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665	Byramji Pudumji v. Emperor	...	21 Bom L R 761; 20 Cr L J 697.
666	Badri v. Emperor	...	20 Cr L J 698.
667	Emperor v. Dhondya Dudya	...	21 Bom L R 768; 20 Cr L J 999.
668	Nandu v. Emperor	...	20 Cr L J 700; 17 A L J 1055.
669	Ramkrishna Haribhaoo Vadke v. Emperor	...	21 Bom L R 753; 20 Cr L J 701.
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736	Laxman v. Ganpat Suryabhan	...	15 N L R 146.
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739	Purgan Pande v. Dhanpat Tewari	...	*Patna High Court.
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746	Hira Lal Singh v. Ramjiram	...	(1919) Pat 372.
746	Bogisetti Akka Nagamma v. Panganama Krishna Rao	...	10 L W 153; (1919) M W N 536.
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The fact of a person giving up the whole of his holding and quitting the village for good shows that he has abandoned all the rights he had in the village, including rights in the *shamilat*, and on such abandonment his share in the *shamilat* passes into the possession of the co-sharers, and he and his descendants lose their right to it. **P** MIRZA *v.* KAHAN SINGH, 96 P. R. 1919 **539**

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———, *settled, re-opening of—Fraud, proof of—Error, whether ground for re-opening accounts—Principal and agent—Agent, duty of.*

As the law on the question of re-opening settled accounts is not contained in any Indian legislative enactment, the guiding principles of English law must be applied, whereby a Court will re-open an account only where the accounts are shown to be erroneous to a considerable extent both in amount and the number of items, or where fiduciary relations exist and a less considerable number of errors is shown, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown. **A** PURAN MAL *v.* FORD AND MACDONALD AND CO, LTD., 17 A. L. J 805 **373**

———, *suit for—Damages for* laches, *claim for, whether can be joined.*

In a suit for accounts against an agent a claim for damages on account of loss caused by his *laches* can be included. RAMESH CHANDRA ACHARJEE *v.* EASIN SARKAR **71**

Account books, entries in, value of *See* EVIDENCE ACT, s 34 **704**

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Accused, admission by, of facts alleged, effect of. *See* PENAL CODE, s. 420 **604**

———, refusal to supply confidential documents to, effect of. *See* CRIMINAL PROCEDURE CODE, s. 526 **273**

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Acquittal, plea of previous—Procedure—Court, duty of. *See* CRIMINAL PROCEDURE CODE, s. 403 **60**

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—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.

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—— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.

—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.

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—— 1894—I. *See* LAND ACQUISITION ACT.

—— 1897—IX. *See* PROVIDENT FUNDS ACT.

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— 1908—V. *See* CIVIL PROCEDURE CODE.
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— 1908—XVI. *See* REGISTRATION ACT.
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— 1910—I. *See* PRESS ACT.
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— 1859—XI. *See* BENGAL LAND REVENUE SALES ACT.
— 1870—VI. *See* BENGAL VILLAGE CHAUKIDARI ACT.
— 1876—VII. *See* BENGAL LAND REGISTRATION ACT
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— 1884—III. *See* BENGAL MUNICIPAL ACT.
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— 1887—XII. *See* BENGAL, AGRA AND ASSAM CIVIL COURTS ACT.
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— 1913—II. *See* ORISSA TENANCY ACT.
— 1908—VI. *See* CHOTA NAGPUR TENANCY ACT.

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— 1901—III. *See* BOMBAY DISTRICT MUNICIPALITIES ACT.

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— 1898—XI. *See* C. P TENANCY ACT.
— 1903—XVI. *See* C. P. MUNICIPAL ACT.

Acts—(Local)—Madras.

— 1884—IV. *See* MADRAS DISTRICT MUNICIPALITIES ACT.
— 1884—V. *See* MADRAS LOCAL BOARDS ACT.
— 1900—I. *See* MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT.
— 1908—I. *See* MADRAS ESTATES LAND ACT.

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— 1900—XIII. *See* PUNJAB ALIENATION OF LAND ACT.
— 1905—II. *See* PUNJAB PRE-EMPTION ACT.
— 1913—I. *See* PUNJAB PRE-EMPTION ACT.

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— 1876—XVIII. *See* OUDH LAWS ACT.
— 1879—XIII. *See* OUDH CIVIL COURTS ACT.
— 1881—XII. *See* U. P. RENT ACT.
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— 1901—II. *See* AGRA TENANCY ACT.
— 1901—III. *See* U. P. LAND REVENUE ACT.
— 1912—IV. *See* U. P. COURT OF WARDS ACT.
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— 1825—XI. *See* BENGAL ALLUVION AND DILUVION REGULATION.

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Admissibility in evidence of statement in civil suit in criminal case between same parties after death of deponent. *See* EVIDENCE ACT, s. 33 **385**
——— of unstamped document executed outside British India without affixing proper British Indian stamp. *See* STAMP ACT, s. 19 **477**
Admission by landlord, whether binding on tenant. *See* ESTOPPEL **739**
——— by Pleader, whether binding on client. *See* TORT **878**
———, gratuitous, value of. *See* IGNORANCE OF RIGHT **503**
——— made by guardian, whether binding on minor. *See* GUARDIAN, ADMISSION BY **825**
Adverse interest, what is. *See* CIVIL PROCEDURE CODE, O. XXXII, R. 4 **636**
Adverse possession — Co-sharers—Overt act *See* LIMITATION ACT, SCH I, ART. 144 **629**
——— during currency of lease. *See* INAM, GRANT OF **770**
——— of limited interest acquired by transferee. *See* BENGAL TENANCY ACT, 1885, s. 73 **289**
——— of tenant, effect of. *See* LANDLORD AND TENANT **650**
———, *title by—Burden of proof—License—Revocation, proof of.*

In a suit for ejectment, the plaintiff's case was that the defendant had been put in possession for certain purposes by leave and license. The defendant denied the license and set up an adverse title; but in appeal to the High Court it was urged on his behalf that it was not proved that the license was ever granted or revoked:

Held, that the plaintiff having based his case upon the license, from the moment the defendant repudiated the license and set up adverse possession, it was no longer possible for him to rely upon the license or to deny its revocation, and that his position was that of a trespasser without any defence unless he established his title by adverse possession.

On the defendant's plea of adverse possession the lower Appellate Court, holding that the onus lay on the plaintiff to prove not only his title but also his possession within twelve years of the suit, dismissed the suit. In appeal to the High Court:

Held, that the decision of the lower Appellate Court was erroneous in law, which was that the onus of establishing a title to property by reason of possession for a certain stipulated period lay on the person asserting such possession. **A** JAI CHAND *v.* GIRWAR SINGH, 7 A. L. J. 814 **366**
——— Trespasser, whether possession of, adverse to collaterals. *See* LIMITATION ACT, 908, SCH I, ART 144 **857**
Agency, proof of. *See* CONTRACT ACT, s. 230 **177**

Agent duly authorised 436

Agra Tenancy Act (II of 1901), ss. 4 (2), 19, 58—*Grove held on yearly rent—Tenancy, whether established—Ejectment—Jurisdiction of Revenue Courts.*

B., the grantee of some land, planted a grove thereon; after his death *D.* was admitted as a tenant on payment of a yearly rent. He continued to pay this rent from 1899 till 1910 when the present defendant sued in the Revenue Court and obtained a decree for his ejectment, the Board of Revenue holding that, though the grove in question was not "land" within the meaning of the Tenancy Act, a decree for ejectment could be given on the ground that *D* came in after the death of the original grantee, not as his heir and not under the same contract as would bind him and the original grantee, but simply as a tenant paying rent from year to year. *D.* thereupon brought the present suit to obtain a declaration that the decree of the Board of Revenue was illegal being one which the Revenue Courts had no jurisdiction to pass:

Held, that a grove-holder such as *D.* was a non-occupancy tenant and the Revenue Courts had the power to eject him, and that the decision of the Board of Revenue was in no way illegal. **A** RAMESHAR SINGH *v.* MADHO LAL, 17 A. L. J. 971 **191**

——— ss. 4 (3), (5), 95 (b)—*Lessee of right to cut grass, whether tenant—Occupancy rights, acquisition of—Ejectment—Suit for declaration of class of tenancy, maintainability of.*

Under section 4 (3), read with section 4 (5), of the Agra Tenancy Act the lessee of a right to cut thatching grass is a "tenant", though not a tenant of an agricultural holding. He cannot acquire occupancy rights or be ejected by a Revenue Court, but he can sue for a declaration as to the class of tenant to which he belongs under section 95 (*b*) of the Act. **U P B R** SHER ALAM KHAN *v.* MUHAMMAD SAID KHAN, 1 U. P. L. R. (B. R.) 11 **228**

——— ss. 4 (3), 67—*Rent, whether includes nazrana—Ejectment on failure to agree to amount of nazrana fixed, whether permissible.*

Rent in section 4 (3) of the Agra Tenancy Act includes *nazrana*, or whatever is paid on account of land, and does not mean merely annual rent.

Where a suit is brought for ejectment because the tenant will not pay as much *nazrana* as is demanded, the tenant can take the plea authorised by section 67 (1) of the Agra Tenancy Act. **U P B R** JAI DAYAL *v.* KESHO PRASAD SINGH, 1 U. P. L. R. (B. R.) 24 **409**

——— ss. 11, 12—*Landlord and tenant—Ejected tenant, lease to relation of, whether continues tenancy.*

Where a tenant is ejected by his landlord and a lease of the holding is given to a relation of the ejected tenant such lease does not amount to a continuation of the tenancy, in spite of the fact that the ejected tenant continues to cultivate either as sub-tenant or partner in cultivation **U P B R** SAHU AJIT PRASAD *v.* JAITHU, 1 U. P. L. R. (B. R.) 11 **225**

——— s. 21—Mandidhari *rights, purchaser of, position of—Right, whether transferable.*

Mandidhari rights are not transferable, and a purchaser of such rights is in no higher position than a non-occupancy tenant. The fact that the purchaser of such rights has redeemed a prior mortgage of the same and has entered into cultivation himself would not improve his position. **U P B R** BHAGIRATHI SHUKUL *v.* RABI PRATAB NARAIN SINGH, 1 U. P. L. R. (B. R.) 10 **238**

Agra Tenancy Act—contd.

——— s. 22 (e)—*Occupancy holding—Succession—Collateral assisting in cultivation—Co-sharer—Right of such collateral to inherit.*

A person, collaterally related in the male line to an occupancy tenant, who assists in cultivating the land is a co-sharer in the cultivation, and on the death of the tenant is entitled, under section 22 (*e*) of the Agra Tenancy Act, to inherit his occupancy rights, his right being in no way affected by any proceedings of the landlord against a person who has no rights in the holding. **U P B R** RAM JATAN *v.* RAMA PRASAD, 1 U. P. L. R. (B. R.) 4 **186**

——— ss. 25 (4), 66 (1)—*Joint tenants, male and female—Female tenancy—Power of Court to grant time for ejectment of sub-tenant—Discretion, exercise of—Appellate Court, interference by.*

The mere fact that one of several joint tenants of a holding is a female is not sufficient to constitute it a female tenancy within the meaning of section 25 (4) of the Agra Tenancy Act.

The power to grant time under section 66 (1) of the Agra Tenancy Act to tenants to eject sub-tenants, is discretionary with the Court and, when judicially exercised, will not be interfered with in appeal. **U P B R** CHAB NATH *v.* DEBI PRASAD, 1 U. P. L. R. (B. R.) 7 **178**

——— s. 34, suit under—Limitation. *See* LANDLORD AND TENANT **469**

——— ss. 43, 44—*Landlord and tenant—Enhancement of rent—Assessment, mode of.*

Under the law, rents can only be enhanced in accordance with prevailing rates; an assessment of fair rates is unknown to the law.

The method of deducing the prevailing rate of rent of land is to take the average rate, or the medium rate, the average rate being calculated with reference to the *area* held at each rate, and not a mere arithmetical average of the various rates.

Per *Ferard, S. M.*—It is open to the Court to count from its calculation of medium rates "fancy" rates on the one hand and nominal or obviously favourable rents on the other. **U P B R** MUHAMMAD ABU BAKER KHAN *v.* BALA, 1 U. P. L. R. (B. R.) 23 **405**

——— s. 167—*Order of Assistant Collector—Revision, whether lies—High Court, power of interference of.*

The High Court has no power to entertain an application for revision against an order passed in appeal against the decision of an Assistant Collector in a matter covered by the provisions of section 167 of the Agra Tenancy Act **A** GAJ KUMAR CHANDER *v* SALAMAT ALI **756**

——— s. 167 *Restitution, application for, dismissal of—Revision—High Court whether can interfere*

An order made by an Assistant Collector rejecting an application for restitution, however erroneous, is not open to revision by the High Court **A** POHKAR *v.* RAM LAL **640**

——— s. 177 (f)—*Jurisdiction, plea of, decision of—Appeal—Court, proper.*

Agra Tenancy Act—concld

Where a defendant raises the plea that the suit is not cognizable by a Revenue Court and that Court overrules the objection and gives a decision upon the merits, an appeal lies, under section 177 (1) of the Agra Tenancy Act, to the District Judge **A** GOKARAN SINGH v. GANGA SINGH **779**

——— **s. 185**—*Revision—Board of Revenue, power of interference of—Gross and palpable error of law—Mistake of law, whether sufficient ground for interference.*

It is only in cases of gross and palpable errors of law involving substantial injustice that the Board of Revenue will interfere in revision beyond the strict wording of section 185 of the Agra Tenancy Act Mere mistakes in law do not warrant revisional action. **U P B R** JANKI PRASAD v. LILA, 1 U. P. L. R. (B. R. 5 **151**

——— **s. 193 (a)**—*Appeal, whether lies from order.*

Orders, as opposed to decrees, under the Agra Tenancy Act are not appealable. **U P B R** TURAB KHAN v. BHURNESH PARTAP SINGH, 1 U. P. L. R. (B R) 12 **241**

——— **s. 194**—*Lease by some of several co-sharers—Tenancy, whether constituted.*

To constitute a tenancy under a lease, the lease must be granted by all the co sharers A lease by any number of co-sharers short of the total number would not operate to constitute a tenancy. **U P B R** PIRTHI SINGH v. BEDA, 1 U. P. L. R (B. R.) 5 **146**

——— **s. 198**—*Imperfect partition*—Lambardar, *second, not appointed—Payment of rent to existing* lambardar, *effect of.*

Where a village is imperfectly partitioned but a second *lambardar* is not appointed, the existing *lambardar* remains the *lambardar*, and if rent is paid to him in good faith, the tenant is protected by section 193 of the Agra Tenancy Act. **U P B R** THAKUR DIN v. DAYALI, 1 U. P. L. R. (B. R) 4 **139**

Alien enemy, *debt due to—Interest, whether suspended during period between outbreak of war and grant of license.*

Where a debtor is under an obligation to pay interest to an enemy firm, such obligation is not suspended between the date of the outbreak of war and the date when the firm is granted a license to conclude certain transactions. **B** VALLI MAHOMED ABU v. BERTHOLD REIF, 21 BOM. L. R. 785 **522**

Allahabad High Court Rules, Part II, r. 26—*Carrying on family business, whether amounts to entering into trade or business.*

The carrying on of a family business by a Vakil, which has been in existence for a long time, does not amount to entering into any trade or business within the meaning of the second paragraph of rule 26, Part II, of the Allahabad High Court Rules.

Before a Vakil embarks on any commercial transactions he should give notice to, and obtain the permission of, the High Court. **A** RAM SARUP v. TIKA RAM **633**

Alluvion and diluvion—*Landlord and tenant—Submergence of land leased—Reformation in situ, effect of—Rent, non-payment of—Third person claiming land as accretion, right of - Bengal Regulation XI of 1825.*

Alluvion and diluvion—concld.

The defendants obtained a lease of certain land in 1876 from the Government, and in the same year the land was submerged in the river and re-appeared in 1905. During the period of submersion the defendants did not pay any rent, but when that land re-appeared, they took possession of it as reformation *in situ* of land which they held under the lease and which had been submerged in the river. The plaintiffs claimed the land as accretion to their *raiyati jote* land:

Held, (1) that as the land was reformation *in situ* it could not be claimed by the plaintiffs as accretion to their *raiyati jote* land:

(2) that, in the circumstances of the case, it was difficult to hold that the rights of the defendants were subsisting at the time when the land re-appeared:

(3) that the Government, as owner of the *khas mahal*, was entitled to the land, and the defendants, professing to hold it as tenants under the Government and in assertion of the same right in which they held under the lease before the submergence of the land, were entitled to set up the rights of the Government. **C** AMINADDI v. TARINI CHARAN MONDAL, 29 C. L. J. 564 **673**

Amendment of plaint, when to be allowed. *See* CIVIL PROCEDURE CODE, O. II, R. 2, O. VI, R. 17 **464**

——— **of pleadings,** whether can be allowed in second appeal *See* CIVIL PROCEDURE CODE, O. VI, R 17 **549**

Amount due on mortgage. *See* TRANSFER OF PROPERTY ACT, s 76 **834**

Antecedent debt, what is *See* HINDU LAW —JOINT FAMILY **525**

Appeal (Civil) - *Abatement—Joint decree - Death of respondent—Failure to bring legal representatives of deceased on record, effect of.*

Certain proprietors of a village obtained a decree declaratory of the right of all the proprietors to obtain a share in certain land. A second appeal was filed in the Chief Court, and it appeared that, before the filing of the appeal, one of the proprietor decree-holders had died, but, owing to the default of the appellants, no notice of the appeal was served on his representatives. It was contended that the appeal had abated in its entirety, while for the appellants it was urged that the appeal had abated only with respect to the share of deceased decree-holder:

Held, that the appeal had abated in its entirety, inasmuch as, even if it were accepted, the decree which was in favour of the proprietors jointly could not stand against only one of them. **P** JAMNA v. SARJIT, 67 P. R 1919 **510**

———, *consolidation of, whether permissible—Pecuniary valuation—Bench of two Judges, hearing by*

Where in separate suits between the same parties, separate decrees are prepared and there is a separate appeal against each decree, the appeals cannot, for the purposes of pecuniary jurisdiction, be consolidated, so as to make the appeals triable by a Bench consisting of two Judges. **O** TIKA DAS v. RADHA KISHEN, 6 O. L. J. 287 **15**

——— by *ex parte* defendants, effect of. *See* CIVIL PROCEDURE CODE, s. 115, SCH. II, PARA. 16 **569**

Appeal (Civil)—contd.

——— *Death of parties—Personal action—Right to sue, whether survives—Abatement of appeal.*

Where both parties to a suit die during the pendency of an appeal by one of them, and the action is a purely personal one, as for instance, a declaration that the defendant is not the lawful wife of the plaintiff, the right to continue the appeal does not survive to the representatives of the deceased parties. **P** ANAND BAHADUR *v.* HARDIL AZIZ, 87 P. R. 1919 **545**

——— Death of sole appellant—Failure to bring representatives on record, effect of. *See* CIVIL PROCEDURE CODE, O. XXII, R. 3 **591**

———, dismissal of, without notice to appellant—Remedy of appellant. *See* CIVIL PROCEDURE CODE, ss. 115, 151 **540**

——— *Documents rejected by trial Court—Appellate Court, power of, to admit documents—Additional evidence.*

Where a trial Court refuses to admit documents tendered to it in evidence, it is open to the Appellate Court to admit them after proof. Such admission does not amount to receiving additional evidence **C** KADER BUX *v.* BENI MADHAB SEN **327**

——— *Fraud, plea of, whether can be raised in appeal—Appellate Court, duty of.*

An Appellate Court ought not to allow a plea of fraud to be raised at the hearing of an appeal before it, which was not raised in the trial Court nor in the grounds of appeal, without giving the opposite party an opportunity of rebutting the plea. **C** GIRISH CHANDRA CHAKRAVARTY *v.* GIRISH CHANDRA ROY **501**

——— from order setting aside *ex parte* decree, whether lies. *See* CIVIL PROCEDURE CODE, O. IX, R 13 **901**

——— order accepting payment after date fixed, not open to, if decree not put into execution *See* CIVIL PROCEDURE CODE, s. 47 **401**

———, order dismissing, for non-payment of process-fees, whether appealable *See* CIVIL PROCEDURE CODE, 1908, s. 115, O. XLI, RR. 18, 19 **179**

——— Order made under Order XXI, rule 97, Civil Procedure Code, not open to. *See* CIVIL PROCEDURE CODE, s. 47 **333**

——— *Order not appealed against, effect of.*

An order passed in appeal which is appealable but against which no appeal is filed, becomes final and must be given full effect to irrespective of whether that order was right or wrong **C** SARADA SUNDARI DASYA *v.* GANGAHARI SAHA, 46 C. 738 **601**

———, right of, whether affected by failure of Court to prepare decree. *See* CIVIL PROCEDURE CODE, s. 33 **479**

——— to His Majesty in Council, whether order of High Court directing subordinate Court to execute decree open to. *See* CIVIL PROCEDURE CODE, ss. 2 (2), 47, 109 **461**

——— to Privy Council—Method of determining value. *See* CIVIL PROCEDURE CODE, s 110 **723**

——— to wrong Court under advice—Time spent in prosecuting appeal, exclusion of. *See* LIMITATION ACT, 1908, s. 5 **235**

Appeal (Civil)—concld.

———, whether can be maintained from preliminary decree after passing of final decree. *See* CIVIL PROCEDURE CODE, s. 97 **697**

———, whether lies from order granting review. *See* CIVIL PROCEDURE CODE, O XLVII, R 1 (*w* **29**

———, whether lies from order returning application for leave to sue as a pauper. *See* CIVIL PROCEDURE CODE, s. 115 **688**

———, whether lies from order under s 193 (*a*), Agra Tenancy Act. *See* AGRA TENANCY ACT, 1901, s. 193 (*a*) **241**

——— **(Criminal)** to His Majesty in Council—Practice of Privy Council in criminal cases—Limitations on Committee's powers. *See* PRESS ACT, 1910, ss. 3 (1) 4 (1), 17, 22 **209**

——— to Privy Council, whether permissible from order under s. 13, Legal Practitioners Act **599**

———, **(second)** **119**

——— *Discretion, exercise of, interference with, by Appellate Court Decision based on erroneous grounds—Limitation Act (IX of 1908), s. 5—Appeal filed beyond time—Extension of time—Sufficient cause—Delay in taking steps, effect of.*

Where the law leaves a matter to the discretion of a Court, and the Court decides to exercise that discretion, and does exercise it, but bases its decision upon entirely erroneous grounds, the discretion cannot be said to have been exercised in a legal and proper manner and cannot be allowed to stand.

Parties ought not to be encouraged to defer till the very last moment the taking of a step in the course of an action for which a limit of time is prescribed by rules, and no indulgence ought to be shown to a party who so puts off taking action, if by an unexpected accident he exceeds the time limit **Pat** JAHAR MAL *v.* PRITCHARD, 4 P. L. J. 381 **225**

——— *Document, proof of—Objection as to mode of proof, whether can be taken in second appeal—Civil Procedure Code (Act V of 1908), O. I, r. 13—Non-joinder of parties—Objection, when should be taken.*

Where the decision of a lower Appellate Court was based upon findings of fact arrived at on a consideration of certain documents and an objection as to the mode of proof of those documents was taken for the first time in second appeal:

Held, that as the objection was not taken at an early stage of the suit, it could not be entertained in second appeal.

An objection as to non-joinder of parties cannot be entertained for the first time in second appeal. **C** HRIDOY NATH PARUI *v.* AKSHOY LAL CHOWDHURY **463**

——— *Finding of fact, erroneous, whether can be interfered with.*

A finding of fact by a lower Appellate Court, however erroneous, will not be disturbed in second appeal. **Pat** PURGAN PANDE *v.* DHANPAT TEWARI **739**

——— *Findings of fact on first appeal, finality of—High Court, power of interference of.*

The High Courts in India are not entitled in a second appeal to go behind the findings of fact of the first Appellate Court, unless such findings result from the misconstruction of a document or the

Appeal (second)—concld.

misapplication of law or procedure. **P C** MIDNAPUR ZEMINDARY CO, LTD. v UMA CHARAN MANDAL, 37 M. L. J. 193; 7 A L J, 1004 **497**

——— *Finding of fact, whether can be challenged —Evidence, consideration of—Court, duty of.*

A finding that the plaintiff has failed to prove a fact is *prima facie* a finding of fact which cannot be challenged in second appeal.

The rule in Oudh regulating the consideration of evidence is, that the Court must apply its mind to every piece of relevant evidence produced, but it is not necessary for the Court to refer to every portion of such evidence. **O** GOPI NATH v. BENI MADHO, 1 U. P. L. R. (J. C.) 12 **173**

——— *Objection on score of limitation, whether can be taken in.*

Where an application to bring the legal representatives of a deceased party on to the record is granted by a trial Court without any objection being taken thereto on the ground of limitation, an objection that the suit had abated by the application not having been made within the prescribed period, cannot be entertained in second appeal. **M** ALUR LAKSHMI NARASIMHA SASTRULU v VENKATA NARASAMMA **614**

——— Question of law, whether can be raised for first time—Question of fact, whether can be raised **125**

——— *Point taken for first time - Consideration of.*

The High Court in second appeal, is not bound to consider a ground of defence not taken in the lower Courts, unless perhaps, it is a question of limitation arising out of proved or admitted facts.

In an action in ejectment the High Court will not consider the plea of want of proper notice to quit, if the same was not urged in the lower Courts and was not decided by them **M** VENKATAPPIER v. RAMASWAMI AIYAR, 10 L. W. 137; (1919) M. W. N. 543 **517**

———, whether a trial **625**

———, whether finding of fact, based upon inference which contravenes Statute, can be questioned in *See* LANDLORD AND TENANT **446**

———, whether lies from appellate order returning plaint. *See* CIVIL PROCEDURE CODE, ss. 21, 107, O. VII, R. 10, O. XLI, R 33, O. XLIII, R 1 (*a*) **801**

Approver, statement of, value of—Corroboration, absence of, effect of. *See* PENAL CODE, ss. 59, 395 **49**

Apurtenances. *See* MUHAMMADAN LAW—PREEMPTION **31**

Arbitration—*Award—Decree on award—Person not party to decree, whether can enforce it.*

Plaintiff was a party to an arbitration award but was not a party to the decree which followed upon the award. He now sued to enforce his rights under the decree:

Held, that the suit was not entertainable as the decree could only be enforced by those persons who were parties to it. **O** BAJRANG LAL v. BRAHMA DAT, 6 O. L. J. 322 **849**

——— *Award—Costs including fee of arbitrators awarded to one party—Fee not fixed by Court before preparation of decree—Court, power of, to fix fee after preparation of decree.*

Where an arbitration award provides for the payment by the plaintiff of the costs including the arbitrators' fee, but the Court omits to fix the fee before the decree is prepared, it is open to the Court to fix the fee after preparation of the decree. **A** WILSON v JAGMANDIR DAS **653**

——— Court, reference to, as arbitrator—Reference by some only of parties validity of. *See* CIVIL PROCEDURE CODE, s. 116, SCH. II, PARA. 16 **569**

——— *Party denying contract, remedy of—Procedure —Injunction, interlocutory, when can be granted.*

Where a dispute is referred to arbitration under a clause contained in a commercial contract, and one or other of the parties to that contract seeks to impeach it upon equitable grounds, such as fraud, mistake or surprise, and seeks either to have it set aside or to have it rectified, in such a case the Court will, and should, restrain the arbitration proceedings until the question of the contract out of which they arise has been determined by the Court.

Where, however, a party denies the contract altogether, his course is to let the arbitrators do what they like, to wait till there is a question of the award being enforced, and the moment he gets notice that the award is going to be filed or has been filed to object to it. It may be prudent in such a case to inform the arbitrators of the objection to their jurisdiction and that, if the award is filed without due notice to the objecting party, such as the law requires, and if, as the result of that, execution is levied, then the arbitrators may make themselves liable in damages, if the party is successful when he moves the Court to take the award off the file.

Where the proceedings will be a nullity and futile, although vexatious, the Court will not grant an interlocutory injunction. **C** SARDARMULL JESSRAJ v. AGAR CHAND MAHATA & Co, 23 C. W. N. 811 **588**

———, *reference to—Party not joining in written application but accepting arbitration orally and taking active part in proceedings, position of—Objection that application was not signed, maintainability of—Estoppel—Revision—Interlocutory order —High Court, power of interference of.*

Where one of the parties to a suit did not join in a written application for the case to be referred to arbitration but made an oral application accepting the arbitration, and took an active part in the proceedings:

Held, that he was estopped from objecting to the legality of the proceedings on the ground that he did not sign the application for reference to arbitration.

Ordinarily, an interlocutory order is not liable to be interfered with in revision: Where, however great or irremediable injury might result, the High Court will interfere with such an order. **P** GAURI SHANKAR v. GANGA RAM, 77 P. R. 1919 **859**

Arbitration Act (IX of 1899), ss. 4 (a), 19—*Arbitration, reference to—Suit by one party—Stay of suit, order for—Court competent to pass order—Award, validity of.*

K., a Shroff at Multan, entered into an agreement with L. D. and Co, a firm at Karachi, to finance their Multan Agents. The agreement contained a clause

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for submission of differences to arbitration. *K.* made a demand on L. D. and Co. in connection with an advance made by him. L. D. and Co, on 11th May, refused to meet the demand, claimed arbitration, appointed an arbitrator and called on *K.* to appoint his arbitrator within 7 days. *K.* made no reply and L. D. and Co. appointed a second arbitrator on behalf of *K*, and on 21st May informed *K.* On 23rd May *K.* repudiated the arbitration and filed a suit in the Court of the Sub-Judge at Multan. L. D. and Co. proceeded to arbitration in Karachi and on 7th June an award was made and L. D. and Co. made an application for the award to be filed under the Arbitration Act On 4th August the Sub-Judge stayed the suit. It was contended that the case was not one to which the provisions of the Arbitration Act applied, that the award was invalid by reason of a concurrent suit in the Court of the Sub-Judge of Multan, the arbitrators having no jurisdiction to proceed after the suit was filed; that the stay order made by the Sub-Judge of Multan was incompetent as no such order could be made after a reference to arbitration and the order did not validate the arbitration proceedings, and that such order could only be made by a District Court:

Held, (1) that the Arbitration Act applied to the case and the fact that *K.* resided in an area where that Act was not applicable did not affect the matter, as his suit could have been instituted at Karachi where the firm on whom he made the demand carried on business and where that Act was applicable;

(2) that the mere fact of a suit being filed did not invalidate arbitration proceedings, and as the Court made a stay order, the effect of which was to decline jurisdiction in favour of the arbitrators, the award was a valid award and the Court had jurisdiction to allow it to be filed.

Per *Pratt, J. C.*, (1) that the stay order made by the Sub-Judge was an order which he was competent to make either before or after reference and award;

(2) that upon a proper construction of section 4 (*a*), read with section 19, of the Arbitration Act, the Court which could make the stay order was the Court in which the suit was pending and that, therefore, the Sub-Judge was competent to make the order. **S** KHILLOORAM LOKURAM *v.* LOUIS DREYFUS & Co., 13 S. L. R. 8 **130**

——— **ss. 4 (a), 19**—*Reference to arbitration—Suit filed by party to reference—Stay of suit, order for—Jurisdiction—Application for stay—Court, proper—Interpretation of Statutes—Legislative Council, proceedings of, whether can be referred to.*

Per *Pratt, J. C.*—An application under section 19 of the Arbitration Act for stay of a suit should be made to the Court trying the suit.

Proceedings of the Legislative Council cannot be referred to as an aid to the construction of a particular section or sections of a Statute, but they may be referred to for the purpose of ascertaining the object of a Statute.

Per *Crouch, A. J. C.*—An application under section 19 of the Arbitration Act to stay a suit pending in a subordinate Court must be made to the District Court to which such Court is subordinate.

Per *Hayward, A. J. C.*—The jurisdiction to grant or refuse stay of a suit under section 19 of the Arbitration Act is vested not in the Court before which the suit is pending but in the District Court specially designated to be the Arbitration Court under the Arbitration Act. **S** FIRM OF RATANCHAND-RAMKISHANDAS *v.* SAHIRAM-DUNICHAND, 13 S. L. R. 23 **139**

Arms Act (XI of 1878), ss. 19, 20—Chhavi, *whether "arm"—Possession of* chhavi, *whether offence*

To determine whether a particular instrument is an arm within the meaning of the Arms Act, the real test is whether it is usually employed for the purpose of offence or defence.

The possession of a *chhavi* is unlawful under the Arms Act **P** JINDA *v.* EMPEROR, 10 P. L. R. 1919; 20 CR. L. J. 577 **193**

Attachment of equity of redemption **956**

——— in execution of decree, effect of, on reversioners of judgment-debtor. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, RR. 58, 63 **157**

——— of land—Refusal of Collector to intervene, effect of—Court, whether can make temporary alienation. *See* CIVIL PROCEDURE CODE, O. XXI, R. 11 **356**

——— set aside by mistake, restoration of, effect of. *See* EXECUTION OF DECREE **343**

Attestation, valid, what is. *See* EVIDENCE ACT, S. 71 **830**

Award, decree based on, whether can be reviewed. *See* CIVIL PROCEDURE CODE, O. XLVII, R. 1, SCH. II, PAR. 12 **696**

Banker—Deposit, suit to recover—Limitation. *See* LIMITATION ACT, 1908, SCH. I, ART. 60 **25**

Benami purchase by Police Officer while in service, validity of. *See* CONTRACT ACT, S 23 **153**

——— *transaction*—Benamidar, *whether can sue for possession of immoveable property without joining beneficial owner.*

A *benamidar* is entitled to maintain an action for recovery of possession of immoveable property in his own name, without joining the beneficial owner as a party to the suit. **Pat** GOIYAN DHANGAR *v.* SHEIKH GONDAR **324**

——— *transaction—Fraudulent intention to defeat creditors—Fraud not carried out—Real owner, whether can recover property.*

A transfer which is merely colourable and made with the intention of defrauding creditors can always be set aside by the transferor at any time before the fraud has actually taken place. But if the fraudulent intention has succeeded, the Courts will not assist either party claiming under such a transaction. **Pat** AHMED HUSAIN *v.* GHULAM ALI ASGHAR **866**

——— transaction effected in order to defeat creditor, whether can be attacked by real owner. *See* HINDU LAW—JOINT FAMILY **402**

Bengal, Agra and Assam Civil Courts Act (XII of 1887), ss. 18, 21—*Suit valued at less than Rs. 5,000—Appellate Court, whether entitled to award decree beyond pecuniary jurisdiction.*

The plaintiff brought a suit claiming specific damages which he estimated at Rs. 4,199, and for such other damages to which, on inquiry, he might be found entitled. It appeared after inquiry that he

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was entitled to a much larger sum than he had claimed and the District Judge, on appeal, awarded him Rs. 11,115-8-0 as damages. In appeal to the High Court the defendant objected that as the amount awarded exceeded the pecuniary limit of the appellate jurisdiction of the District Judge, which was limited to suits of the value of less than Rs 5,000, he had no jurisdiction to award a sum in excess of that amount:

Held, that as the valuation of the suit did not exceed Rs 5,000 the District Judge had jurisdiction to entertain the appeal and once having assumed jurisdiction, he legally had jurisdiction to make a decree for damages for a sum exceeding Rs. 5,000, his original jurisdiction being unlimited. **Pat** SATYA KINKAR SAHANA v. SHIBA PRASAD SINGH, 4 P. L. J. 447 **452**

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4—*Accretion, what is—Riparian rights—Custom—Boundary between estates—Deep stream, whether boundary—Shahabad District.*

After recession and encroachment by the river Ganges, the land washed away and afterwards reformed on the old ascertained site is not land gained by increment, within the meaning of section 4 of Regulation XI of 1825.

In the Shahabad District, in the locality on the south bank of the river Ganges, where the Maharaja of Dumraon owns a large tract of land, there is no custom by which the deep stream of the river is recognised as the boundary between estates on each side of the river **Pat** LACHMI NARAYAN LAL v. KESHO PRASAD SINGH **147**

Bengal Drainage Act (VI B. C. of 1880), ss. 2, 42, 44A, 50—*Rent-free holder, whether tenure-holder—Payment by landholder—Right to recover payment from tenure-holders.*

A rent-free holder comes within the definition of tenure-holder in section 2 of the Bengal Drainage Act.

Under the Bengal Drainage Act the owner of an estate is primarily liable to the Collector for the apportioned sum in respect of the drainage costs, and a landholder who has made any payment in respect of lands which are held by tenure-holders immediately under him is, upon application to the Collector, entitled to recover the amount so paid. **C** PEARY MOHAN v. SARAT KUMAR ROY **832**

Bengal Land Registration Act (VII B. C. of 1876), s. 78—*Landlord and tenant—Rent, suit for—Non-registration of name of proprietor, effect of—Registration before decree, whether cures defect.*

Non-registration of a person as the recorded proprietor of land in accordance with the provisions of section 78 of the Bengal Land Registration Act is not a disqualification which would deprive him of a cause of action; it is merely an impediment against his right to recover rent by a decree until the provisions of section 78 are complied with.

Where a plaintiff in a suit for rent was not registered as the recorded proprietor up to the date of the first Court's decree in his favour but was so registered prior to an appeal to the District Judge:

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Held, that he was entitled to the benefit of a decree from the District Judge if the facts otherwise justified a decree being granted in his favour. **Pat** BALAK MAHTON v. MATHURA RAM DUBEY **267**

Bengal Land Revenue Sales Act (XI of 1859), ss. 25, 26—*Commissioner, power of, to annul sale—Jurisdiction—Sale, when there are no arrears, validity of—Specific Relief Act (I of 1877), s. 42—Relief—Discretion of Court—Substantial injury.*

Under section 25 of the Bengal Land Revenue Sales Act the Commissioner has jurisdiction to annul a sale which may appear to him not to have been conducted according to the provisions of the Act.

A sale of an estate for arrears of revenue where no such arrears exist is null and void.

In a suit under section 42 of the Specific Relief Act, the granting of relief is discretionary with the Court, and the Court will not grant relief unless there is substantial injury. **Pat** CHHAKOWRI v. SECRETARY OF STATE FOR INDIA **990**

——— s. 34, *application of—Suit by third party for relief not provided by Act.*

Section 34 of the Bengal Land Revenue Sales Act applies merely to the case of an owner who has committed default in payment of the revenue rent of his property and who, subsequently, by a suit succeeds in setting aside the sale held under that Act, and who has applied for and withdrawn the surplus purchase-money lodged in the Collectorate under such sale for his own benefit.

The section has no application to a suit instituted by a third party against an auction-purchaser at a revenue sale, *e.g.*, a suit by the reversioners, in respect of a claim for relief not provided by the Act itself. **Pat** BANSI SINGH v. SHEONANDAN **692**

Bengal Municipal Act (III B. C. of 1884), ss. 241, 273—*Building Regulations of Giridih Municipality, r. 13 2)—Building still below plinth level—Conviction for contravention of rule, legality of.*

Accused was convicted under section 273 of the Bengal Municipal Act for having infringed clauses 1 and 2 of rule 13 of the Building Regulations of the Giridih Municipality made under section 241 of the Act. The evidence for the prosecution showed that the accused had only laid the foundation a few feet below the ground level, the brickwork of which had not even reached the plinth level, and there was no evidence to show what kind of building the accused was going to construct, and whether the main building when completed would contravene the clauses of the rule for infringing which he had been convicted, nor had the Municipality taken steps to enforce the submission of a plan:

Held, that the conviction could not be maintained, because there was in fact no building in existence and it was not known whether and where the building would be erected. **Pat** SHIV DATT RAY v. SATISH CHANDRA GHOSH, 20 Cr L. J. 626 **386**

Bengal Public Demands Recovery Act (I B. C. of 1895), ss. 10, 12, 15 32—*Certificate, execution of—Appeal against order in execution, dismissal of—Suit to recover amount levied—Limitation.*

In execution of a certificate under the Bengal Public Demands Recovery Act the defendant realized

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from the plaintiff certain costs of drainage When the certificate was filed and notice issued upon the plaintiff, he did not contest his liability. He took objection only when notice was served in proceedings taken to execute the certificate, and his objection was disallowed. He preferred an appeal, which was rejected. Then, within six months of the date on which the appeal against the order in the execution case had been disposed of, the plaintiff instituted this suit for refund of the amount realized from him in execution of the certificate:

Held, that as the suit was not brought within six months from the date of decision of an appeal from the original order of the Certificate Officer, the suit was barred by limitation under section 15 of the Bengal Public Demands Recovery Act

A certificate under the Bengal Public Demands Recovery Act can be executed only after it has become final, and, so long as the certificate is not set aside, the judgment-debtor cannot get back the money recovered in execution of that certificate. A judgment-debtor cannot, by merely preferring an appeal against an order passed in execution of a certificate, get a fresh start of six months for bringing a suit under section 15 of the Public Demands Recovery Act. **C** PEARY MOHAN *v.* KUMAR SARAT KUMAR ROY **832**

Bengal Regulation VII of 1822, s. 9—*Settlement Officer, power of, to record fair rent—Landlord, whether can claim enhanced rent recorded by Settlement Officer—Suit for recovery of enhanced rent, whether can be treated as one for enhancement of rent.*

Section 9 of Bengal Regulation VII of 1822 does not authorize the settlement authorities to enhance the rent payable by *raiyats* Consequently a landlord cannot claim rent at the rate recorded by the Settlement Officer as the fair rent payable by cultivators.

It is well settled that a Settlement Officer under Regulation VII of 1822 does not settle rent but records rates of rent existing in the village.

Where a suit for recovery of enhanced rent, instituted on the theory that the rent payable by the defendants had been lawfully enhanced as a result of proceedings under Regulation VII of 1822, is found to be unfounded and is successfully contested by the tenant defendants, the suit cannot be treated as one for enhancement of rent, inasmuch as to do so would be to entirely alter the scope of the suit. **C** JAGADINDRA NATH ROY *v.* MOHENDRA NATH, 23 C. W. N. 587 **90**

Bengal Tenancy Act (VIII B. C. of 1885), ss. 4, 105—*Scope of Act—'Landlord', 'tenant', meanings of—S. 105, applicability of, to non-agricultural lands in Mufassil municipality.*

In its general scope, the Bengal Tenancy Act is a aw for agricultural landlords and tenants.

'Tenant' and 'landlord' in section 105 of the Bengal Tenancy Act mean, respectively, a tenant and a landlord as defined in section 4 of the Act.

Section 105 of the Bengal Tenancy Act does not apply to non-agricultural lands situated in a Mufassil municipality and occupied by tenants engaged in trade or other non-agricultural employment. **C** BIPRADAS PAL *v.* AZAM OSTAGAR, 46 C. 441 **412**

Bengal Tenancy Act—contd.

——— ss. 6, 50, 105—*Application under s. 105 for settlement of fair and equitable rent—Presumption of fixity of rent, whether arises in respect of heritable tenure created after Permanent Settlement—Landlord and tenant—Heritable tenure, whether necessarily* mokarari.

The plaintiff landlord applied under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent of a tenure created by a *howla pattah* in 1233 B. S, which expressly made the tenure hereditary but which contained no clause about fixity of rent:

Held, (1) that although the plaintiff had been realizing the same rent for a great many years, that did not by itself show that the rent was fixed, and that, therefore, he was entitled to have a fair and equitable rent assessed;

(2) that the mere fact that a heritable tenure was created could not by itself mean that a *mokarari* tenure was created **C** SRIMANTA KUMAR CHAKRABARTY *v.* SABAR ALI **702**

——— s. 11—*Agricultural lease, whether transferable—Landlord and tenant—Lease—Covenant against alienation in permanent agricultural lease, validity of—Breach of covenant—Re-entry, right of.*

A lease in respect of agricultural lands covered by section 11 of the Bengal Tenancy Act is transferable.

A condition in a permanent lease restraining alienation is not void by itself, but the lessor is not entitled to eject the transferee from the lessee unless the lessor reserves to himself the right of re-entry or the lease provides that it would be void in case of a breach of the covenant against alienation. **C** NISHI KANTA DUTTA *v.* SHASHI KANTA KARMAKAR **19**

——— s. 18A, *scope of—Landlord not party to document—Document whether can be used against landlord.*

Section 18A of the Bengal Tenancy Act does not prevent the use of a document, to which the landlord is not a party, to show that there was an assertion by the tenant at the time that the tenancy was of a particular description. **C** BANWARILAL SINGH *v.* DWARKA NATH MISSER, 29 C. L. J. 577 **825**

——— s. 20 (1)—Raiyat *holding under trespasser*—Bona fides *of parties—Occupancy rights, acquisition of.*

Where lands appertaining to a *mahal* are held for more than 12 years by a *raiyat* under a trespasser, the *raiyat* would acquire a protected interest as against a purchaser of the *mahal* under the Bengal Land Revenue Sales Act, if the *raiyat* had a *bona fide* belief that the person under whom he held the land was the real owner, and if that person also *bona fide* believed that he was the real owner **C** UMESH CHANDRA DASS *v.* SIKDAR ALI **699**

——— ss. 29, 147A—*Landlord and tenant—Compromise changing rate of rent whether lease—Enhancement of rent, legality of—Status, change of, effect of—Compromise relating to matters extraneous to suit, whether can be recorded.*

Section 29 of the Bengal Tenancy Act does not apply where a compromise changes the status of a tenant

There is no substantial difference between rule 3 of Order XXIII of the Civil Procedure Code and section 147A of the Bengal Tenancy Act in regard

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to the jurisdiction of a Court to record a compromise, and there is no reason why a settlement of disputes forming the subject-matter of a suit should not be regarded as the consideration for the contract relating to matters extraneous to the suit **Pat** RAMPARARATH SINGH v. SOHRAI KOERI **20**

——— ss. 35, 50, 102 (b), 115—*Scope of s. 35—Tenant recorded as occupancy raiyat under s 102 (b)—Presumption under s 50, applicability of.*

The presumption under section 50 of the Bengal Tenancy Act does not apply to the case of a tenant who has been recorded in the Record of Rights as an occupancy *raiyat* under section 102, clause (*b*), of the Act and not as a *raiyat* holding at fixed rates.

From the mere forbearance on the part of the landlord to claim enhancement of rent for a long period it does not follow as a matter of course that the original contract of tenancy was for payment of rent by the tenant at a fixed rate for ever.

Section 35 of the Bengal Tenancy Act relates to the amount of assessment and does not refer to the grounds upon which a Court has to determine whether enhancement should be allowed or not **C** GURU CHARAN NANDI v SARAB ALI, 30 C L J 9: 23 C. W. N. 1041 **79**

——— s. 60—*Landlord and tenant—Rent, suit for, by registered proprietor—Tenant, whether can plead right of third person to receive rent.*

Under section 60 of the Bengal Tenancy Act, it is not open to a tenant to plead in defence to a suit brought by the registered proprietor that a third person is entitled to receive the rent, nor is it for him to decide to whom he must pay rent. **Pat** HIRA SINGH v. KESHWAR LAL **523**

——— s. 71 (4)—*Appraisement of crops—Crops removed by tenant—Method of appraisement—Presumption.*

Section 71, clause 4, of the Bengal Tenancy Act contemplates that, where tenants remove a crop without having the same properly appraised, a presumption arises against them and the landlord is entitled to the full measure of the crop as of the best crop in the neighbourhood of a similar character for that harvest. **Pat** BALAK MAHTON v. MATHURA RAM DUBEY **267**

——— s. 73, *applicability of, to non-transferable occupancy holding—Landlord and tenant—Transferor of non-transferable occupancy holding, liability of, for rent—Adverse possession of limited interest acquired by transferee—Transferor, whether jointly liable for rent to landlord.*

The provisions of section 73 of the Bengal Tenancy Act can not be extended by analogy to the case of a non-transferable occupancy holding.

Where the transferor of a non-transferable occupancy holding has acquired the title of a tenant by adverse possession of the limited interest, the transferor is not liable for rent to the landlord. **C** JATINDRA NATH SINHA ROY v. BINODE BEHARI GUPTA **289**

——— s. 74—*Landlord and tenant*—Abwab, *meaning of—Rent, what is—Construction of document—Appeal, second, whether maintainable*

A question of the construction of a document, if it is a document of title and not merely a piece of evidence in the case, is a question of law, and the High

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Court will interfere in second appeal where the lower Appellate Court has misconstrued the document or has made no attempt to construe it

The defendant executed a *kabuliyat* in favour of the plaintiff covenanting to pay Rs. 67-7-5 as *mal jama*, the amount being made up as follows:—*Mal jama* Rs. 15 - -0 *dasahra salami* Re , *dasahra patta*, Rs -, price of *ghee* Re. 1; price of *dahi*, Re 1 *tahrir* of *patwari* Rs 4-14-5; total Rs. 167-7-5. It was contended on behalf of the defendant that Rs 156-9-0 formed the rent, and that all the other items were illegal impositions not forming part of the rent:

Held, that, on a proper construction of the document, it was clear that the consideration for the use and occupation of the land was a certain amount of rent in cash and the price of certain other articles, and that the total of these items was to constitute one whole rent or *jama* which was payable by the defendant, and that there being no indication whatever that the price of the articles mentioned was in any case intended to be an imposition independent of the rent of the land which the defendant was leasing from the landlord, the amount claimed must be held to be part of the total rent payable for the land . **at** KUDRESHWARI PRASAD SINGH v DHANA MAHTO **119**

——— ss. 102, cl. (j), 105, 105 A (a), (b), (c)—*Application under s 105, for settlement of fair rent—Settlement Court, questions which can be decided by.*

In an application for settlement of fair rent made under section 105 of the Bengal Tenancy Act, the Revenue Court has, by virtue of the provisions of section 105A, clauses (*a*), (*b*) and (*c*), read with section 102, clause (*j*) of the Act, jurisdiction to go into the questions whether the land is not liable to pay rent and whether a person who is the occupant of the land, stands in the relation of a tenant towards the applicant. **C** UPENDRA NATH GHOSH v. ANATH BANDHU CHAKRAVARTY **406**

——— s. 155—*Landlord and tenant—Decree directing tenant to pay a sum of money to landlord—Extension of time, power of Court to grant—Possession taken by landlord, effect of.*

A Court has power to entertain an application by a tenant judgment-debtor for enlargement of time to pay a sum of money awarded to the landlord decree-holder in a decree under section 155 of the Bengal Tenancy Act, even if the decree-holder has applied for execution of the decree and, as a matter of fact, has obtained possession of the property in execution. **Pat** MAHABIR SINGH v. DEOKI RAI **137**

——— s. 170—Sale of *taluk*—Tenure-holder, whether entitled to apply to set aside sale. *See* CIVIL PROCEDURE CODE, 1908, O XXI, RR 89, 90 **237**

——— s. 171—*Civil Procedure Code (Act V of 1908), s. 47—Execution of rent decree—Question between mortgagees, decision of Appeal, whether lies—Procedure, summary, applicability of.*

Where in execution of a decree against a tenant for arrears of rent the Court decides a controversy between a usufructuary mortgagee and a simple mortgagee as to their respective rights under their mortgages, the decision of the Court is not appealable as the questions in controversy are not questions

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relating to the execution, satisfaction or discharge of the decree and do not arise between the parties to the suit or their representatives-in-interest within the meaning of section 47 of the Civil Procedure Code, nor are the matters in difference between the mortgagees such as ought to be summarily determined in a proceeding under section 73 of the Bengal Tenancy Act. C DWARKA NATH DAS v. KANGALI CHARAN SAHU, 24 C. L. J. 45 980

——— **s. 174,** scope of 514

——— **s. 174**—*Civil Procedure Code (Act V of 1908), s. 15*—*Execution of rent decree Sale—Deposit of decretal amount within 30 days Failure of Court to set aside sale—Suit to set aside sale, maintainability of—Court, duty of—Inherent power, exercise of.*

In execution of a rent decree certain property was sold and was purchased by *P.*, who was not a party to the suit. Within 30 days of the sale the judgment-debtor deposited the decretal money with the usual penalty and *talbana* for notices, under section 174, Bengal Tenancy Act, and asked that the sale be set aside. Notices were not served and as the judgment-debtor took no further steps, the Court confirmed the sale The judgment-debtor then brought the present suit to set aside the sale and to obtain possession. The Appellate Court held that the suit was not maintainable, but that complete relief could be given under section 151 of the Civil Procedure Code by treating the suit as an application under that section. The auction-purchaser appealed:

Held, (1) that the suit was maintainable and the plaintiff was entitled to the relief he claimed, but that section 151 of the Code did not apply as an application under that section could only be made in a pending suit and as the Court had held that a suit did not lie there was no suit pending

(2) that section 174 of the Bengal Tenancy Act did not make it necessary for any notice to be served on the persons affected by an application under that section, and on the conditions imposed by the section being complied with, it was obligatory on the Court to set aside the sale. **Pat** PAHALAD SINGH *v.* SAJIWAN RAI 982

——— **s. 181.** *See* BENGAL CHAUKIDARI ACT, 1870, s. 51 181

——— **Sch. III, Art. 1 (a)**—Suit for ejectment of tenant—Limitation, commencement of. *See* MORTGAGE, USUFRUCTUARY 473

Bengal Village Chaukidari Act (VI B. C. of 1870), s. 51—*Bengal Tenancy Act (VIII B. C. of 1885), s. 181*—Chaukidari chakran *lands—Zemindar, title of, accrual of*—Chaukidar, *whether liable to be ejected—Occupancy rights, whether can be acquired in* chakran *lands.*

Inasmuch as *chakran* lands are held on condition of service, a *chaukidar* in occupation of such lands cannot acquire a right of occupancy therein.

A *chaukidar*, so long as he performs the duties of his office, is not a trespasser and is not liable to be ejected from such lands

The title of a Zemindar to *chakran* land is always there and remains unaffected by the fact that such land is appropriated to the maintenance of an officer who performs the duties of village watchman.

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Upon the transfer of such land to the Zemindar, it is at his disposal, and may be treated by him as his *mal* land or *zerait* land, but once he elects to treat the land as his *mal*, he cannot afterwards say it is his *zerait* land. **Pat** KARIMAN AHIR *v.* NIRMAL KUMAR 181

Bombay District Municipalities Act (III Bom. of 1901), s. 161 (2), *order under—Revision—High Court, power of interference of—Criminal Procedure Code (Act V of 1898), ss 435, 439.*

The Magistrate referred to as 'such Magistrate' in the latter part of sub-section (2) of section 161 of the Bombay District Municipalities Act is an inferior Criminal Court, and his orders are liable to revision by the High Court. **B** DINBAI JIJIBHOY KHAMBATA, *In re*, 21 BOM. L. R. 755; 20 CR. L. J. 702 670

Buddhist Law, Burmese—*Minor, whether competent to enter into contract of marriage—Breach of promise of marriage—Damages, suit for, maintainability of—Contract Act (IX of 1872), s 11.*

Under section 11 of the Contract Act the competency of a Burmese Buddhist youth under 18 years of age, to make a contract of marriage, must be determined by the Burmese Buddhist Law.

Under Burmese Buddhist Law, ordinarily, a promise of marriage by a minor is voidable and the marriage of a minor youth or of a girl under 20 years of age requires the consent of the parents, unless the parties are steadfastly determined to marry.

Where, however, a young man and a young woman have clandestine intercourse, the parents of the former are not at liberty to withhold their consent to the marriage, and if the young man repudiates the young woman, he must pay her his *kobo*. **L B** TUN KYIN *v.* MA MAI TIN, 10 L. B. R. 28 653

——— ———*Succession Death of husband or wife, childless—Survivor, rights of.*

According to Burmese Buddhist Law, on the death of a husband or wife without children, the survivor succeeds to the whole of the deceased spouse's estate, including the right of the deceased to a share in undivided ancestral property. **L B** MA SEIN U *v.* TUN BA, 12 BUR L. T. 79 929

Burden of proof—*Evidence on both sides—Court, duty of*

The question of onus of proof only arises when there is a question of fact to be determined and there is no evidence one way or the other which will enable the Judge to come to a conclusion. In such a case, the Court has to decide whether the burden of proving that fact lies upon the plaintiff or the defendant. If the burden of proof lies upon the plaintiff, and the proof of that fact is essential to his case, then the plaintiff must fail because he has not discharged the burden which lay upon him. On the other hand, if the onus of proving that fact was upon the defendant, and its proof is essential to the defendant's success in the case, then the defendant must fail because he failed to discharge the burden which was upon him.

But, where there is a fact which is essential to the determination of the case, whether the burden, in the

Burden of proof—concld.

first instance, be upon the plaintiff or upon the defendant, if there is evidence adduced by both parties, then the question of the burden of proof becomes immaterial and the Court has to determine that question upon the evidence before it. **Pat** JHARI SINGH v. TOKHARAM MARWARI 860

Calcutta Municipal Act (III B. C. of 1899), s. 495—*Tea-dust, whether article of food or drink—Food, what is*

The accused were charged with an offence under section 495 of the Calcutta Municipal Act for selling as tea-dust some substance which was found not to contain any tea:

Held, that tea-dust came within the purview of the words "article of food or drink" in section 495 of the Calcutta Municipal Act.

The word "food" includes any article which ordinarily enters into or is used in the composition or preparation of food, and includes flavouring matters and condiments. **C** CHAIRMAN OF THE CORPORATION OF CALCUTTA v. PAGLI, 23 C. W. N. 911; 30 C. L. J. 150; 20 CR L. J. 607 223

Cantonment Code, 1912, r. 97—*Building in ruinous condition—Removal or repairs—Owner, whether has choice*

The option given by rule 97 of the Cantonment Code of deciding, when any building is in a ruinous condition or in any way dangerous to the occupier, whether the owner shall be required to remove the same, or be required to cause repairs to be made, is an option given to the Cantonment authority and not to the owner of the building **B** BYRAMJI PUDUMJI v. EMPEROR, 21 BOM. L. R. 761: 20 CR L. J. 697 665

——— **rr. 97, 107A**—*Order directing repairs to be carried out, failure to obey—Sentence in respect of future default, legality of.*

An order under rule 107A of the Cantonment Code inflicting a fine for persistent failure to carry out an order under rule 97 of the Code must, in order to be legal, refer to a failure as regards the past It is illegal to convict a person, under this rule, of a failure in regard to the future. **B** BYRAMJI PUDUMJI v. EMPEROR, 21 BOM. L. R. 759; 20 CR L. J. 624 288

Carrier, liability of, extent of. *See* CONTRACT ACT, s. 151 296

Causes. *See* POLICE ACT 495

Causes of action, joinder of. *See* CIVIL PROCEDURE CODE, O. II, R. 2 325

———, *meaning of.*

A cause of action has no relation to the defence set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. **C** HARIDAS GOSWAMI v. EKKARI KONAR 929

C. P. Municipal Act (XVI of 1903), s. 110, act complained of under s. 34, Police Act, also an effence under. *See* POLICE ACT, s 43 495

C. P. Tenancy Act (XI of 1898), s. 46 (5)—*Registration, deed presented for, recitals in—Registrar, whether can go behind recitals—Legislature, intention of.*

The language of sub-section 5 of section 46 of the C. P. Tenancy Act indicates that the Registration Officer is not expected by the Legislature to decide as to the soundness of the recitals in a deed presented for registration. If the document contains a recital of any of the kinds mentioned, he is not precluded from effecting registration **N** DEORAM v. RUKHMINI BAI 744

Cess paid by landlord—Tenant, liability of, extent of *See* MADRAS LOCAL BOARDS ACT, s. 73 468

Charges, joinder of—Objection not taken during trial, effect of. *See* CRIMINAL PROCEDURE CODE, ss 234, 235, 476, 537 (*b*) 418

———, joinder of—Prepartion of false balance sheet on two different occasions, whether same transaction. *See* CRIMINAL PROCEDURE CODE, ss. 235, 239 481

Chaukidari Chakran lands, whether occupancy rights can be acquired in. *See* BENGAL CHAUKIDARI ACT, 1870, s. 51 181

chhavi, whether "arm"—Possession of *chhavi*, whether offence *See* ARMS ACT, ss 19, 20 193

Chota Nagpur Tenancy Act, 1908, ss. 215, (3), 224, 229, appeal to High Court under—Power of High Court to stay execution *See* CIVIL PROCEDURE CODE, 1908, s 151, O. XLI, R. 5 185

Civil Procedure Code (Act XIV of 1882), s. 456 *Guardian* ad litem, *appointment of—Notice to minor, whether necessary.*

Where a suit was instituted and a guardian *ad litem* appointed of the minor defendants when the Civil Procedure Code of 1882 was in force, objection cannot be taken to the appointment of the guardian on the score of want of notice to the minors, as section 456 of that Code did not require that notice should go personally to, and be served personally upon, the minors **A** GANESHI SINGH v. SHYAM SINGH 636

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, 109 *Execution of decree—Order of High Court directing subordinate Court to execute decree, whether final order or decree—Appeal to His Majesty in Council—Leave, whether can be granted.*

An order of a High Court holding that a subordinate Court has jurisdiction to execute a decree and directing it to proceed with execution is not a final order in respect of which leave may be obtained to appeal to His Majesty in Council

Such an order relates solely to jurisdiction and does not determine a question relating to the execution, discharge or satisfaction of the decree, and is not, therefore, a decree within the meaning of section 2 (2) of the Civil Procedure Code **Pat** GIRWAR PRASAD SINGH v. RAMESWAR LAL BHAGAT, 4 P. L. J. 461 461

——— **ss. 2, 47, 51, 72, O. XXI, r. 11**—*Execution of decree—Order refusing to execute decree, whether decree—Court, whether can act* suo motu *under* s. 51—*Attachment of land—Refusal of Collector to intervene, effect of—Court, whether can make temporary alienation*

Any and every order passed in execution proceedings is not a decree within the meaning of section 2 of the Civil Procedure Code; the decision whether

an order is such a decree depends on its nature and contents.

A. applied for execution of his money decree by attachment and sale of certain land belonging to the judgment-debtor Notice was issued to the Collector asking whether he desired to intervene under section 72 of the Civil Procedure Code. The Collector refused to intervene and the Court held that, under the circumstances, it was useless to send the record to the Collector and that the decree-holder should seek some other remedy for the realization of the decretal money. The District Judge dismissed an appeal from this order holding that it was not open to a Civil Court to take any further action. The decree-holder appealed to the High Court:

Held, (1) that the question whether the appellant was entitled to have the provisions of section 72 of the Civil Procedure Code carried out for his benefit was one relating to the execution of the decree and within section 47 of the Code, and the order was a decree within the meaning of section 2 of the Code:

(2) that the refusal of the Collector to take action was wrong and the executing Court erred in accepting the position taken up by the Collector:

(3) that as the land could not be sold in execution, it was open to the Court to grant something less than a sale and to act under section 72, Civil Procedure Code.

Although section 51, Civil Procedure Code, provides that the Court shall act on the application of the decree-holder, yet an application may be inferred from an action of the Court. **L** RAM RATTAN *v.* DATAR KAUR 356

——— **s. 11, O. XLI, r. 27**—*Appeal, second, whether trial*—Res judicata, *doctrine of, applicability of, to second appeals—Admission of fresh evidence—Copy of judgment of High Court, admissibility of.*

There is no objection on grounds of principle or convenience to the admission in second appeal of a document, such as the judgment of a High Court, which could not be produced earlier because it was not in existence, and which requires no further evidence to explain it. No general rule, however, can be laid down and each case must be dealt with with reference to its own merits, and the existence of the sufficient cause referred to in Order XLI, rule 27, of the Civil Procedure Code.

Section 11 of the Civil Procedure Code is not confined in its application to suits and first appeals. Its provisions apply equally to a second appeal, the hearing of which is a trial within the meaning of that section. **M** GADDAM PARAMASIVUDU *v.* MULAKALA SUBBANNA, (1919) M W N. 45 625

——— **s. 11, O. VII, r. 6**—Res judicata—*Defendant failing to claim set-off—Suit, subsequent, to recover amount due, whether maintainable.*

Where the defendant to a suit for the recovery of a sum of money sets up a defence of non-liability until certain goods deposited by him with the plaintiff as security are returned to him, and his defence is accepted, he is not precluded from instituting a suit to recover the goods, or the price thereof. The fact that he omitted to claim a set-off in the regular suit brought against him would not bar his claim, as he was under no obligation to avail himself of the right to claim set-off conferred by Order VIII,

rule 6, of the Civil Procedure Code. **P** AMRITSAR NATIONAL BANKING CO, LTD. *v.* FAZAL ILAHI, 74 P. R. 1919 850

——— **s. 11**—Res judicata—*Dismissal of suit—Finding in favour of plaintiff, whether* res judicata *—'Matter substantially in issue,' 'final decision,' meanings of*—Res judicata *between co-defendants.*

A decision on a question in an appealable suit, when the decree is in favour of the party against whom that decision is given, is not a final decision within the meaning of section 11, Civil Procedure Code.

To constitute a finding on an issue *res judicata* in a later suit between the parties it is necessary, under section 11, Civil Procedure Code, that the matter should have been directly and substantially in issue between them and should also have been heard and finally decided. Where a finding has been arrived at on a matter which is not necessary for the disposal of the suit and it is not made the basis of the decree which is given in spite of it, that matter cannot be said to have been substantially in issue between the parties, it can only be said to have been incidentally in issue. Such findings are more in the nature of *obiter dicta* than of *res judicata*. Nor can the question be said to have been finally decided by such a finding

Where a decree is given to a party in spite of a finding against him, that finding is not *res judicata* in subsequent litigation.

For a matter to be in issue under section 11, Civil Procedure Code, it is not necessary that an express issue should be framed about it. It is enough if a decision about it is necessary for the decree.

As between co-defendants there must be an active controversy *inter se* before a finding can be treated as *res judicata* **M** KELU NAMBIAR, *v* CHATHU NAMBIAR, 25 M. L T 6; (1919) M. W N. 34; 9 L W. 84 258

——— **s. 11**—Res judicata, *doctrine of, limitations of—Dismissal of suit in spite of findings against defendant—Findings against defendant, whether* res judicata—*Costs, disallowance of, owing to adverse finding, effect of Merger of finding in decree, whether necessary to operate as* res judicata

It cannot be laid down as a uniform rule of law that where a plaintiff's suit is dismissed in spite of findings against the defendant, such findings are not *res judicata* They will be *res judicata* where they are clear and where the intention of the Court was to give a definite decision on matters in issue not inconsistent with the decree or with any other finding.

Under section 11, Civil Procedure Code, it is not necessary that in order to operate as *res judicata* a finding or decision should be engrafted in the decree.

Where costs are disallowed to a successful defendant owing to adverse findings against him and notwithstanding the dismissal of the plaintiff's suit, such findings are *res judicata*.

Per *Sadasiva Aiyar, J.*—The decision of the Privy Council reported as *Run Bahadur Singh* v. *Lucho Koer*, 11 C. 301; 12 I. A 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 only means that, where in spite of a useless finding on the evidence, an exactly opposite finding is arrived at by the same Court as the basis of its decree, the former useless

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finding can never be *res judicata* in subsequent proceedings. But it will be going far beyond their Lordships' intentions to say that no finding against a defendant can ever be *res judicata* under any circumstances if the plaintiff's suit is ultimately dismissed notwithstanding that finding.

In cases where a plaintiff is non-suited on the ground of limitation, *res judicata*, misjoinder, insufficient Court-fee on the plaint, jurisdiction or a like technical and preliminary ground and yet the Court proceeds to give a finding on the merits against the defendant to save a remand by the Appellate Court, such finding will not be *res judicata* if, on appeal, the Appellate Court does not itself think it necessary to give its decision on the merits or if, in case there is no appeal, it is evident that the first Court did not intend its findings to be final.

The doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the Court intended to give and has given a final decision on that question **M** RAMA KRISHNA NAIDU *v.* KRISHNASAMI NAIDU, (1919) M. W. N. 725; 25 M. L. T. 88; 9 L. W. 180; 36 M. L. J. 641 **34**

——— **s. 11**—Res judicata *Mortgage—Foreclosure suit—Person in possession of mortgaged property joined as defendant*—Ex parte *decree—Subsequent suit—Paramount title, whether can be pleaded.*

A decree for foreclosure passed *ex parte* against a person joined as defendant on the sole ground that he is in possession of the mortgaged property does not operate as *res judicata* so as to prevent him or his transferee from setting up a title paramount in a subsequent suit, where there has been no express adjudication on the question of title, though the final decree orders delivery of possession and possession has been accordingly delivered. **N** LAXMI NARAYAN RAMNARAYAN *v.* VITHOBA, 15 N. L. R. 114 **82**

——— **s. 11, O. II, r. 1**—Res judicata—*Suit to redeem as karnavan of tarwad, dismissal of—Subsequent suit to redeem as successor of tarwad, maintainability of—Joinder of causes of action in alternative when allowed.*

A plaintiff is not entitled to set up a false case to the relief which he claims and when he has failed, to plead a fresh case. If he be in doubt as to which case is true, he should set out the two cases in the alternative, each case being one which ought to be made a ground of attack, so as to afford ground for a final decision upon the subject in dispute.

Where the plaintiff filed a suit for redemption as *karnavan* of a *tarwad*, and on its dismissal for want of proof of the title set up, brought the present suit for the same relief as successor of the *tarwad* which had become extinct:

Held, that the suit was barred as *res judicata*. **M** GOVINDA MENOKKI *v.* GOVINDA KARUP, 30 L. W. 170; (1919) M. W. N. 677 **735**

——— **s. 11, O. II, r. 2**—*Suit for possession based on title as landlord, dismissal of—Second suit based on reversionary right, whether maintainable—Cause of action*—Res judicata—*Multiplicity of claims.*

The dismissal of a suit for possession of property wherein the plaintiff claims to be the defendant's landlord, does not bar a subsequent suit by the plaintiff against the same party for possession as the reversionary heir of the last male owner, either under section 11 or under Order II, rule 2, Civil Procedure Code, as the title put forward in the first suit based on the contractual relationship of landlord and tenant and the title put forward in the second suit as one of the heirs of the last male owner constitute different causes of action.

Per *Sadasiva Aiyar, J.*—One of the considerations to be kept in mind when considering the question what ground of attack ought to have been advanced in the first suit is whether under Order II, rule 1, Civil Procedure Code, it was 'practicable' to have framed the first suit by alleging the facts put forward in the second suit without the evidence respectively adduceable on the two sets of facts becoming mutually destructive. **M** MANGALATHAMMAL *v.* VEERAPPA GOUNDAN, (1919) M. W. N. 287 **813**

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——— **s. 20 (c)**—*Place of suing—Partnership—Suit for taking accounts—Court, proper.*

In the absence of proof of an agreement that accounts should be taken elsewhere, a suit for the taking of accounts of a partnership should be instituted in the Court within whose jurisdiction the business of the partnership was carried on. **A** NIRANJAN SINGH *v.* KUNDAN SINGH, 17 A. L. J. 1015 **655**

——— **ss. 21, 107, O. VII, r. 10, O. XLI. r. 33, O. XLIII, r. 1 (a)**—*Appeal—Order by Appellate Court returning plaint for presentation to proper Court—Appeal, second, whether lies—Place of suing, objection to—Failure of justice, finding as to—Court, duty of.*

An order passed by an Appellate Court directing the plaint filed in the case to be returned for presentation to the proper Court, is appealable to the High Court.

An Appellate Court, before allowing an objection as to the place of suing, should consider and decide whether there has been a failure of justice consequent on the suit having been instituted in the wrong Court. **C** SARADA SUNDARI DASYA *v.* GANGAHARI SAHA, 46 C. 738 **801**

——— **ss. 24, 92**—Suit under s. 92, whether can be transferred by District Judge to Additional District Judge. *See* OUDH CIVIL COURTS ACT, 1879, s. 7 **45**

——— **s. 24**—*Transfer of cases—Power, whether can be delegated—Senior Subordinate Judge, whether can transfer case to junior Subordinate Judge—Court becoming seised of case in irregular manner—Failure to object—Waiver—Acquiescence.*

The power to transfer cases under section 24, Civil Procedure Code can be delegated by the District Judge to a Subordinate Judge, but when so delegated it must be exercised in accordance with law. It can only be exercised in regard to cases pending in a Court subordinate to the Court exercising the power.

A Senior Subordinate Judge cannot transfer a case from his own Court to that of the Junior Subordinate Judge as the Court of the latter is not subordinate to him.

Where there is jurisdiction over the subject-matter, but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. **L** KISHEN LAL *v.* JAI LAL **352**

——— **s. 33**—*Court, duty of, to prepare decree—Failure to prepare decree, effect of—Appeal, right of, whether affected.*

Although under section 33 of the Code of Civil Procedure, it is imperative that a decree should follow the judgment and it is the duty of the Court to have one drawn up, yet an omission or neglect by the Court in the performance of its duties in this respect cannot deprive an appellant of his right of appeal. **P** MANOHAR LAL *v.* NANAK CHAND, 66 P. R. 1919 **479**

——— **s. 34**—*Oudh Rent Act (XXII of 1886,) s. 141—Rent, suit for, against under-proprietor—Interest, future, whether can be awarded.*

The liability to pay future interest under section 34 of the Civil Procedure Code, if the Court decides to adjudge it, is not controlled by section 141 of the Oudh Rent Act, and it is within the competence of the trial Court, in a suit for arrears of rent, against an under-proprietor to award future interest at such rate as it may consider reasonable **O** RAJ KUMAR LAL UMANATH BAKHSH SINGH *v.* DARSHAN SINGH, 6 O. L. J. 362 **865**

——— **s. 47**. *See* MORTGAGE—REDEMPTION **466**

——— **s. 47, O. XXI, r. 90**—*Bengal Tenancy Act (VIII B. C. of 1885), s. 174, scope of—Rent-decree against two persons—Execution of decree against one judgment-debtor—Sale of holding—Application to set aside sale by other judgment-debtor, nature of.*

Plaintiff and defendant *A* held a holding jointly. Defendant *B*, the landlord of the holding, obtained a rent-decree against plaintiff and defendant *A* and in execution of that decree against the latter alone brought the entire holding to sale. Defendant *C* purchased the holding at the sale. Plaintiff thereupon brought a suit to have the sale set aside. His plaint was treated as an application under section 47 of the Civil Procedure Code and the sale was set aside. Defendant *C* appealed, contending that plaintiff had no right to make an application under section 47 of the Code, as he was not a party to the execution proceedings, and that his remedy was to apply either under section 174 of the Bengal Tenancy Act or under Order XXI, rule 90 of the Civil Procedure Code, to set aside the sale.

Held, that section 47 of the Civil Procedure Code does not require that a person making an application thereunder should be a party to the execution proceedings, but requires that he must be a party to the suit in which the decree is passed, and as plaintiff was a party to the suit he was competent to make the application.

Section 174 of the Bengal Tenancy Act and Order XXI, rule 90 of the Civil Procedure Code, are of limited scope and application, and an application which raises questions as to the execution of a decree, clearly beyond their scope ought to be dealt with under section 47 of the Code **Pat** ABDUL RAHIM *v.* GUJESHAR MAHTO **514**

——— **s. 47**—*Decree for ejectment directing payment of compensation within period fixed Payment after date fixed—Order accepting payment—Appeal, whether lies.*

The judgment in an ejectment suit made the ejectment conditional upon the payment of compensation by the plaintiff; in the decree, however, no mention was made of this condition, but it only directed payment of the compensation within the date fixed. The plaintiff deposited the money after the period had expired, and, notwithstanding the defendant's objection, the Court made an order that the money be received:

Held, that as the decree had not been put into execution, the order was not one under section 47 of the Civil Procedure Code, and was, therefore, not appealable. **C** IMAM ALI SIKDAR *v.* KARIM BUKSH, 30 C. L. J. 32 **401**

——— **s. 47, O. XXI, r. 97**—*Execution of decree—Application by auction-purchaser for recovery of possession as against prior auction-purchaser, nature of—Appeal, whether lies—Appeal, second, maintainability of.*

An application by an auction-purchaser, alleging that he was obstructed by the opposite party in obtaining possession of the property purchased by him, on the ground that the latter was a prior auction-purchaser, and praying that he might be put in possession, is an application under Order XXI, rule 97, of the Civil Procedure Code and not under section 47 of the Code.

An order made under Order XXI, rule 97, of the Civil Procedure Code is not appealable to the District Court and is consequently not open to second appeal. **Pat** MEGHU SINGH *v.* BASUDEVA JHA **383**

——— **s. 47**—*Execution of decree—Attachment—Objection by defendant whose name had been removed—Declaration, suit for, by decree-holder, maintainability of.*

One *J. P.* was impleaded as one of the defendants in a suit to recover a sum of money; his name was removed from the array of defendants and a decree was passed against his father *K. P.*, but the decree stated that *J. P.* was exempted and was to bear his own costs In execution of the decree certain property was attached and it was objected on behalf of *J. P.*; that the property belonged to him and not to *K. P.*; his objection was allowed. The decree-holder then brought the present suit for a declaration that the property was in fact the property of *K. P.* The Courts found that, as the outcome of a family conspiracy, the property had been entered in the name of *J. P.* and decreed the claim. In appeal to the High Court it was contended that, as *J.P.* was a party to the original suit, his objection was final by reason of section 47 of the Civil Procedure Code and it was not open to the plaintiff to bring the suit:

Held, that *J. P*, having been expressly excluded from the former suit, was not a party to the suit, and, therefore, not a party to the decree, and that, on the findings of fact as to the family conspiracy, section 47 did not apply and the suit had been rightly decreed. **A** JAMNA PERSHAD *v.* RAM DULARE LAL **187**

——— **s. 47**—*Execution of decree—Interest, recovery of—Court-fees, whether payable.*

In equity and in law a party is required to pay a Court-fee upon the sum for the recovery of which he seeks the assistance of the Court. Thus, where a decree-holder sues to recover a sum as interest in addition to the sum named in the decree, he must pay Court-fees on the amount he claims.

Proceedings under section 47 of the Civil Procedure Code which are of the nature of a suit are

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chargeable with Court-fees. **Pat** TARAPADA MITRA v JAGADAMBA KUMARI **802**

——— s. 47 – *Limitation Act (IX of 1904), ch I, Art. 138—Execution of decree—Sale—Decree-holder auction-purchaser, position of—Possession, delivery of, whether question relating to execution Suit to recover possession, maintainability of.*

Questions relating to the possession of property purchased by the decree-holder at a sale in execution of his decree are not questions relating to the execution, discharge and satisfaction of the decree within the meaning of section 47 of the Civil Procedure Code, and that section is no bar to a suit by such decree-holder to recover possession based upon the title acquired by the sale and on the ground that by the sale the right, title and interest of the judgment-debtors in the land was extinguished and they were mere trespassers Such a suit must be brought within the period of limitation prescribed by Article 138 of Schedule I to the Limitation Act. **Pat** SRIDHAR SIRDAR v JAGESHWAR SINGH, (1919) PAT. 354 **711**

——— s. 47, O. XXI, r. 100—*Mortgage suit—Paramount title, claim of—Defendant, discharged, whether party to suit Possession suit for—Events subsequent to date of suit, whether can be subject-matter of enquiry in suit or appeal.*

To constitute a person a party to a suit within the meaning of section 47 of the Civil Procedure Code, there must be a decree either dismissing the suit or decreeing the claim in favour of or against him, but a defendant, against whom the claim is neither dismissed nor decreed who is discharged as not being a proper party to the suit, ceases to be a party to the trial of the suit.

A person, who is discharged from a mortgage suit because he pleads a paramount title, is not a party to the mortgage suit within the meaning of section 47 of the Civil Procedure Code and a separate suit by such a person or his transferee is not barred under that section.

So far as such a person is concerned, he is entitled to object to the delivery of possession of property under Order XXI, rule 100, of the Civil Procedure Code, and if such objection fails, a regular suit lies at his instance within the period fixed by the law of limitation.

A plaintiff's right to possession must be determined with reference to the state of things at the date of the suit. Ordinarily, any subsequent changes which may take place cannot be made the subject-matter of fresh enquiry in an appellate or later stage of the case **N** LAXMAN v GANPAT SURYABHAN, 15 N.L. R. 146 **736**

——— s. 47, O. XXI, r. 103—*R. 103, whether restricted by provisions of s. 47.*

Order XXI, rule 103, Civil Procedure Code, which gives a right of suit to a party who is not a judgment-debtor, is not restricted by the general provisions of section 47. **M** BADMI SESHIAH v. KATTI CHINNA MARIPPA **928**

——— s. 48, Sch. III, para. 11 (3), *applicability of—"Period of limitation," whether includes period provided by s. 48.*

The provisions of clause (3) of paragraph 11 of the 3rd Schedule to the Civil Procedure Code are

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wide enough to include the case of an application for the execution of a decree to which section 48 of the Code applies The words "period of limitation" in the clause are intended to apply to the restrictions placed upon the right of a decree-holder to take out execution of his decree both by the Limitation Act and section 48 of the Civil Procedure Code. **A** SHYAM KARAN v COLLECTOR OF BENARES. **742**

——— ss. 51, 73, O. XXI, r. 84, O. XL, r. 1—*Decree against heirs of holder of estate—Receiver, appointment of—Decree, subsequent, against one of several heirs in respect of personal debt—Receiver, separate, whether can be appointed in respect of share of judgment-debtor Rateable distribution, whether can be allowed—Judgment-debtor, whether same.*

One *M. A* was the last holder of a *taluka* which, after his death, was taken possession of by *A. M*, his brother and *H. M* and *A B* his nephews. A suit was brought on the basis of certain mortgage-deeds executed by *M A.* against these three as representatives of the mortgagor, and a decree was obtained providing for payment by instalments and in case of default for sale of the property. Another decree was obtained against them by *R A*, the daughter of *M A.*, for her share of the dower due to her mother. In execution of this decree a Receiver was appointed and placed in possession of the *taluka* with directions to satisfy these two decrees out of the profits of the *taluka* Subsequently to these proceedings, *M. L.* obtained a decree against *A B.* for his personal debts and, in an application to execute it, he urged that as the two previous decrees were against the representatives of *M. A.*, who were liable to the extent of the assets received by them, the decrees should be satisfied by sale of the property left by *M. A*, and not out of the profits which were not assets left by him, and that as his judgment-debtor owned a one-third share of the property, his decree could be satisfied from the profits of that share He accordingly prayed that his judgment-debtor's share be attached under Order XXI, rule 84 of the Civil Procedure Code, and a Receiver appointed under Order XL, rule 1, to realise the profits and apply them in satisfaction of his decree, *or*, that if no Receiver was appointed the share of his judgment-debtor might be attached and sold to satisfy his decree, *or* that if this was not permitted, he might be allowed a rateable share in the profits realised by the Receiver already appointed:

Held, 1· that section 51 of the Civil Procedure Code entitled the Court to appoint a Receiver of rents of the estate of a deceased person for the purpose of liquidating debts against that estate, and that there was nothing in the Code to limit the appointment of a Receiver of rents to a case where the debt to be discharged was a debt against the heirs and not against the deceased holder of the estate, and that so long as the present Receiver was maintained, the appilcation for the appointment of a Receiver for the sale of the property held by the Receiver already in possession thereof could not be entertained;

2 that as to rateable distribution, the application was barred by the fact that the decree was not

against the same judgment-debtor within the meaning of section 73 of the Civil Procedure Code. O MUNSHI LAL v. MUHAMMAD AMIR MIRZA BEG, 22 O. C. 194 305

——— ss. 50, 51, O. XXI, rr. 17, 22, 23—*Execution of decree—Death of judgment-debtor—Execution against one of several legal representatives—Objection by legal representative—Procedure—Discretion of Court.*

A judgment-creditor has a statutory right to proceed against whichever of two legal representatives of his judgment-debtor he prefers, and, if the one against whom he proceeds offers any objection to the execution of the decree, the matter is left to the discretion of the Court, to be exercised on judicial principles, including equitable considerations, and it is open to the Court to consider the equities between the two legal representatives and make such order as it thinks fit. S KEWALRAM v. ISARBAI, 13 S. L. R. 138 906

——— s. 73, O. XXXIV, r. 14—*Attachment of property—Mortgage executed during pendency of attachment—Simple money decree obtained by mortgagee—Rateable distribution.*

Where a mortgagee under a mortgage, executed while the property was under attachment, claimed rateable distribution under section 73 of the Civil Procedure Code, in respect of a simple money decree for interest due on his mortgage:

Held, that the disability imposed by Order XXXIV, rule 14, of the Code did not apply to him, and that he was entitled to rateable distribution. O RADHE KISHAN v. BIKARMAJIT SINGH, 22 O. C. 150 645

——— s. 92, *scope of—Declaration that plaintiff and defendant are co-mutwallis, suit for, whether falls within section.*

Section 92 of the Civil Procedure Code has no application to a suit for a declaration that the plaintiff and defendant are the *mutwallis* of *waqf* property and are entitled to manage it jointly. A ALI HUSSAIN v MOHAMED HUSSAIN 628

——— s. 97—*Appeal from preliminary decree, whether can be maintained after passing of final decree.*

An appeal against a preliminary decree can be maintained in spite of the fact that a final decree has been passed in pursuance of the preliminary decree, especially where the final decree is in accordance with the preliminary decree and does not in any way modify it or supersede it. M SIVASUBRAMANIA MUDALIAR v. LAKSHMANAIER 697

——— s. 97, O. XXIII, r. 3—*Partition suit—Preliminary decree—Appeal—Proceedings, stay of—Compromise, whether can be recorded.*

Where, in a suit for partnership accounts, a preliminary decree is passed, the fact that an appeal has been preferred from that decree does not operate as a stay of proceedings under that decree, except so far as the Appellate Court may order, nor does such an appeal necessarily oust the jurisdiction of the Court to entertain an application to have a compromise between the parties recorded under Order XXIII, rule 3 of the Civil Procedure Code, and a decree passed in accordance therewith. S CHELLARAM KHIALDAS v. KIAMATRAM, 13 S. L. R. 135 899

——— s. 99, O. XXIII, r. 3, O. XXXIV, r. 1—*Compromise, fraudulent—Court, whether bound to recognise compromise—Mortgage—Redemption, suit for—Tenant holding under mortgagee, whether necessary party to suit—Misjoinder of parties, effect of—Irregularity.*

Every interest created by a mortgagee sought to be redeemed puisne to his own is an interest which in a redemption suit should be represented before the Court in order to enable it effectively to give relief between the parties to the mortgage-deed. Thus a tenant introduced by the mortgagee upon the mortgaged land subsequent to his mortgage is a necessary party to a suit for redemption of the mortgage. Even if he is not a necessary party, the joinder of such tenant as a party to the suit would not be a sufficient cause for dismissal of the suit on the ground of misjoinder of parties: his joinder in the suit would amount merely to an irregularity not prejudicing the trial of the merits of the case, within the ambit of section 99 of the Civil Procedure Code.

A Court is not bound to pass a decree in accordance with a compromise which is shown to be fraudulent. Pat ASAN PANDEY v. RAJMON MISSER 105

——— s. 100—*Omission to notice question taken in memo of appeal, whether vitiates decision.*

The fact that an Appellate Court does not take notice of a question not raised in the memorandum of appeal, cannot be said to vitiate its decision by any error or defect in procedure within the meaning of section 100, Civil Procedure Code. M VENKATAPPIER v. RAMASWAMI AIYAR, 10 L. W. 137; (1919) M. W. N. 548 517

——— s. 107—*Appeal—Appellate Court, whether can examine parties.*

An Appellate Court is competent to examine any of the parties if, for the sake of doing justice and for the purpose of ascertaining facts, it considers it necessary to do so. A JANG BAHADUR RAI v. RAJ KUMAR RAI, 17 A. L. J 945 289

——— s. 110—*Appeal to His Majesty in Council—Value, determination of, method of—One of several parties desiring to appeal.*

In order to determine the value for the purposes of an appeal to His Majesty in Council in a case where there is a dispute as to property valued at more than Rs. 10,000, and only one of the parties affected by the decision desires to appeal, what must be looked at is the detriment to that party, and if, in fact, the total amount of the subject-matter of the suit so far as his interest is concerned is under Rs. 10,000, it does not come within the terms of section 110 of the Civil Procedure Code, and, therefore, an appeal is not permissible. Pat BHAUNATH GIR v. BIHARI LAL, (1919) PAT. 257; 4 P. L. J. 415 723

——— s. 115, 151—*Appeal, dismissal of, without notice to appellant—Irregularity—Remedy of appellant—Inherent powers, exercise of—Revision—High Court, power of interference of.*

Where a Court dismisses an appeal, of the hearing of which the appellant has no notice whatever, the Court, though in ignorance of the true facts, must be held to have acted with material irregularity and in such a way as to induce a miscarriage of justice, and the High Court would be justified in using

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not only its inherent powers referred to in section 151 of the Civil Procedure Code, but also its powers under section 115, to set aside the order of dismissal. **M** PAMIREDDI SAMBAYYA v. NIMMAGADDA NAGAYYA, 9 L. W. 513 **540**

——— s. 115, O. XLI, rr. 18, 19—*Appeal—Non-payment of process-fees—Appellate Court, duty of—Order dismissing appeal for non-payment of process-fees, whether appealable—Revision.*

No appeal lies against an order passed under Order XLI, rule 18, of the Civil Procedure Code.

In order to be able to avail itself of the provisions of Order XLI, rule 18, of the Civil Procedure Code, it is the duty of the Appellate Court to fix a date by which the process-fees are to be paid.

The appellant filed an appeal in the Court of the District Judge and was ordered, at the time the date of the hearing was fixed, to pay the amount of the process-fee, which not having been paid even on the date of the hearing, the appeal was dismissed. He appealed to the High Court:

Held, (1) that no appeal lay;

(2) that inasmuch as the appellant had not pleaded that the non-payment was due to the fact that he had not been directed to pay by any fixed date, this was not a fit case for the exercise of the discretionary powers of revision. **L** ATTAR SINGH v. KARM CHAND **179**

——— s. 115, applicability of, to suits, appeals and proceedings under Madras Estates Land Act **634**

——— s. 115, O. XXIII, r. 1, O. XXXIII rr. 5, 7, 15—*Application for leave to sue as pauper—Application to withdraw application, dismissal of—Subsequent application for leave, maintainability of—Revision—High Court, power of interference of.*

Where, upon the dismissal of an application to withdraw an application for leave to sue as a pauper, the applicant declines to proceed, and his application is, in consequence, dismissed, such dismissal operates to bar a subsequent application for leave to sue as a pauper, though it is open to the applicant to file a suit in the usual way on payment of fees.

Quære.—Whether an order of dismissal such as the foregoing is open to revision by the High Court under section 5, Civil Procedure Code. **C** BARODA DASI v. UPENDRANATH MANDAL **562**

——— s. 115, O. VII, r. 10, O. XXXIII, r. 8, O. XLIII, r. 1 (a)—*Application for leave to sue as pauper—Order returning application for presentation to proper Court, legality of—Appeal, whether lies—Irregularity—Revision.*

An application for leave to sue as a pauper is not a plaint, and it only reaches the stage of a plaint when it is granted. Where, therefore, a Court, regarding such application as a plaint, directs it to be returned for presentation to the proper Court, it acts without jurisdiction, and, although such an order is not appealable, the High Court will, in the exercise of its powers of revision, interfere and set the order aside. **A** NUR MUHAMMAD v. FIRM MAULVI JAMIL AHMAD **688**

——— ss. 115, Sch. II, para. 16—*Arbitration—Court, reference to, as arbitrator—Reference by some only of parties, validity of—Award as against all parties—Appeal, whether lies—Appeal by ex parte defendants, effect of—Award passed on local inspection without recording evidence and without allowing time for objections—Remand, whether re-opens whole case or only in respect of party appealing—Revision—Irregularity—High Court, power of interference of.*

A consent given by the parties to a suit to abide by the decision of a Court is not such a reference to arbitration as is contemplated by the provisions of Schedule II to the Civil Procedure Code.

Where a Court itself acts as arbitrator on a question of fact and gives an award, there is no appeal against its decision, not because the provisions of Schedule II to the Civil Procedure Code apply to the award made by the Court, but because a party cannot go back on his consent to abide by the decision of an arbitrator after the award is given

A judgment on an award, if it is pronounced in contravention of the provisions of Schedule II, paragraph 16, clause (1), does not fall under paragraph 16 (2) and, consequently, there is no prohibition of an appeal from such a judgment.

Where, therefore, a Court, which is asked to arbitrate, pronounces an award on a mere local inspection and on no legal evidence and without pronouncing on the evidence already adduced and without giving time to the parties to prefer their objections to it, the award is illegal and an appeal lies against it. Even if no appeal were competent in such a case, the High Court would have power to interfere in revision on the ground of material irregularity.

An award by a Court, which is appointed as arbitrator by some only of the parties, will bind those who join in the reference, but in respect of those who do not, the Court should give its decision on the materials placed before it as a Court. It is illegal for a Court to accept the position of arbitrator when all the parties interested do not join in consenting to such appointment.

Where an Appellate Court remands a case for re-trial on the appeal of those defendants who did not join in a reference to arbitration on the ground that the award was not binding on them, the whole case is re-opened even in respect of those parties who did not appeal. **M** CHENGALRAYA CHETTY v. RAGHAVA RAMANUJA DOSS, 37 M. L. J. 100 **569**

——— s. 115, O. XXI, rr. 89, 90—*Execution of decree—Sale—Application by prior vendee of portion of property to set aside sale, maintainability of—Order dismissing application—Revision—High Court, interference by.*

A purchaser at a private sale from a judgment-debtor of a portion only of certain properties, which are subsequently sold in execution of a decree, is not entitled to ask that the execution sale be set aside on the ground that the amount of the decree has been fully paid by himself and other purchasers of the rest of the property.

An order dismissing such an application does not give rise to any question of jurisdiction and is not open to interference by the High Court on revision.

A mere wrong decision on a question of law is not a ground for revision under section 115, Civil

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Procedure Code. **M** KOPPAKA CHANDRAYYA *v.* ROBERTSON **641**

——— **s. 115, O. XXI, r. 89**—*Execution of decree—Sale—Application to set aside sale—Judgment-debtor, whether entitled to make application after parting with his interest in property sold to third person—Purchaser from judgment-debtor, whether can make application—Court refusing to accept deposit—Revision—High Court, interference by.*

The fact that a judgment-debtor has parted with his interest to a third party in property attached and sold in execution of a decree is no bar to his making an application under Order XXI, rule 89 of the Civil Procedure Code, to have the sale set aside.

A purchaser by means of a private deed of the property of a judgment-debtor attached and sold in execution of decree has no *locus standi* to make an application under Order XXI, rule 89 of the Civil Procedure Code.

When a deposit is made under rule 89 of Order XXI of the Civil Procedure Code, it is the duty of the Court to proceed to set aside the sale.

Where a Court declines to accept the deposit from the judgment-debtor, its action amounts to a refusal to exercise jurisdiction and the High Court can interfere under section 115 of the Civil Procedure Code. **Pat** LACHMI NARAIN *v.* KALI PROSONNO **344**

——— **ss. 115, 148, O. IX, rr. 8, 9**—*Limitation Act (IX of 1908), ss. 5, 18, Sch. I, Art. 163—Dismissal of suit for default—Application for restoration—Limitation—Extension of time—Discretion of Court, proper exercise of—Laches, effect of—Arbitrary order—Revision—High Court, power of interference of.*

The discretion granted by section 148 of the Civil Procedure Code of enlarging the time for doing an act ought not to be arbitrarily exercised in matters to which the rules of limitation apply, and in which by those rules the Court can only extend the time after a proper judicial consideration of the cause shown under section 5, or the fraud established under section 18 of the Limitation Act.

Where a Court fails to apply its mind to the question of limitation and arbitrarily grants an application for the restoration of a suit long after the period of limitation has expired, it acts without jurisdiction and its order is liable to be set aside by the High Court acting under section 115 of the Civil Procedure Code.

Litigants who are guilty of gross laches and who refuse to comply with the orders of a Court ought to be shown no indulgence under section 148 of the Civil Procedure Code. **Pat** DUKHNO *v.* MUNSHI SAHU, 4 P. L. J. 428 **439**

——— **s. 115**—*Revision—Adjournment, refusal to grant—Dismissal of suit for default—Reversal of order and grant of adjournment, legality of—Irregularity*

In a suit before a Munsif, the plaintiff and the Pleader for the defendant appeared on the date fixed for the hearing, the plaintiff asked for an adjournment on the ground that his witnesses were not present: the defendant's Pleader stated that his witnesses, too, had not come. The Munsif refused the adjournment and dismissed the suit for want of prosecution. Later in the day the plaintiff with his Pleader appeared before the Munsif and called his attention to the fact that the burden of proof had been laid on the defendant. The Munsif, thereupon, treating the application as one for setting aside an *ex parte* decree, in the presence of the Pleader for the defendant set aside his previous order and granted the adjournment which he had previously refused. On the adjourned date, the defendant did not appear, and an *ex parte* decree was passed against him. On an application for revision to the High Court:

Held, that the Munsif had not only acted in the exercise of his jurisdiction with material irregularity but had acted without jurisdiction in his attempt to correct his first erroneous order, and that neither of his orders nor the *ex parte* decree could be upheld. **A** ABDUL AZIZ *v.* SHEKHAR CHAND, 17 A. L. L. J. 868 **263**

——— **s. 115**—*Revision—Error of law, whether ground for interference—High Court, power of interference of.*

A High Court cannot interfere in revision on grounds of alleged error in law or fact, in which the question of jurisdiction is not involved. The fact that a Court has taken, in the exercise of its jurisdiction, a mistaken view as to what does or does not constitute misconduct in an arbitrator, is not a ground upon which the High Court will interfere under section 115, Civil Procedure Code. **S** KUNGOMAL *v.* THADHOMAL, 13 S. L. R. 98 **864**

——— **s. 115**—*Revision—'Illegality' or 'irregularity', what is—Trial of wrong issue or misplacement of onus, whether justifies interference—Failure of justice for want of sufficient evidence.*

In interfering with a decision of a lower Court under section 115, Civil Procedure Code, the High Court is not concerned with any error in the decision on matters of law or fact. It must be shown that there is a question of jurisdiction within the meaning of clauses (*a*) and (*b*) of section 115 or that there has been an act of actual illegality or irregularity in procedure affecting the merits.

The words "illegality" or "irregularity" in section 115, clause (*c*), of the Civil Procedure Code refer to matters of procedure only.

The plaintiff instituted a suit in the Court of Small Causes at Calcutta and obtained a decree. Against that decree an application under section 115, Civil Procedure Code, was made to the Original Side of the High Court. The grounds for making the application were (1) that a wrong issue was tried, (2) that the onus was wrongly placed upon the defendants, and (3) that there was no evidence to support the judgment of the Small Cause Court:

Held, (1) that the trial of a wrong issue amounted only to an error in law and did not amount to any illegality or irregularity in procedure

(2) that the fact that the onus was wrongly placed did not entitle the High Court to interfere under section 115, Civil Procedure Code;

(3) (Per *Woodroffe, J.*) that to justify interference for want of evidence it must be shown that there was absolutely no evidence at all. **C** HARAN CHANDRA CHATTERJEE *v.* CORPORATION OF THE ROYAL EXCHANGE ASSURANCE, 23 C. W. N. 759 **767**

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——— s. 115—*Revision - Interlocutory order—Remedy, alternative, open—High Court, power of interference of.*

Where an alternative remedy is provided, the High Court will not entertain an application for the exercise of its powers of revision under section 115 of the Civil Procedure Code.

A trial Court refused the request of the defendant's Pleader to frame a particular issue and the defendant moved the High Court in revision. At the hearing a preliminary objection was taken that no revision lay from an interlocutory order:

Held, that the application was not maintainable, inasmuch as another remedy was open to the defendant, *viz.*, that if he was adversely affected by the omission of the proposed issue, he could appeal to the High Court and urge the objection that his defence was not considered in its entirety. **A** KEDAR NATH v. SHEO PRATAP, 1 U. P. L. R. (H. C.) 72 **411**

——— s. 115—*Revision—Material irregularity—Court taking erroneous view of law or omitting to decide question of fact.*

Where a Court takes an erroneous view of the law, or omits to decide a question of fact, *e. g.*, whether or not a balance was struck, it commits a material irregularity, and its decision is open to revision by the High Court. **P** RAMJI LAL v. MANYA, 37 P. L. R. 1919 **115**

——— s. 145, O. XXI, r. 43—*Attachment of moveables—Delivery to surety for safe custody—Execution proceedings against surety, maintainability of.*

Per *Sadasiva Aiyar, J.* (*Spencer, J., contra*).—Section 145 (*b*), Civil Procedure Code, refers to restitution of property "taken in execution," that is, taken possession of by a party in execution in accordance with the terms of the decree or order in his favour, and not to properties taken possession of by the Court through attachment in execution of a decree. A decree-holder cannot execute his decree against a person who has become surety under Order XXI, rule 43, in respect of properties taken possession of by the Court Amin. It is only a surety who comes under section 145 of the Code that can be proceeded against in execution as if he were a party to the decree.

Per *Spencer, J.*—The Court has inherent power to assign a bond executed in its favour for the purpose of a suit being brought to enforce its terms.

The word 'restitution' in section 145 (*b*) of the Civil Procedure Code must be read in the wide and general sense of restoration or making good that which is deficient, and a Court can, under that section, proceed in execution against a surety who has failed to perform his conditional undertaking to produce the judgment-debtor's property when called upon to do so. **M** KONIMAREDDI SUBBAREDDI *v.* KOLLIPARA VEERAYYA TATE, 25 M. L. T. 220; (1919) M. W. N. 219; 9 L. W. 476 **410**

——— ss. 151, 152—Amendment of decree—Inherent power of Court. *See* JUDGMENT **574**

——— s. 151, O. XLI, r. 5—*Chota Nagpur Tenancy Act (VI B. C. of 1908), ss 215 (3), 224, 229—Appeal to High Court under Chota Nagpur Tenancy Act—Stay of execution—High Court, power of, to stay execution.*

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The provisions of the Civil Procedure Code as to stay of proceedings do not apply to cases under the Chota Nagpur Tenancy Act, but, as that Act gives a right of appeal to the High Court, the Court has inherent jurisdiction as a Court of Appeal, where an appeal lies to it, to stay proceedings as ancillary to its powers as the appellate authority to reverse an order of an inferior Court. The jurisdiction, however, should be exercised sparingly and only in cases where it is manifest that justice demands such an exercise. **Pat** LAL NILMANI NATH SAHI *v.* BALDEO DAS BISTA, 4 P. L. J. 371; (1919) PAT. 145 **185**

——— s. 151, O. XLI, r. 23—*Remand—Appellate Court, power of, to remand case for re-trial—Minor—Appeal by minor not represented by guardian, whether competent—Procedure—Inherent power of Court, exercise of.*

A Court of Appeal is competent to remand a case for re-trial under circumstances not mentioned in rule 23, Order XLI of the Code, where the ends of justice require this to be done.

An appeal preferred by an infant not represented by a guardian *ad litem* cannot be entertained, but in such a case the High Court will exercise its powers under section 151 of the Civil Procedure Code and make such order as is necessary for the ends of justice. **C** MISRI SAHU *v.* VISHNU NATH SAHU, 29 C. L. J, 419 **985**

——— s. 153, O. VI, r. 17—*Amendment of plaint—Oral application whether sufficient.*

A written application is not necessary to move the Court for an order allowing an amendment of the pleadings. An oral application is sufficient. **M** KAMAKSHI AMMAL *v.* SUBBARAYA CHETTY **758**

——— O. I, r. 9, *scope of.*

Order I, rule 9, of the Civil Procedure Code deals with cases where the Court can deal with the matter in controversy with regard to the rights and interests of the parties actually before it. **A** MADHO RAM *v.* JAGAT SINGH, 1 U. P. L. R. (H. C.) 7 **18**

——— O. I, r. 13—Non-joinder of parties—Objection, when should be taken. *See* APPEAL, SECOND **463**

——— O. II, r. 2—*Abandonment of claim—Causes of action, joinder of—Vendor and purchaser—Assignment of arrears of rent to purchaser—Suit on assignment, whether bars subsequent suit for rent on title.*

Where the vendee of certain property got an assignment of the uncollected rents from the vendor and sued the defendant first for arrears of rent under his assignment and afterwards for rent that had accrued due since his purchase, basing it on title:

Held, that the causes of action for the two suits were different and the second suit was not barred under Order II, rule 2, Civil Procedure Code.

Under Order II, rule 2, Civil Procedure Code, the test is not whether the plaintiff could have sued for both the claims in the same suit but whether he was bound to have sued **M** CHIDAMBARAM PILLAI *v.* DURAISWAMY CHETTY, 10 L. W. 31; 26 M. L. T. 114 **325**

——— O. II, r. 2, O. VI, r. 17—*Amendment of plaint, when to be allowed—O. II, r. 2, whether applicable to amendment of plaint.*

The object of litigation being to ascertain and give effect to the rights of parties, an amendment of the plaint should always be allowed when it does not change the nature of the suit and when the rights of the defendant are in no way prejudiced by the amendment; any inconvenience caused to him can be healed by the award of costs

Order II, rule 2, of the Civil Procedure Code merely bars a second suit for relief which should have been included in an earlier suit, and does not apply to the case of an amendment of a plaint. **P** FATEH KHAN *v* MUHAMMAD ISA, 6 P. L. R. 1919; 84 P. R. 1919 **464**

——— **O. II, r. 2**—*Suit for declaration of title and for injunction restraining disturbance of possession—Dismissal of suit for failure to prove possession—Subsequent suit for declaration and possession, whether barred.*

A suit for declaration of title to and possession of property will not be barred under Order II, rule 2, Civil Procedure Code, by reason of the dismissal of a previous suit for declaration and injunction restraining defendant from disturbing plaintiff's possession, on account of the failure of the plaintiff to prove possession. **M** AIYANAR RAJA *v.* ALAGAR RAJA **434**

——— **O. VI, r. 5**—*Plaint, averments in, not precise—Particulars, failure to apply for—Appeal, second—Objection, whether can be raised—Contract Act (IX of 1872), ss* 16, 74—*Loan—Interest, high rate of, whether can be reduced—Undue influence—Unconscionable bargain—Penalty—Hindu Law—Joint family*—Karta, *alienation by—Criminal charge, defence of, whether valid necessity—Consent of son, effect of—Necessity—Presumption.*

Where the averments in a plaint are not sufficiently precise, it is open to the defendant to apply for particulars under Order VI, rule 5, of the Civil Procedure Code, and, if such application is not made, he cannot, in second appeal, be permitted to refer to the matter.

In all cases relating to money-lending transactions, the Court will relieve the debtor by reducing the rate of interest only when it is satisfied that the lender was in a position to dominate the Will of the borrower, and that the "bargain" was unconscionable within the meaning of section 16 of the Contract Act; but where neither of these elements is pleaded, it is not open to the Court to give relief to the defendnt on the ground of undue influence.

A member of a joint Mitakshara family is entitled to use the family funds in repelling a criminal charge made against him.

The *karta* of a joint family has undoubted power to alienate joint family property for a justifying family necessity, if the other members of the coparcenary assent to the transaction. An assent given by a son to a mortgage by his father subsequently to its completion is not, in any sense, a ratification of what was done by his father, but is presumptive proof of a justifying family necessity.

Where a Hindu father raised a loan agreeing to pay interest at 3 per cent. per month with quarterly rests, and the transaction was assented to by his son, and there was no evidence that his consent was not a free consent, or that he did not give his consent with knowledge of actual facts

of a family necessity justifying the raising of a loan on such onerous terms:

Held, that the rate of interest was not a penal rate, and that the lender was entitled to recover interest at the rate agreed upon.

In dealing with cases under the Hindu Law it is always dangerous to employ technical terms of English Law. **Pat** PREM SUKH DAS *v.* RAM BUJHAWAN MAHTO **964**

——— **O. VI, r. 17**—*Amendment of plaint, when to be allowed—Cause of action, fresh, whether can be substituted.*

A plaintiff ought not to be allowed to amend his plaint so as to substitute a plaint on a fresh cause of action or a separate cause of action for the plaint as originally framed. **U B** MA NYUN *v.* MAUNG SHWE KAUNG, 3 U. B. R. (1919) 171 **961**

——— **O. VI, r. 17**—*Appeal, second—Amendment of pleadings, whether can be allowed.*

Where parties elect to go to trial on a particular cause of action, and the issues and the evidence, in consequence, are limited to those which are relevant to that cause of action, the Court, in second appeal, will not permit an amendment of the pleadings with a view to a remand for re-trial, as that would practically be starting a new trial on cause of action deliberately abandoned. **O** BAJRANG LAL *v.* BRAHMA DAT, 6 O. L. J. 322 **849**

——— **O. VII, r. 6**—*Plaint—Suit barred by limitation—Ground saving limitation, whether should be specifically pleaded.*

Where a suit is brought after the prescribed period of limitation, it is incumbent on the plaintiff, under Order VII, rule 6, of the Civil Procedure Code, to state explicitly the ground on which the bar is saved. **M** MARUDAI MUTHIRIAN *v.* CHINNAKANNU MUTHIRIAN, 9 L. W. 32; 25 M. L. T. 295; (1919) M. W. N. 429 **243**

——— **O. IX, rr. 4, 9, O. XXI, rr. 90, 100, 101**—*Execution of decree—Application to set aside sale—Dismissal for default—Application for restoration, maintainability of.*

Order IX, rule 9, of the Civil Procedure Code does not apply to an order dismissing for default an application to set aside under Order XXI, rule 90, of the Code a sale held in execution of a decree.

Rule 4 of Order IX expressly applies to suits, and a case under Order XXI, rules 100 and 101, is not a suit within the meaning of that rule. **Pat** JUGUL KISHORE *v.* BACHINDER MOHAN **416**

——— **O. IX, r. 8, O. XVII, rr. 2, 3**, *scope and applicability of—Plaintiff unable to produce evidence—Dismissal for default—Appeal, second, whether lies.*

In order to apply rule 3 of Order XVII of the Civil Procedure Code to a case, it must be shown that there was something upon which the Court could bring its judicial mind to bear in the shape of either evidence or pleadings, and that the Court did before making its decision duly apply its mind.

Unless the facts clearly indicate that there was an adjudication, an order of dismissal, whether i be for want of evidence or not, should be treated as an order under Order IX of the Civil Procedure Code.

Where, in consequence of the plaintiff not adducing any evidence in support of his case, his suit is dismissed in default, and there is no indication that

Civil Procedure Code—1908—contd.

he was either willing to have the suit decided on the merits, or that the Court in any way applied its mind to the rights and liabilities of the parties, the order must be treated as one under Order XVII, rule 2 of the Civil Procedure Code, and is not open to second appeal. **Pat** MUHAMMAD BAKAR ALI *v.* CHULHAI MAHTON **290**

——— O. IX, r. 9—*Probate and Administration Act (V of 1881), s. 83—Probate application—Dismissal for default—Restoration, application for, maintainability of.*

Order IX, rule 9, of the Code of Civil Procedure is applicable to the dismissal of an application for Probate which has, under section 83 of the Probate and Administration Act, been treated as a suit. The applicability of the latter portion of rule 9 is not conditional on that of the former. **M** RALLABANDI VEERAMMA *v.* RALLABANDI SUBBA RAO **639**

——— O. IX, r. 9—Sufficient cause, what amounts to **959**

——— O. IX, r. 13, O. XLIII, r. 1 (a)—Ex parte *decree—Application to set aside decree—Order granting application—Appeal, whether lies.*

An order granting an application under Order IX, rule 13, of the Civil Procedure Code is not appealable. **A** BENAIK RAO *v.* PUTAIN SINGH, 17 A L. J. 1052 **901**

——— O. XVII, r. 3, *scope of—Dismissal of suit for default, legality of—Court, duty of.*

Rule 3 of Order XVII of the Civil Procedure Code is an enabling rule and not a mandatory one.

A mere order of dismissal based on default is not a proper or legal order under this rule. The Court should proceed with the disposal of the suit on the materials before it and, if the circumstances are such that it cannot decide the suit forthwith on the materials before it, it should not avail itself of the provisions of that rule.

Where, therefore, it appeared at the first hearing of a suit that certain defendants had not been served and the Court passed orders adjourning the case and directing issue of summons to all absent defendants on receipt of process-fees, or a proclamation by beat of drum at the expense of the plaintiff, but the plaintiff took no action whatever in respect of the order and on the date of hearing gave no reasons for his default and pleaded no extenuating circumstances but asked for forgiveness and indulgence and the Court dismissed the suit under Order XVII, rule 3, Civil Procedure Code:

Held, that under the circumstances rule 3 of Order XVII was inapplicable and should not have been applied. **L** SHER ALI *v.* MANGU **292**

——— O. XXI, r. 2, application under, time for, when may be extended **958**

——— O. XXI, r. 2—*Execution of decree—Payment out of Court—Decree-holder, whether bound to certify payment within any fixed period—Obligation, nature of.*

Except where an Act of the Legislature provides a time for the performance of a duty, the ordinary and natural inference is that the obligation to perform that duty is a continuing obligation

A decree-holder can, at any time, certify a payment to the Court, and it is enough if he mention, the payment in his application for execution **S** SHAFI MAHOMED *v.* CHOITHRAM, 13 S. L. R. 37 **804**

Civil Procedure Code—1908—contd.

——— O. XXI, r. 2—*Execution of decree—Satisfaction of decree—Evidence of satisfaction, admissibility of—Payment certified but not recorded, whether can be recognised.*

A Court executing a decree is entitled to go into evidence for the purpose of considering whether the decree holder has certified satisfaction of the decree Order XXI, rule 2, clause 3, of the Civil Procedure Code enables a Court to recognise a payment or adjustment which has been certified but not recorded. **Pat** RAM PROSAD ROY *v.* KIRIT ROY **764**

——— O. XXI, r. 2—*Execution of instalment decree—Payment of instalment out of Court—Admission by decree-holder and judgment-debtor—Certification, whether necessary—Limitation.*

N obtained a decree against *Q.* for a specific sum of money payable by six annual instalments, with the proviso that in case of default *N.* could realise the whole sum with interest *N* applied to execute the decree alleging that the second and third instalments had been paid, but the fourth had not. *Q.* contended that the application was barred by limitation inasmuch as *N.* had not certified payment of the second and third instalments to the Court, and that the fourth instalment had also been paid:

Held, that as *Q.* admitted payment, no question of certifying to the Court of any payment out of Court arose in the circumstances, and that it was not necessary for *N* to prove such payment. **A** QADAM SINGH *v.* NATHU SINGH **362**

——— O. XXI, r. 2—*Satisfaction of decree—Certification, mode of—Reference to satisfaction in pleadings, whether sufficient.*

In order that a satisfaction of a decree may be treated as a proper satisfaction under Order XXI, rule 2 of the Civil Procedure Code, the adjustment should be notified to the Court whose duty it is to execute the decree in a form which will come before it in its execution work. A casual reference to such an adjustment in a plaint or other civil proceeding is not sufficient. **S** MAHOMED KHAN *v.* NENUMAL, 13 S. L. R. 130 **901**

——— O. XXI, r. 5—*Execution of decree—Duty of Court—"Striking off" application, whether permissible—Order releasing property from attachment, effect of—Decree-holder, whether can subsequently apply for execution by arrest of judgment-debtor.*

In execution of a decree the decree-holder attached certain property of the judgment-debtor and the same was made over to a *sapurdar*. Certain attempts at sale proving abortive, the bailiff reported on 1st May 1916 that the *sapurdar* had left and the goods were in possession of the judgment-debtor who, however, presented a written statement denying that he was in possession. Owing to the non-attendance of parties, the execution proceedings were consigned to the record room on the 7th June 1916. A year later, the decree-holder made a fresh application for execution on the 27th July 1917 and a specific order was recorded that the goods were released and the application was again consigned to the record room In November 1917 the decree-holder applied for execution by the arrest of the judgment-debtor:

Held, (1) that the Court was not justified in

"striking off" the application for execution on the 7th June 1916, which should either have been dismissed or adjourned, as the Court was not legally competent to do anything else;

(2) that it must be held that the application was not dismissed and that the attachment continued to subsist;

(3) that the order of release must be regarded as one involving and implying the dismissal of the second application and that that application should be held as having been dismissed;

(4) that, consequently, the attachment ceased on the 27th July 1917 and the goods were thereafter at the disposal of the judgment debtor;

(5) that, in any event, the judgment-debtor was a party to the disappearance of the property and the decree-holder was entitled to execute the decree by the arrest of the judgment-debtor. **L** DIWAN CHAND v. BEDHA RAM-DEVI DIAL **294**

——— **O. XXI, r. 17 (2)**—*Execution of decree—Application for execution, return of—Presentation after amendment—Limitation, commencement of—Time, grant of, for making amendment, application for, whether 'step-in-aid' of execution—Limitation Act (IX of 908,) Sch. I, Art. 182 (5).*

Where an application for execution of a decree or order is re-presented after the required amendments have been made the amended application should, for purposes of limitation, be deemed to have been presented on the date on which it was first presented, and not on the date of re-presentation.

An application for time to amend an execution application and to put it in the form prescribed is not a 'step-in-aid' of execution within the meaning of Article 182 (5) of the Limitation Act, nor is an adjournment granted to convert an irregular application not placed on the file into a regular one a step-in-aid' of execution.

In order that a particular act may amount to a 'step-in-aid' of execution, execution must be pending before the Court which it can aid. **M** VALASUBRAMANIA PILLAI v CHIT COMPANY YELA NIDHI, LTD., 10 L. W. 222 **765**

——— **O. XXI, r. 18**—*Execution of decree—Cross-decrees—Set-off, direction as to, in one decree—Application for execution, whether necessary before set-off can be allowed.*

Where a landlord holds a decree against his tenant for rent, and the latter holds a decree against his landlord for mesne profits, but there is a direction in the decree for rent that execution is not to issue until the amount due under the decree for mesne profits is ascertained, the intention is that the decrees should be set off against each other. It is not necessary, in such a case, that the decrees on both sides should be before the Court for execution as required by Order XXI, rule 18 of the Civil Procedure Code, in order that a set-off might be claimed. **Pat** HIRA LAL SINGH v. RAMJIRAM, (1919) PAT. 372 **746**

——— **O. XXI, rr. 54, 66, 90**—*Execution of decree—Sale—Notice to judgment-debtor, absence of, effect of—Sale, whether can be set aside.*

The mere absence of notice to a judgment-debtor of the intended sale of his property is not a material irregularity in the publication of the sale, within the meaning of Order XXI, rule 90, of the Civil Procedure Code, sufficient of itself to justify the setting aside

of the sale. **U P B R** MAHPAL BAHADUR v. RAM BAHADUR SINGH, 1 U. P. L R (B. R.) 7 **167**

——— **O. XXI, rr. 58, 61, 63**—*Attachment in execution of decree, effect of—Ancestral property—Reversioners, position of—Declaration that property is not liable to sale, suit for, maintainability of.*

An attachment cannot be regarded as an alienation of the property attached. It may infringe the right of the judgment-debtor but does not give a cause of action to his reversioners.

Under customary law, a suit for a declaration at the instance of the reversioners does not lie when ancestral property has been merely attached in execution of a decree with a view to sale but has not been sold.

In a suit for a declaration that a certain house was not liable to attachment and sale in execution of a decree against the plaintiffs' father, it appeared that the plaintiffs had filed objections under Order XXI, rule 58, Civil Procedure Code, claiming that they were in possession as owners. The claim having been disallowed, they filed the present declaratory suit, alleging that the land was ancestral; that they had built certain of the houses, that the debts contracted by their father were without consideration and necessity, and that the houses were exempt from attachment and sale by virtue of section 60 (1) c), Civil Procedure Code

Held, (1) that the plaintiffs' suit was undoubtedly in part one under Order XXI, rule 63 of the Civil Procedure Code, but that they were not, because of an order under Order XXI, rule 61 of the Code, incompetent to institute a suit for a declaration under the provisions of section 42 of the Specific Relief Act;

(2) that the house in suit not having been sold, the plaintiffs' suit was premature. **L** WARYAM SINGH v. NARAIN DAS **157**

——— **O. XXI, rr. 58, 63**—*Limitation Act (IX of 1908), Sch. I, Art. 11—Execution of decree—Sale—Claim that property should be sold subject to mortgage, rejection of—Suit to establish right—Limitation.*

A petition to a Court, asking that it be notified that certain property ordered to be sold in execution of a decree is liable to a mortgage and that the sale be held subject to the mortgage, falls within the provisions of Order XXI, rule 58 of the Civil Procedure Code, and where such petition is rejected, a suit by the petitioner to enforce his right against the property must be brought within one year under Article 11 of Schedule I to the Limitation Act. **M** LAKSHUMNAN CHETTIAR v. PARASIVAN PILLAI, 37 M. L. J. 159; (1919) M. W. N. 653 **720**

——— **O. XXI, r. 63**—*Execution of decree—Attachment—Objections, petition of, asking that objections be recorded, effect of—"Kuri" transaction—Security, duty of bidder to furnish—Time, whether of essence of contract.*

Where a person objects to the attachment of property and files a petition asking that his objections be recorded, without asking for an investigation of his claim, and the Court records his objections, such recording of objections does not amount to an order against the objector to which

Civil Procedure Code – 1908 – contd.

the provisions of rule 63 of Order XXI of the Civil Procedure Code would apply.

The rule in *kuri* transactions being that the amount which is payable to the bidder is to be paid to him only on his furnishing security for future instalments, time is of the very essence of the contract, and, unless the security is furnished within the prescribed period, the bidder loses his right to the amount payable to him. **M** AYYA PATTAR *v.* ATTUPURATH MANAKKAL. **938**

——— O. XXI, r. 83 – *Execution of decree—Equity of redemption belonging to two brothers, attachment of—Permission to one brother to raise decretal amount by private sale—Brother not joining in sale, title of, whether affected—Suit to recover half share, maintainability of.*

Where the equity of redemption in certain property belongs in equal shares to two divided brothers, and is attached in execution of a decree against both, and is ordered to be sold, the senior brother has no power to sell his brother's interest by virtue of permission obtained under Order XXI, rule 83, of the Civil Procedure Code to sell the equity of redemption privately.

In the case of such a sale the junior brother is entitled, on payment of half the purchase-money, to recover his share from the purchaser. **M** RAMAYYA AYYAR *v.* KRISHNA CHARIAR, 26 M. L. T. 151; 10 L. W. 291; (1919) M. W. N. 611 **956**

——— O. XXI, r. 83 (2) – *Pre-emption—Private sale by judgment-debtor with leave of executing Court, whether liable to pre-emption—Pre-emptor bidding at auction—Waiver.*

A sale of property executed by the judgment-debtor in virtue of a certificate granted to him by the executing Court under Order XXI, rule 83 (2), Civil Procedure Code, is a private sale, and, even though it does not become absolute until confirmed by the Court, it cannot be said to be a sale by a Court in execution of the decree and thus not liable to pre-emption.

Failure of a person entitled to pre-empt to outbid the purchaser at an auction sale does not amount to waiver. **L** AHMAD JAN *v.* KISHEN CHAND **337**

——— O. XXI, r. 89 – *Execution of decree—Sale—Judgment-debtor, agreement by, to sell property to third person if sale is not confirmed – Application to set aside auction sale, whether can be made by private purchaser.*

Where the property of a judgment-debtor is sold in execution of a decree, but before the sale is confirmed, the judgment-debtor arranges to sell it to a third party for a stipulated sum in the event of the sale not being confirmed, the judgment-debtor, in depositing the money in Court, should himself apply, as the owner of the property, for the auction sale to be set aside. An application by a person as purchaser subsequent to the auction sale, being in contravention of rule 89 of Order XXI of the Civil Procedure Code, cannot be entertained. **A** MAHABIR PRASAD PANDE *v.* GANGA DEHAL RAI, 17 A. L. J. 878 **331**

——— O. XXI, r. 89 – *Execution of decree—Sale—Application to set aside sale—Deposit made but not received by Court within thirty days—Sale, whether should be set aside.*

Civil Procedure Code – 1908 – contd.

The property of a judgment-debtor was sold by auction on 20th March. On 20th April he applied to the sale officer to set aside the sale and offered to deposit the decretal amount and the penalty mentioned in rule 89 of Order XXI of the Civil Procedure Code. The sale officer, not being competent to entertain the application, forwarded it on 22nd April to the Court which had ordered the sale. On 23rd April the judgment-debtor applied to the Court asking that the money might be received. The Court did not receive the money and ordered the matter to come before it on 30th April. The money was deposited on 1st May, but the Court refused to set aside the sale on the ground that the deposit had not been made within thirty days of the sale. This order was reversed by the Appellate Court and the High Court was moved in revision, it being contended that the Appellate Court had no jurisdiction to make the order it did as no deposit had been made within thirty days:

Held, that the actual delay in the deposit of the money was not due to any act on the part of the judgment-debtor, and that, although the deposit was actually made on 1st May, he had brought the money into Court on 20th April, and that the Appellate Court was, therefore, justified in setting aside the sale. **A** GAJADHAR DAS *v.* RAM SUMIRAN DUBE, 17 A. L. J. 991 **161**

——— O. XXI, r. 89, 90 – *Civil Procedure Code (Act XIV of 1882), ss. 310A, 311—Bengal Tenancy Act (VIII of 1885), s. 170—Execution of decree—Sale of taluq—Tenure-holder, whether entitled to apply to set aside sale.*

Petitioner, who held a permanent under-tenure in a *taluq* which was sold in execution of a decree for arrears of rent under the provisions of the Eastern Bengal and Assam Tenancy Act, applied under Order XXI, rule 89, of the Civil Procedure Code to have the sale set aside:

Held, (1) that section 170 of the Bengal Tenancy Act did not exclude from the operation of section 310A of the Civil Procedure Code of 1882, corresponding to Order XXI, rule 89, of the Civil Procedure Code of 1908, a tenure or holding attached in execution of a rent-decree and that, therefore, Order XXI, rule 89, Civil Procedure Code, was applicable to a sale held for arrears of rent in Eastern Bengal and Assam;

(2) that the petitioner, holding an under tenure in the *taluq* sold, had such interest therein as would entitle him to apply under Order XXI, rule 89, of the Civil Procedure Code to set aside the sale of the *taluq* in execution of a rent-decree.

The scope of Order XXI, rule 89, of the Civil Procedure Code, 1908, is not narrower than that of section 310A of Act XIV of 1882. **C** SARAT CHANDRA DAS *v.* MATI LAL CHUCKERBUTTY, 23 C. W. N. 597 **237**

——— O. XXI, r. 90 – *Execution of decree—Sale—Misstatement of approximate value in sale proclamation—Irregularity—Sale, whether can be set aside.*

A misstatement of the approximate value of the property in a sale proclamation constitutes material irregularity within the meaning of Order XXI, rule 90, of the Civil Procedure Code.

Where on enquiry made by the lower Court it was ascertained that the value of the property

Civil Procedure Code—1908—contd

sought to be sold in execution of a decree was Rs. 11,200 but in the sale proclamation the value was stated to be Rs. 6,000 and the property was sold for Rs 6,300:

Held, that the sale should be set aside, inasmuch as the decree-holder knowingly made a misstatement of the value in the sale proclamation which amounted to material irregularity, and thereby caused substantial injury to the judgment-debtor. **C** CARESH NATH GHOSE *v.* HARI CHARAN SHAHA **23**

——— O. XXI, rr. 91, 92, 93 *Execution of decree—Sale—Judgment-debtor having no saleable interest in property sold—Suit by auction-purchaser to recover purchase-money, whether maintainable.*

At a Court-auction there is no warranty, express or implied, that the judgment-debtor has a saleable interest.

Where it is found that the judgment-debtor had no saleable interest in the property sold in execution of a decree against him, the auction-purchaser has, in the absence of fraud or misrepresentation, no right of action against the decree-holder, either under the Civil Procedure Code or apart from it, to recover the purchase-money paid by him **L B** SOOLAYMAN CASSIM SINGI *v.* S. S. A. O. CHETTY FIRM **174**

——— O. XXI, r. 93—*Execution of decree—Sale—Warrant of title Purchase-money, whether can be recovered on eviction by third person—Consideration, which afterwards fails, maintainability of.*

There is no implied warranty of title in an auction-sale under the Civil Procedure Code, either by the decree-holder or by the Court and, therefore, no action lies against the decree-holder for a return of purchase-money paid at a Court auction in execution of a money decree, when the purchaser is evicted by a third party who successfully establishes his title to the property in a regular suit.

Where the right, title and interest of the judgment-debtor is sold and the conveyance effectually passes it, there can be no failure of consideration, for the consideration was the right, title and interest, which *ex hypothesi* passed, though it was valueless. The same argument applies when property is sold as property believed to belong to the judgment-debtor, where the sale, as in a Court auction, is by implication one with all risks and all defects. **N** DEWAJI *v.* AMRITA, 15 N. L. R. 140 **818**

——— O. XXII, r. 3—*Appeal Death of sole appellant—Failure to bring legal representatives on record, effect of—Abatement of appeal—Hindu Law—Succession—Sister, whether heir.*

Where a sole appellant dies and no application is made to bring his legal representatives on to the record, the appeal abates. The fact that in a cross-appeal the deceased's legal representatives have been brought on to the record as respondents will not suffice to prevent his appeal from abating

Under the Mitakshara School of Hindu Law a sister is not an heir at all to her brother, and, consequently, cannot be brought on to the record as the heir and legal representative of her deceased brother to continue a suit or appeal. **P** SHAMBHU NATH *v.* RALLI, 25 P. W. R. 1913 **591**

——— O. XXII, r. 4—*Partition, suit for—Preliminary decree—Death of defendant Application by plaintiff to bring legal representatives on record and for division and allotment of property, nature of—Application granted.*

Civil Procedure Code—1903—contd.

After a preliminary decree for partition was passed by the District Court at Cuddapah the 1st defendant died. The plaintiff filed an application for bringing his representatives on to the record, for the appointment of a Commissioner to divide the properties into six shares, and for delivery of one such share to herself. The District Judge brought defendants Nos. 8 to 10 on to the record as 1st defendant's legal representatives, but treated the other prayers as prayers in execution and transferred the execution to the District Court at North Arcot:

Held, (1) that as the Cuddapah District Court had jurisdiction under the law to continue the further trial of the suit, which must be considered as pending in that Court till a final decree was passed, the order of transfer to the District Court of North Arcot was illegal;

(2) that the plaintiff's application was in substance not an application for execution, but an application in the suit to pass a final decree. **M** ALUR LAXSHMI NARASIMHA SASTRULU *v.* VENKATA NARASAMMA **614**

——— O. XXII, r. 9—*Evidence Act (I of 1872), s. 115—Death of plaintiff—Legal representative, application for substitution by, dismissal of—Suit by legal representative—Objection by defendant—Estoppel—Limitation Act (IX of 1908), s. 14—Time spent in prosecuting wrong remedy, exclusion of.*

The mother of a last male owner brought a suit to obtain a declaration that an adoption made to the latter was invalid. During the pendency of the suit the plaintiff died, and the present plaintiffs sought to continue the suit, but the defendants contended that they were not entitled to do so and the Court, allowing the contention, dismissed the suit. The plaintiffs thereupon brought the present suit. The defendant, who was a defendant in the previous suit, contended that the suit was barred under Order XXII, rule 9 of the Civil Procedure Code, by reason of the decree dismissing the previous suit and that it was also barred by time:

Held, (1) that it was not open to the defendant to contend that the previous decision was erroneous, and that the plaintiff's proper remedy was to continue the suit first filed;

(2) that the plaintiffs were entitled, under section 14 of the Limitation Act, to claim a deduction of the interval between the date of their applying to continue the previous suit and the date of the Court's order dismissing that suit. **M** ARUNACHALAM PILLAI *v.* VELLAYA PILLAI, 9 L. W. 345; 25 M. L. T. 369 **465**

——— O. XXIII, r. 1 (1), *construction of—Withdrawal of suit—Co-plaintiff, whether can withdraw*

Per *Ferard, S. M.*—Rule 1 (1) of Order XXIII of the Civil Procedure Code should be construed according to its strict wording. One of several co-plaintiffs, when they have embarked upon a joint suit, cannot withdraw from the suit without the consent of the others.

Per *Hopkins, J. M.*—The meaning of rule 1 (1) of Order XXIII, Civil Procedure Code, is not clear, but the idea underlying it is that no person can be forced to prosecute legal proceedings against his will,

or prevented from withdrawing from them: but, once a person has withdrawn from a suit, he ought not to be allowed to renew it without good cause shown for the withdrawal. **U P B R** KALI CHARAN RAI *v.* SHEIKH SAKHAWAT, 1 U. P. L. R. (B. R.) 14 **183**

——— O. XXIII, r. 1—Withdrawal of suit as against one defendant, effect of. *See* CONTRACT ACT, s. 134 **870**

——— O. XXIII, r. 2 **20**

——— O. XXVI, r. 9—*Local investigation—Court, power of, to make local inspection—Duty of Court—Appeal, second—Appellate Court, judgment of, based on result of local inspection made by trial Court, legality of.*

Order XXVI, rule 9, of the Civil Procedure Code gives no power to a Court to itself hold a local inspection. A Judge can only hold such inspection for the purpose of understanding the evidence and for no other purpose. He must decide the case on the evidence adduced before him, and, if he finds that complete justice cannot be done without a local investigation, he has power, under the rule above quoted, to appoint a commission for this purpose; the fact that the plaintiff has not applied for this to be done, does not relieve the Judge of the duty imposed upon him of having before him all the material available which is necessary for the determination of the point at issue between the parties.

The judgment of a lower Appellate Court, based entirely upon a local investigation conducted by the Judge of the Court of first instance himself, cannot be sustained in second appeal. **Pat** DAWARKA PRASAD *v.* MAKHU LAL **41**

——— O. XXXII, r. 3—*Guardian* ad litem, *appointment of—Provisions, whether applicable to partition proceedings*

The provisions of the Civil Procedure Code regarding the appointment of a guardian *ad litem* for a minor defendant do not apply to partition proceedings under the U. P. Land Revenue Act **O** PATESHWAR *v.* AJODHIA, 1 U. P. L. R. (J. C.) 9 **123**

——— O. XXXII, r. 4—*Guardian* ad litem—*Adverse interest, what is—Suit attacking mortgage—Father mortgagor, interest of, whether adverse to minor son.*

Where the guardian *ad litem* of minor defendants is their father and is also the mortgagor of the suit property, it does not necessarily follow that his interests are adverse to the minors who with him form a joint family of which he is the managing member. **A** GANESHI SINGH *v.* SHYAM SINGH **636**

——— O. XXXII, r. 7, Sch. II, para. 1, *scope of—Minor—Reference to arbitration by next friend of minor plaintiff—Ratification by conduct—Plaintiff, whether can challenge reference*

An application of the guardian or next friend of a minor under Schedule II, paragraph , of the Civil Procedure Code comes within the purview of Order XXXII, rule 7, of the Code and, unless the leave of the Court is expressly obtained and recorded, the application will have the same effect and be open to the same objections as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court expressly recorded in the proceedings.

One *H.* carried on business in partnership with one *N*. *H.* having died, his sons, *A*, *B* and *C*, sued *N.* for dissolution of the partnership and settlement of accounts. During the pendency of the suit *C* died and the present plaintiff's name was substituted as a co-plaintiff with *B*, his uncle, as the next friend. Subsequently the parties agreed to refer the dispute to arbitration and applied to the Court for an order of reference, which was granted. The arbitrator gave his award, but the plaintiff being dissatisfied with it filed objections. Eventually a decree was passed in accordance with the award. Plaintiff then brought the present suit for a declaration that the decree was null and void and ineffectual against him. It appeared that the plaintiff had been well represented in the earlier suit and had by his conduct accepted the situation and did not impugn the reference to arbitration, but was contented to contest the award on the ground of the misconduct of the arbitrator:

Held, that as the plaintiff's next friend did not obtain an express sanction of the Court before referring the case to arbitration, the plaintiff's claim was maintainable, but that as he had expressly ratified and affirmed the reference, he was debarred from contesting it. **L** MUHAMMAD IBRAHIM *v.* ALLAH BAKHSH **327**

——— O. XXXIII, rr. 4, 5, 6, 7—*Application for leave to sue* in forma pauperis—*Inquiry, scope of—Evidence, admissibility of, on merits—Examination of applicant—Jurisdiction—Irregularity—Revision.*

Where, upon an application to sue *in forma pauperis*, the Court holds an inquiry under the provisions of Order XXXIII of the Civil Procedure Code, it is empowered to examine the applicant not only with reference to the question of his pauperism, but also with reference to the merits of his claim, and to consider the statements made in the plaint and by the applicant in his examination in determining whether his allegations do not show a cause of action as laid down in clause (*d*) of rule 5 of that Order. But the Court cannot examine other witnesses for deciding the question of limitation or any question other than the pauperism of the applicant.

Where, therefore, a Court decided the question of limitation, not upon the allegations made in the plaint, nor upon the statements made by the applicant in his examination, but upon conclusions based upon an examination of the witnesses who were summoned for the purpose of proving the pauperism of the applicant, the High Court set aside the order as being made without jurisdiction **C** JOGENDRA NARAYAN RAY *v.* DURGA CHARAN GUHA, 46 C. 651 **610**

——— O. XXXVIII, r. 5 *Attachment before judgment—Security furnished—Property not returned to surety—Surety, whether liable for decree.*

Where property attached before judgment is released on security being furnished but the surety is not placed in possession of the property, he cannot be proceeded against in the event of a decree being passed against the defendant. **L B** RANGLAL *v.* S. T. M. CHETTY, 12 BUR. L. T. 89 **930**

Civil Procedure Code—1908—contd.

——— O. XXXIX, r. 7—*Inventory, order directing preparation of, when can be made.*

An order made under Order XXXIX, rule 7, of the Civil Procedure Code directing upon an application the preparation of an inventory of the property which is the subject-matter of a suit, should be made only where such inventory is essential for a proper decision of the case, and not otherwise. **C** MAHAMED RASEK *v.* TAHIDUNNESSA **33**

——— O. XXXIX, r. 7 (1) (a)—*Suit to redeem pledge—Order on pledgee to produce articles pledged, whether can be made after he has parted with articles.*

Certain articles of jewellery were pledged by the plaintiff with the defendant. In a suit to redeem the articles the defendant pleaded that, in consequence of a settlement between the parties, the plaintiff had abandoned his right to redeem and the articles in question belonged to the defendant, and that the latter had been dealing with them as his property having sold some, broken up others and raised money on some of them. On the application of the plaintiff the trial Court made an order requiring the defendant to produce in Court the articles in suit within one month. The defendant moved the High Court in revision, urging that the trial Judge had no jurisdiction to make the order in question, inasmuch as the articles were not in the custody or possession of the defendant at the time the application was made:

Held, that, although the articles were not in the custody or possession of the defendant, he nevertheless was in a position to redeem them and produce them in Court, and that consequently the trial Court had jurisdiction to make the order for their production under Order XXXIX, rule 7 (*i*) (*a*), of the Civil Procedure Code. **C** JITENDRA NATH CHATTERJEE *v.* ASOKE NATH MITTER, 30 C. L. J. 64 **4**

——— O. XLI, r. 19 *Appeal, dismissal of, for default—Application for restoration, whether can be summarily dismissed—Procedure.*

An application under Order XLI, rule 19, Civil Procedure Code, praying for the restoration of an appeal dismissed in default, ought not to be rejected summarily without affording the applicant an opportunity of establishing the allegations made in his application, and without considering whether there was good cause for his absence on the date fixed. **P** RAM SARAN DAS *v.* NATHWA, 38 P. W. R. 1919 **926**

——— O. XLI, rr. 23, 25—*Appeal—Remand, order of, under rr. 23, 25, whether competent—Failure to appeal against order of remand, effect of—Appeal, second—Question of law, whether can be raised for first time—Question of fact, whether can be raised.*

The landlord of a holding sued the recorded tenants thereof for rent and obtained an *ex parte* decree in execution of which he brought the holding to sale, the purchaser being defendant No. 1 in whose favour the sale was confirmed. The plaintiffs instituted the present suit to set aside the sale, claiming to be private purchasers of a portion of the holding and alleging that defendant No. 2 was a private purchaser of the remainder. The trial Court decided all the material issues in favour of the plaintiff but dismissed the suit on the ground that it was not maintainable because the plaintiff had not applied under Order XXI, rule 90, of the Code of Civil Procedure to set aside the sale. The plaintiff appealed and the lower Appellate Court, disagreeing on the point of maintainability, set aside the whole decree and remanded the suit for trial, adding two new issues. The trial Court found that defendant No. 1 was *benamidar* for defendant No. 2 and decreed the suit, which decree was upheld on appeal. The defendant No. 1 appealed to the High Court and contended that the suit was not maintainable under Order XXI, rule 92 of the Code, and that the order of remand was not an order under Order XLI, rule 23, because the suit was not disposed of on a preliminary point, the trial Court having determined and recorded findings upon all the issues in the suit:

Held, that as the sole reason for dismissing the suit was that it was not maintainable, the suit was disposed of on a preliminary point and the fact that the Court decided the other issues in the suit made no difference, and that the defendant not having appealed from the order remanding the case, that order was now final.

It was also contended that the suit was barred by limitation under Article 2 of the first Schedule to the Limitation Act, there being an admission in the plaint that the plaintiff came to know of the sale more than a year before instituting the suit:

Held, that as this plea was not taken in either of the Courts below and as the determination of the point required a finding of fact after taking additional evidence, it could not be entertained in second appeal.

It was urged on behalf of the respondent that the sale was a nullity, inasmuch as after the decree one of the two judgment-debtors had died, and the sale was held without the issue of any process to his heirs:

Held, that as the point was not taken at any stage of the suit and no opportunity had been given of showing that the surviving judgment-debtor was entitled to represent the heirs of the deceased, it was impossible, upon the facts as found, to say that the sale was a nullity. **Pat** BHADAI SAHU *v.* MANOWAR ALI **125**

——— O. XLIII, r. 1 (*w*), O. XLVII, rr. 1, 4, 7—*Appeal from order granting application for review, when lies—"Sufficient cause" within meaning of O. XLVII, r. 1, what is—Review.*

Order XLIII, rule 1 (*w*), of the Civil Procedure Code permits an appeal from an order granting an application for review only on the grounds mentioned in Order XLVII, rule 7, of the Code, and on no other.

The omission of the Court and the Pleaders to notice certain provisions of the Code which might govern a case would be a "sufficient reason" within the meaning of Order XLVII, rule 1, of the Code for granting a review. **C** WAHED ALI *v.* CHANDA MIA, 30 C. L. J. 20 **29**

——— O. XLV, r. 13 (d)—*Appeal to His Majesty in Council—Proceedings stayed by High Court—Direction by Privy Council to proceed—Receiver, appointment of—High Court, power of.*

Owing to a default in complying with certain orders of the High Court, proceedings taken upon permission granted to appeal to His Majesty in Council were stayed. Thereupon the appellant obtained an order from the Privy Council directing

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that the appeal should proceed, and, while the necessary papers were under preparation, the High Court appointed a Receiver of the property in suit. On the application of the appellant it was objected that the High Court had no jurisdiction to make such appointment as special leave had been obtained from the Privy Council for the appeal to proceed:

Held, that the High Court had jurisdiction under Order XLV, rule 3 (*d*), of the Civil Procedure Code to appoint a Receiver. **Pat** WAZIR NARAIN SINGH v. JAGADAMBA KUERI, 4 P. L. J. 482 **407**

——— **O. XLVII, r. 1** **29**

——— **O. XLVII, r. 1, Sch. II, para. 12**—*Arbitration—Award, decree based on—Review whether competent—Jurisdiction of Court.*

An application for review of a decree based upon an arbitration award, on the ground of an evident mistake in the award, is maintainable, and a Court has jurisdiction, under Order XLVII, rule 1 of the Civil Procedure Code, to go into the merits of the application. **C** JOGESH CHANDRA DEB v. JAGAT CHANDRA DEB **696**

——— **O. XLVII, r. 1**—*Review, application for—Appeal, filing of, pending review, whether affects review.*

Where, during the pendency of an application for review, the applicant files an appeal against the order of which he is seeking a review, the fact that such appeal is pending is no bar to the disposal of the application for review. **A** PARTAP SINGH v JASWANT SINGH, 17 A. L. J. 1021 **642**

——— **Sch. II, para. 8**—*Arbitration—Award not filed within time, effect of—Extension of time, power of.*

The parties to a suit agreed to refer the dispute to arbitration. After the arbitration, but before the award, the Junior Subordinate Judge, in whose Court the case was pending, took leave for 2 months on the 25th April 1916. No one was appointed in his place and on the 2nd May 1916, the Senior Subordinate Judge ordered that the case should be kept in his Court The award not having been filed within the time originally fixed, several extensions were granted. On the 10th October the case was re-transferred by the Senior Subordinate Judge to the Junior Subordinate Judge on his return from leave, and on the same date at the request of the parties further time was allowed. Time was again extended several times and eventually the award was filed on 9th January 1917, and a decree was passed in accordance with the award. The defendants applied for revision:

Held, (1) that the order of the Senior Subordinate Judge re-transferring the case to the Junior Subordinate Judge was *ultra vires*;

(2) but that the parties, having acquiesced in the jurisdiction of the Junior Subordinate Judge, after the case was re-transferred to him, could not subsequently object to it;

(3) that when once the Court became seised of the case, it had full power to extend the time for filing the award, even though the time originally fixed had previously expired;

(4) that, consequently, the award was a valid one and the Court was right in passing a decree in accordance therewith. **L** KISHEN LAL v. JAI LAL **352**

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——— **Sch. II, paras. 20, 21**—*Arbitration, reference to—Time within which award must be made—Delay, effect of—Party, right of, to call upon arbitrators to make award or renounce appointment.*

The period of time within which arbitrators should issue their award depends upon the facts of each particular case, and it is always open to either party to call upon the arbitrators either to give their award or to renounce their appointment.

Where an unreasonable amount of delay occurs, and the issue of the award, after a long period of inactivity, synchronises with a dispute between one of the arbitrators and the attorney of one of the parties, the award must be regarded with great suspicion. **P** MUHAMMAD RAMZAN KHAN v. SARDAR BEGAM, 71 P. R. 1919 **847**

Companies Act (VII of 1913), s. 104—*Return of allotment of shares, failure to furnish—Ignorance of provision of law, whether excuse.*

Under section 104 (1) (*a*) of the Companies Act, the Directors and Manager of a Company are bound to furnish to the Registrar the return of allotment of shares: and their failure to do so renders them liable to the penalties provided by sub-section (3) of that section A plea of ignorance of the provisions of the law in this respect cannot be accepted as an excuse for failing to comply therewith. Where, however, the default is not intentional, but is due to negligence alone, the full or a heavy penalty ought not to be exacted. **P** EMPEROR v. NATHU RAM, 25 P. R. 1919 CR.; 20 CR L. J. 725 **885**

Compensation is so due. *See* TRANSFER OF PROPERTY ACT, s. 76 **834**

Complaint. *See* CRIMINAL PROCEDURE CODE, s. 4 (1) (*h*) **595**

Complainant, death of—Abatement of proceedings *See* CRIMINAL TRIAL **797**

Compromise between landlord and third party, whether binding on tenant. *See* ESTOPPEL **739**

——— changing rate of rent, whether registration necessary. *See* REGISTRATION ACT, s. 17 **20**

———, fraudulent, whether Court bound to recognise. *See* CIVIL PROCEDURE CODE, 1908, s. 99 **105**

——— *Good faith, want of—Advantage secured by one party—Trust—Transferee in good faith, position of—Trusts Act (II of 1882), ss. 89, 96.*

Where a compromise is entered into as between persons, one of whom could not have in good faith believed in the claim put forward by him and the latter secures an undue advantage to the prejudice of the other party, such advantage must be deemed to be held in trust for the benefit of the person prejudiced or his representative and should be restored to the latter

An alienee in good faith and for consideration from the party who has secured such advantage is not, however, affected by the infirmities affecting his alienor's title. **M** OVULA KONDAMA NAICKEN AIYEN AVERGAL v. APARANJI AMMA **1003**

Confession, *uncorroborated, value of—Conviction based on uncorroborated confession, legality of.*

A conviction based upon an uncorroborated confession is not bad, if the surrounding circumstances point to the confession having been the outcome of a voluntary act on the part of the confessor, and in the absence of any evidence of coercion either by the Police or any other person. The fact that the confession was retracted before the Committing Magistrate would not deprive it of its voluntary character. **Pat** SHEO PRASAD KOERI *v.* EMPEROR, 20 CR. L. J. 562 **50**

——— *, value of—Corroboration, whether necessary—Court, duty of.*

The law does not require that the confession of an accused person should be corroborated before it can be acted upon. It is for the Court to decide whether it believes a confession or not. **A** EMPEROR *v.* DHANI, 20 CR. L J. 721 **881**

Contempt of Court, describing proceeding as contrary to law, whether amounts to. *See* GOVERNMENT OF INDIA ACT, s. 107 **279**

Contract Act IX of 1872, s. 11—*Minor, mortgage in favour of—Suit on mortgage by minor, whether maintainable.*

There is nothing in law to prevent a minor, in whose favour a mortgage has been executed, from suing to recover the money, principal and interest, advanced by him on the mortgage. **Pat** MADHAB KOERI *v.* BAIKUNTHA KARMAKER, (1919) PAT. 343 **338**

——— **ss. 16, 19A**—Contract induced by undue influence, breach of. *See* WORKMAN'S BREACH OF CONTRACT ACT **593**

——— **s. 16,** undue influence. *See* MORTGAGE—REDEMPTION **542**

——— **ss. 16, 74**—*Undue influence, what is—Mortgage-bond—Interest, higher rate of, payable on default, whether penalty.*

A mortgage-bond provided that interest should be paid at 3 per cent. per month, and that the mortgage-money should be repaid on a specified date, and that in case of default in such payment interest would run at the rate of 6 per cent. per month. The mortgagee sued to recover the money by sale of the mortgaged property. The trial Court held that the stipulations as to interest were in the nature of a penalty and decreed the suit, allowing interest at 12 per cent. per annum On appeal the lower Appellate Court held that the stipulation to pay higher interest in default alone was in the nature of a penalty, but it found that there had been undue influence and, in consideration of this, dismissed the appeal. The plaintiff appealed to the High Court, contending that the decision as to undue influence was wrong as no issue was framed as to this, and maintaining that the stipulation to pay interest at 6 per cent. per month was not in the nature of a penalty:

Held, (1) that, in order to establish undue influence, it must appear that there was something unconscionable either in the original dealing or in the subsequent stages of the transaction, and as nothing unconscionable had been made to appear in this case and there was no plea as to undue influence, the stipulated rate of interest could not be disallowed on the ground of undue influence;

(2) that the stipulation to pay interest at the rate of 6 per cent. per month on default was in the nature

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of a penalty. **Pat** HANUMAN BUX *v.* LAL NILMONI NATH SAHI DEO **335**

——— **s. 23**—*Public policy*—Benami *purchase by Police Officer while in service, validity of.*

The *benami* purchase of a village by a Police Officer while in the service, though effected in contravention of the rules of the service, both under the Police Manual and the Government Servants' Conduct Rules, by which the purchaser is bound, is not void as being opposed to public policy under section 23 of the Contract Act, nor is it illegal inasmuch as such purchase is not prohibited by any Statute which imposes a penalty for doing or omitting to do an act for the protection of the public. The Government Servants' Conduct Rules are not statutory rules in this sense that they do not provide a penalty for a breach of them. **N** BALKISSEN *v.* DEBI SINGH **153**

——— **s. 23**—*Public policy—Speculative dealing in gold currency, whether opposed to public policy.*

Plaintiff was employed as a commission agent by the defendant for the purchase and sale of sovereigns. He entered into several contracts on behalf of the defendant for this purpose, and the defendant became liable to him for a specific sum. The defendant paid a portion of this and refused to pay the balance, whereupon the plaintiff brought the present suit to recover that balance. The defendant contended, *inter alia*, that the transactions were against law and public policy and that the plaintiff was not entitled to sue in respect thereof. The trial Court dismissed the suit, on the ground that the contracts were opposed to public policy as tending to defeat the whole scheme of the Government finance. The plaintiff appealed, and the main contention for the defence was that the contracts were contrary to public policy:

Held, that the contracts did not offend against any clear general head of public policy to warrant the conclusion that, on that ground, they were unlawful; and that the plaintiff was entitled to a decree for the amount claimed by him. **B** SHRINIVASDAS *v.* RAMCHANDRA, 21 BOM. L. R. 788 **546**

——— **s. 30**—*Wagering contract*—"Kuri," *whether wagering contract—Suit to recover money paid towards "kuri," whether maintainble.*

Though a "*kuri*" as ordinarily conducted in Malabar is not a lottery, yet if some subscribes obtain as prizes amounts which are in excess of the amounts subscribed by them, it comes within the definition of lottery and a suit to recover money paid for such lottery is not enforceable. **M** SANKUNNI *v.* IKKORA KUTTI, 10 L. W. 155; 37 M. L J. 209; (1919) M. W. N. 570 **989**

——— **s. 55**—*Contract for re-sale of property conveyed—Time, whether of essence of contract.*

The doctrine that time may not be of the essence of a contract, which arises on the construction of contracts of sale, should not be applied to contracts for the re-sale of property conveyed. The right to re-purchase, being an option, must be exercised according to the strict terms of the power. **M** SAMARAPURI CHETTIAR *v.* SUTHARSANA CHETTIAR, 37 M. L. J. 109; (1919) M. W. N. 598; 10 L. W. 371; 26 M. L. T. 269, 42 M. 802 **590**

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——— **s. 60**—*Creditor and debtor—Appropriation of payments—Collection of debt due to debtor—Prejudice to third parties, effect of.*

A creditor's right of appropriation of payments on behalf of the debtor towards any particular debt due to him is preserved until the moment of his filing his plaint in Court In appropriating a particular debt the creditor is not bound to look to the likely or probable prejudice which might be caused to third parties having claims against the debtor, but can put himself in an advantageous position so long as it is not unconscionable or inequitable on his part to do so. **M** MANAMATHI MUNUSAWMI MUDALI v. PERUMUL MUDALY, 10 L. W. 329; 37 M. L. J. 367 **950**

——— **s. 65**—*Contract becoming void by reason of unforeseen contingency—Money paid, whether can be recovered.*

Where a contract expressly omits to provide for a contingency which is not contemplated, and which is already provided for by the law, and that contingency occurs, whereby the contract becomes void, the contract is not opposed to public policy, and under section 65 of the Contract Act, the person who has received an advantage under the contract is bound to restore it to the person from whom he received it. **A** MAHABIR PRASAD PANDE v GANGA DEHAL RAI, 17 A. L. J. 578 **331**

——— **ss. 126, 140, 141**—*Principal and surety—Oral contract, validity of—Surety paying off whole debt, position and remedies of—Right to avail of remedies of creditor—Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage, payable on demand—Limitation, commencement of—Transferee, position of.*

Section 126 of the Contract Act makes no difference between an oral and a written guarantee, the former being as equally binding as the latter.

Where a surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off and is entitled to the benefit of every security which the creditor had against the debtor at the time when the surety was entered into.

Where a mortgage is payable on demand, time begins to run from the date of its execution, and in order to succeed in a suit to enforce the mortgage the suit must be brought within twelve years of its execution, otherwise it will be barred by time This rule applies equally to a transferee of mortgage rights, who in this respect can be put in no better position than the mortgagee. **A** BARKATUNNISSA BEGAM v. MAHBOOB ALI MIAN **684**

——— **s. 134** *Principal and surety—Suit against surety without impleading principal, maintainability of—Civil Procedure Code (Act V of 1908), O XXIII, r. 1—Withdrawal of suit as against one defendant, effect of.*

A suit against a surety is maintainable, although no suit is instituted against the principal

Where a plaintiff withdraws a suit against one of two defendants, and elects to proceed against the other, such withdrawal is not the withdrawal contemplated by Order XXIII, rule 1, Civil Procedure Code. **S** BHAROOMAL v. MAZOR, 13 S. L. R. 92 **870**

——— **151** *Carriage by sea—Carrier, liability of, extent of—Negligence, liability for, whether can be contracted out of.*

A carrier by sea cannot, under the Indian law, contract out of liability for the negligence of himself or of his servants. Section 151 of the Contract Act lays down an irreducible minimum of liability for common carriers as well as for other bailees. **L B** ALLIBHAI MAHOMED v BRITISH INDIA STEAM NAVIGATION CO., LTD. **296**

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——— **s. 230**—*Principal and agent—Agent, whether liable under contract made on behalf of principal—Agency, proof of—Contract, liability under—Stranger, whether liable.*

No one is liable on a contract except a party thereto.

An agent cannot personally enforce a contract entered into by him on behalf of his principal, nor is he personally bound by such contract.

A finding by a Court to the effect that it is "satisfied that the defendant took the articles, a list of which was prepared at the time, on hire ..... He entered into the contract and disclosed the purpose for which he took, and the person to whom he sent, the articles" is not a finding that he acted as agent in the transaction. **Pat** HAMID HASAN v. SHAHZAD KHAN **177**

——— **ss. 253, 254, 262**—*Partnership—Assets due to partnership—Suit by partner for his share in one item of partnership assets, maintainability of—Accounts, relief by way of, nature of—Suit, frame of Nattukottai Chetties, custom among—Deposits on thavanai, suit for—Limitation Act (IX of 1908), ss. 6, 7, Sch I, Arts. 57, 60, 115—Evidence Act (I of 1872), s. 32 (5)—Statement by father as to son's age at preparation of horoscope, admissibility of.*

No partner has a right, at least in the absence of a special agreement, to take any portion of the partnership property and to say that it is his exclusively either during the existence of the partnership or after it has become dissolved The share of a partner to which he is entitled is his proportion of the partnership assets that have been realised and converted into money after all the partnership debts and liabilities have been paid and discharged.

A partner cannot be allowed to take one item of the firm's accounts, divide it into equal shares according to the number of partnership shares, and ask to be given one share, without first having an account taken of the partnership liabilities and deducting the sum total of them from the aggregate assets of the firm.

In the absence of evidence to the contrary, deposite made with Nattukottai Chetties on *thavanai* are deposits payable on demand and come within the definition of deposits under Article 60 of Schedule I to the Limitation Act If there is evidence, however, that the money is payable without demand, Article 57 or Article 115 would be applicable, according as it is payable at any time after it was lent or after a fixed period.

A partner is competent to give a valid discharge of a debt due to the partnership even after its dissolution.

The evidence of a person who prepared a child's horoscope, as to the statement made to him by the child's father about the date of the child's birth, is admissible in evidence under section 32 (5) of the Evidence Act, as it is the date of the commencement of a relationship. **M** ANNAMALAI CHETTI v. ANNAMALI CHETTI, 10 L. W. 67 **456**

Contribution, suit for—Joint mortgage paid off by plaintiff—Limitation, commencement of **243**

———, suit for—Limitation, commencement of *See* LIMITATION ACT, SCH I, ART. 61 **243**

Co-owners —*Settlement of portion of joint land made by one co-owner—Co-owner, right of other, to declaration that settlement would not affect his share—Joint possession with tenant, whether can be decreed.*

The plaintiff claimed an undivided 10-annas 8-pies share in a *taluq* by virtue of a redemption-decree. The defendant No 2 claimed to hold 3 *drones* of land in the *taluq* under a settlement made by the owner of the remaining 5-annas 4-pies share of the *taluq* :

Held, (1) that the plaintiff was entitled to a declaration that the settlement in favour of defendant No. 2 was invalid and inoperative as regarded the 10-annas 8-pies share to which the plaintiff was entitled;

(2) that, in the absence of any finding as to who was in possession of the remaining lands in the *taluq*, the plaintiff could not get joint possession with the defendant No. 2 of the three *drones* of land of which the latter was in possession by virtue of the settlement. **C** KUMODINI ROY *v.* ABDUL GANI **171**

Co-sharers, lease by some of several—Tenancy, whether constituted. *See* AGRA TENANCY ACT, 1901, s 194 **146**

——— One co-sharer dealing with joint property—Rights of other co-sharers. *See* JOINT PROPERTY **543**

——— *Partition, suit for—Partible property, whether can be converted into impartible property—Agreement not to apply for partition, effect of—Co-sharer in possession applying for partition—Revenue Court, order by, refusing partition—Declaration, suit for—Limitation—U. P. Land Revenue Act (III of 190), s. 111—Limitation Act (IX of 1908), Sch. I, Art. 120.*

The right to bring a suit for partition unlike other suits is a continuing right incidental to the ownership of joint property; and no agreement between the owners of that property, whether acted on or not, can operate to render the property permanently incapable of partition.

A co-sharer may be in possession of his share either by receiving profits from the *lambardar* or by collecting the profits himself from specific lands which, though they continue to be joint property, he holds in his separate possession.

Where a co-sharer in possession of his share applies for partition and the Revenue Court, without making an order under section 111 (1) (*b*) of the U. P. Land Revenue Act, declines to effect the partition until the applicant establishes his right in the Civil Court, the applicant is not bound to bring his suit within any particular period of time, provided he continues in possession of his share. **O** SAKHAWAT ALI *v.* ABU SAID, 22 O. C. 100 **73**

———, *position of—Joint land—Possession, exclusive for long time, effect of—Partition, suit for.*

Where land is in the exclusive possession of one co-sharer from a long time, the other co-sharers of the village have no right to disturb his possession except by means of a suit for partition. **O** HARDEO SINGH *v.* CHANDKA BAKHSH SINGH, 6 O. L. J. 278 **7**

Costs - *Discretion of Court—Appeal, whether lies—Appeal, second, whether competent—Civil Procedure Code (Act V of 1908), s. 35 (2), applicability of—Final disposal of case on merits.*

Section 35 (2) of the Civil Procedure Code does not apply where a suit is disposed of without adjudication upon the merits.

Where there is no decision in a suit upon the merits of the case and the question to be decided by the trying Court relates only to the costs incurred in the suit, the Court, in deciding the matter as to costs, exercises a judicial discretion based upon certain principles and, as such, its order is appealable. Similarly, as the order of the Court of Appeal as to costs involves matters of principle, it is subject to second appeal. **Pat** RAGHUNATH KAHAR *v.* RAMA RATAN PANDEY **961**

Court. *See* PROVINCIAL INSOLVENCY ACT, ss. 36, 37 **519**

Court-fees—*Cross-objection, value of—Declaration in respect of mortgage sought to be set aside—*Ad valorem *fee.*

Where the object of a cross-objection is to have a declaration in respect to a mortgage set aside, the proper value of the cross-objection, for the purpose of Court-fees, is the value of the mortgage. **Pat** SATDEO NARAIN *v.* RAMAYAN TEWARI **1002**

———, *deficit, whether can be directed to be paid after disposal of suit—Order directing recovery of deficit by attachment of moveables, legality of—Jurisdiction.*

A Court, after disposing of a suit, held that the suit had been undervalued, and that on a proper valuation there was a deficiency in the amount of the Court-fees paid by the plaintiff. It accordingly directed the plaintiff to make good the deficiency and on his failure to do so, made an order, of its own motion, for realisation of the deficit by attachment of his moveable property:

Held, that the Court had no jurisdiction to make the order in question. **C** JATRA MOHAN SEN *v.* SECRETARY OF STATE, 46 C. 820 **435**

———, whether payable on proceedings under s. 47 Civil Procedure Code. *See* CIVIL PROCEDURE CODE s. 47 **802**

Court Fees Act (VII of 1870), s. 5 —*Court-fee payable on memorandum of appeal—Taxing Officer, decision by—Division Bench, whether can re-open question of valuation.*

The terms of section 5 of the Court Fees Act are imperative and the decision of the Taxing Officer under that section as to the proper fee payable upon a memorandum of appeal is final, and before the appeal is admitted, a Division Bench of the High Court has no jurisdiction to re-open the valuation of the appeal. **Pat** CHANDERBATTI KOER *v.* GOREY LAL SINGH **508**

——— **s. 12,** *applicability of—Civil Procedure Code (Act V of 1908), O VII, r. 10, O XLIII, r. 1 (a)—Valuation, decision as to, to determine jurisdiction—Plaint, return of, for presentation to proper Court—Appeal, whether lies.*

Section 12 of the Court Fees Act has no application where the valuation is made by the Court for the purpose of determining the question whether the suit is within the pecuniary limits of the Court's jurisdiction.

Where, on the basis of such valuation, a plaint is returned for presentation to the proper Court, an

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appeal lies against the order under Order XLIII, rule 1 (*a*), Civil Procedure Code. **M** CHILUKURI NARASIMHACHARYULU GARU *v.* ZAMINDAR OF BOBBILI, 10 L. W. 178; 26 M. L. T. 152; (1919) M. W. N. 599 **1001**

Court of Wards, *admission by, whether binding on minor.*

An admission by the Court of Wards, made at the time when the estate was in charge of the Court, cannot bind or prejudice the infant proprietor. **C** BANWARILAL SINGH *v.* DWARKANATH MISSIR, 29 C. L. J. 577 **825**

Criminal Procedure Code (Act V of 1898), ss. 1, 488, 489—*Malabar Law—Maintenance—Issue of* sambandam *marriage, right of, to order under s.* 488—*"Unable to maintain itself," meaning of—Change of circumstances, what is—"Special law" in s.* 1, *meaning of.*

The offspring of a Malabar *sambandam* marriage are not entitled to an order for maintenance under section 488, Criminal Procedure Code, where the *tavazhi* or *tarwad* to which their mother is attached has sufficient funds to maintain them.

Per *Napier, J.*—The words 'unable to maintain itself' in section 488 of the Criminal Procedure Code cannot be confined to the tender age of the child but must also have reference to its financial dependency.

Where the amount available from the *tavazhi* or *tarwad* funds becomes insufficient to maintain the children, that would be a change of circumstances within the meaning of section 489 of the Code.

The expression 'special law' in section , Criminal Procedure Code, has reference to statutory enactments and not to local family law. **M** PARAPPATI CHINNA *v.* SHANKUNNI MENON, 10 L. W. 229; 26 M. L. T. 238; 37 M. L. J. 361; (1919) M. W. N. 632; 20 CR. L. J. 733 **893**

——— ss. 4 (l) (h), 190 (1) (a), (b), (c), 200, 526—*'Complaint' 'Police report'—Report made by Police Officer in non-cognizable case, whether complaint or 'Police report'—Jurisdiction of Magistrate to take cognizance—Failure to examine complainant on oath, effect of—Irregularity.*

The Superintendent of Police by a letter to the Deputy Commissioner made charges of extortion against the petitioner who was a Police Officer under suspension, and this letter was placed before a Magistrate empowered under section 190, Criminal Procedure Code, who issued a warrant for the arrest of the petitioner and thereby instituted proceedings against him without examining the Superintendent on oath:

Held, that if the Police Superintendent's letter was not a 'Police report' it was a 'complaint' within the meaning of section (4) (1) *h* of the Criminal Procedure Code, and the proceedings were not liable to be quashed, whether the letter was a 'Police report' or a 'complaint.'

If a Magistrate, duly empowered, takes cognizance of an offence upon complaint, but omits to examine the complainant on oath, the omission is no more than an irregularity and it does not affect the Magistrate's jurisdiction to try the offender. **C** HARIHAR ROY *v.* EMPEROR, 23 C. W. N. 481; 29 C. L. J. 384; 20 CR. L. J. 675 **595**

Criminal Procedure Code—contd.

——— ss. 65, 190—*Magistrate directing arrest of accused, legality of—Damages, suit for—Magistrate, liability of.*

A Sub-Magistrate, acting under sections 65 and 190 of the Criminal Procedure Code in respect of a complaint under section 448 of the Penal Code, went to a temple, where the accused were in hiding, and arrested them, although he had passed no final order on the occurrence report which he had received the day previous:

Held, that, independently of the occurrence report, the Magistrate's action was justified, and he was not liable in an action for damages. **M** RAMAMURTHI AYYAR *v.* PARASARAM MANGAYACHARYULU **609**

——— s. 100, *applicability of—Order for removal of child from custody of accused if no steps are taken to move higher Court for getting rid of order, propriety of.*

On a complaint made to the effect that the adopted son of the complainant's daughter-in-law living with her was removed from her house by his natural father without her consent and was not brought back, the accused produced the boy in Court before any search warrant was issued and admitted having made a contract for giving the boy in adoption but denied any actual ceremony of adoption. Thereafter, when the complainant filed a written statement and produced the original contract, the Magistrate adjourned the case to a certain date and ordered that "if the High Court be not moved by that date he would order the boy to be made over to the complainant:"

Held, (1) that the order directing the child to be made over to the complainant but temporarily kept in abeyance, was improper and should be set aside;

(2) that in a matter like this the health or safety of the child was the paramount consideration;

(3) that it was doubtful whether section 100 of the Criminal Procedure Code applied to a case like this. **C** CHAGAN RAJ *v.* HERA LAL, 29 C. L. J. 693; 20 CR. L. J. 729 **889**

——— s. 103—*Penal Code (Act XLV of 1860), s. 332—Search, whether can be conducted without warrant—Witnesses, absence of, effect of—Search, legality of—Deterring public servant from doing duty.*

An officer of Police who is empowered to conduct an investigation, is entitled to carry out a search without a warrant, but in carrying out such search he is bound, under section 103 of the Criminal Procedure Code, to call upon two or more respectable inhabitants of the locality to attend and witness the search, and if he omits to do so, a householder would be justified in closing his door and refusing ingress into the house, and would not be guilty of an offence under section 332 of the Penal Code.

While it may be necessary to oppose a Police Officer from forcing his way into a house in order to honestly prevent an illegal search, there would be no justification for compelling him to do something illegal. **A** NIRMAL SINGH *v.* EMPEROR, 20 CR. L. J. 695; 17 A. L. J. 1047 **633**

——— s. 109—*Security for good behaviour—Arrest under suspicion—Accused residing within jurisdiction—Order directing furnishing of security, legality of.*

Criminal Procedure Code—contd.

Accused was arrested under suspicious circumstances and was placed before a Magistrate, within whose jurisdiction he resided, who disbelieved his explanation of his presence at the place where he was arrested, and, under section 109 of the Criminal Procedure Code, bound him over to be of good behaviour:

Held, that the Magistrate's action was bad in law, as it could not be said that the accused was unable to give a satisfactory account of himself within the meaning of clause *b)* of section 109 of the Code of Criminal Procedure. **A** LALTU *v.* EMPEROR, 17 A. L. J. 891; 20 CR. L J. 572 **60**

——— **ss. 110, 437** *Enquiry under s.* 110—*Further inquiry, whether can be directed District Magistrate, power of.*

Under section 437, Criminal Procedure Code, a District Magistrate has jurisdiction to direct further inquiry in a case where a person has been discharged in an inquiry under section 110 of the Criminal Procedure Code. **A** DESRAJ SINGH *v.* EMPEROR, 20 CR L J. 704 **672**

——— **ss. 110, 117, 439**—*Proceedings under s.* 110—*Magistrate, powers of—Evidence, character of—Revision - High Court, power of interference of.*

The High Court is not a Court of Appeal for cases under section 110 of the Criminal Procedure Code, and it is only in very rare cases that it will interfere

Section 110 of the Criminal Procedure Code, coupled with section 117 of the Code, gives very extensive powers to Magistrates and should be administered with scrupulous care, and materials ought not to be brought on to the record which are not legally admissible in evidence and which are liable, if on the record, to prejudice the accused.

Specific instances of crime in which the accused is suspected, are not good evidence and do not fall within the meaning of "general repute" under section 117, because suspicion cannot take the place of proof that a man has committed an offence Similarly, history sheets are not evidence, especially where the official who produces them is not himself responsible for all the entries thereon.

Where a Court disbelieves the evidence adduced by an accused person, it ought to record specific reasons for such disbelief: the mere fact that, assuming the accused is guilty, it was easy for the accused to get witnesses of fairly good status to give evidence on his behalf, is no ground for disbelieving the witnesses. **A** JABRUDDIN *v.* EMPEROR, 20 CR. L. J. 689 **657**

——— **s. 110**—*Proceeding under s.* 110—*Previous acquittal—Magistrate, whether can question legality of acquittal.*

Where an accused person is being tried by a Magistrate under section 110 of the Criminal Procedure Code and it is found that in a previous case of dacoity he was acquitted by the Court of Session, it is not for the Magistrate to question in his judgment the decision of the Sessions Judge **A** BADLU *v.* EMPEROR, 20 CR. L. J. 727 **837**

——— **s. 110**—*Security proceedings—Evidence for prosecution and defence balanced—Bond, whether should be required.*

In a case under section 110 of the Criminal Procedure Code if the evidence for the defence is as good as that for the prosecution, no bonds should be taken from the accused. **A** MANJI SINGH *v.* EMPEROR, 20 CR. L. J. 716 **796**

——— **ss. 145, 439**—*Order under s.* 145 *without taking evidence, legality of—Jurisdiction of Magistrate—Revision.*

An order under section 145, Criminal Procedure Code, without taking any evidence whatever, is an order made without jurisdiction. **C** SAHADAT KHAN *v.* TAIJADDI SHEIKH, 23 C. W. N. 760; 20 CR. L. J. 688 **608**

——— **ss. 145, 431, 435**—*Proceedings under s.* 145—*Revision—Death of applicant—Application, whether abates.*

An application under section 435 of the Criminal Procedure Code for the revision of an order passed under section 145 of the Code abates upon the death of the applicant, the right to carry on the proceedings conferred by sub-section (7) of section 145 being confined to proceedings before a Magistrate. **P** KRISHEN DEO SINGH *v.* HARI SINGH, 23 P. R. 1919 CR.: 20 CR. L. J. 720 **800**

——— **s. 188**—*Offence committed in Native State Trial in British India, when permissible—Certificate of Political Agent, whether necessary.*

A subject of a Native State arrested in British India cannot be tried in a British Indian Court for an offence committed in that State without the certificate of the Political Agent of the State or the sanction of the Local Government required by section 188 of the Criminal Procedure Code.

An agreement between a Native State and the authorities of a British Indian District, conceding to the British Indian Courts the right to try subjects of the State arrested in British India, cannot take the place of the certificate or sanction contemplated by section 188 of the Criminal Procedure Code. **A** NANDU *v.* EMPEROR, 20 CR. L. J. 700 17 A. L. J. 1055 **663**

——— **s. 195**—*Letter to District Magistrate containing imputations as to conduct of enquiry by Sub-Inspector of Police—Report as to falsity of allegations contained in letter, whether sufficient material for sanction—Sanction to prosecute, when to be granted.*

A sanction under section 195 of the Criminal Procedure Code must be based on materials on the record before the Court. Where there is nothing to show that the information given by the accused was false to his knowledge or that he believed it to be false, no sanction for prosecution for an offence under section 182, Indian Penal Code, should be given. **Pat** SUNDER *v.* EMPEROR, 20 CR. L J. 618 **282**

——— **ss. 195, 476**—*Penal Code (Act XLV of 1860), ss.* 463, 466—*Order directing prosecution for forgery, whether can be made against person not party to proceedings—Offence under s.* 466, *Penal Code, whether included in s.* 195, *Criminal Procedure Code—Judicial proceeding, what is.*

A plaintiff in a civil case sought to enforce a right by means of a forged deed. The Court sanctioned his prosecution for an offence under section 209 of the Penal Code. He was tried and acquitted. An appeal was then made to the Sessions Judge who, purporting to act under section 476 of the Criminal Procedure Code, sanctioned the prosecution of the

Criminal Procedure Code—contd.

petitioner in this case for an offence under section 466 of the Penal Code. An application to revise this order was made to the High Court, and it was contended that, inasmuch as the petitioner was not a party to the civil suit out of which the original prosecution arose, the order was bad in law as made without jurisdiction:

Held, that the Sessions Judge was entitled, under section 476 of the Criminal Procedure Code, to direct the prosecution of the petitioner for forgery, irrespective of the fact that he was not a party to the original proceedings.

It was further contended that the Sessions Judge had no power to order the prosecution for an offence under section 466 of the Penal Code, because that section is not specifically mentioned in section 195 of the Criminal Procedure Code:

Held, that, inasmuch as section 195 of the Criminal Procedure Code confers jurisdiction to grant sanction to prosecute under section 463 of the Penal Code, and as the latter section, in its comprehensive and general terms, covers an act of a particular kind of forgery which may constitute a separate offence under the specific enumeration of crimes provided for by the Penal Code, the Sessions Judge had power to make the order.

Lastly, it was contended that the Sessions Judge had no right to exercise the powers vested in him by section 476 of the Criminal Procedure Code, inasmuch as the matter out of which the prosecution arose did not come before him in the course of a judicial proceeding:

Held, that as there was an appeal to the Sessions Judge from the order discharging the original accused under section 209 of the Penal Code lawfully presented to a proper Court and that Court was of opinion that the petitioner should be prosecuted, the Sessions Judge did have before him a judicial proceeding in the course of which he became acquainted with the facts as to the petitioner's participation in the act of forgery, and that he did not exceed his powers in making the order in question **Pat** BACHU BEHARI LAL *v.* EMPEROR, 20 CR. L. J. 620 **390**

——— **ss. 195, 409**—*Penal Code (Act XLV of 1860), s. 211—Sanction to prosecute—Additional Sessions Judge, whether competent to grant sanction in matter arising out of trial before First Class Magistrate—Discretion of Court, exercise of—False charge, prosecution for, sanction for, when to be granted.*

An additional Sessions Judge is competent to grant sanction to prosecute in a matter arising out of a trial before a Magistrate having first class powers, inasmuch as an appeal would ordinarily lie from the Court of the latter to the Court of the former.

In dealing with an application for sanction to prosecute, the Court to which the application is made ought to proceed with caution and discernment, and be guided by two principles, namely, (1) whether there is a *prima facie* case against the person for whose prosecution sanction is asked, and (2) whether the real object of the applicant is not to satisfy his private ends or personal spite.

The mere acquittal of an accused person is not sufficient for sanctioning a prosecution under section 211 of the Penal Code, there must be something more; there must be a reasonable belief in the mind of the sanctioning Court that there was no foundation whatever for the criminal charge; in other words, there must be a belief that in instituting criminal proceedings the petitioner acted knowingly without belief in the truth of the allegations made by him or recklessly without caring whether the allegations were true or false, and the judgment of the trial Court ought to show that there was no foundation whatever for the criminal case against the persons who were acquitted. **Pat** KUSUM SAO *v.* JANAK LAL, (1919) PAT. 250; 4 P. L. J. 574; 20 CR. L J 603 **219**

——— **s. 195**—*Sanction to prosecute, application for—Notice to accused, whether necessary—Failure to give notice, effect of—Proceedings, validity of.*

Although the issue of a notice to the accused is not legally essential to validate a sanction granted under section 195, Criminal Procedure Code, nevertheless in common moral propriety it is desirable, as a matter of practice and prudence and in common fairness, that a person who is sought to be prosecuted should have notice of the fact that an application has been made for his prosecution under the provisions of that section, and it is in accordance with the traditions of the administration of justice that such person should be permitted to show cause against the grant of sanction for his contemplated prosecution, but an omission to give such notice is not an illegality which would wholly vitiate an order granting sanction. **Pat** SUKHDEO MISSIR *v.* MONOOLAL SAHU, 20 CR L J. 616 **280**

——— **s. 195**—*Sanction to prosecute, application for—Small Cause Court, order made by Revision—Court, proper.*

Held by a majority of the Court (*Jwala Prasad, J.*, dissenting), that clause (*c*) of sub-section 7 of section 195 of the Criminal Procedure Code applies to as Small Cause Court, and that the authority to review an order made by the latter Court granting or refusing sanction to prosecute is the District Court within whose local limits the Small Cause Court is situate.

Jwala Prasad, J.—Neither sub-section 7 of section 195 of the Criminal Procedure Code nor any of it clauses, (*a*), (*b*) or (*c*), applies to Courts of Small Causes. Under sub-section 6 of that section an application can be made both to the District Court and to the High Court for the purpose of revoking or granting a sanction given or refused by a Court of Small Causes. As a matter of procedure, however, such applications should not, except under special circumstances, be entertained by the High Court.

The scope of section 195 of the Criminal Procedure Code examined and discussed. **Pat** LALJI TEWARI *v.* EMPEROR, 20 CR L J. 577; (1919) PAT. 329; 4 P. L. J. 609 **193**

——— **ss. 195, 435**—*Sanction to prosecute granted by Magistrate and upheld by Sessions Judge—Revision—High Court, power of interference of.*

Where a Court exercising jurisdiction under the Criminal Procedure Code sanctions, under section 195 of the Code, the prosecution of a witness for giving false evidence, and the sanction so given is upheld by the Sessions Judge, acting under clause 6 of section 95, the High Court has jurisdiction under section 435 (1) of the Code to call for and

examine the record of the proceeding before the Sessions Judge and to set aside the order if it is not satisfied as to its propriety.

The existing state of the law permitting a revision to the High Court from the order of a Sessions Judge under section 195 (6) of the Criminal Procedure Code animadverted upon. **A** MUQADDAS HUSSAIN *v.* ZAHURUDDIN, 10 CR. L. J. 564 **52**

——— **s. 195 (1) (a)**—*Penal Code (Act XLV of 1860), s. 182—False charge against public servant made in letter addressed to Collector—Sanction for prosecution, who can grant—Jurisdiction.*

A addressed a letter to the Collector of the district making certain charges against an official of the district. It was found that in respect of this letter he had committed an offence under section 182 of the Penal Code, and the Sub-Divisional Magistrate sanctioned his prosecution:

Held, that the Sub-Divisional Magistrate had no jurisdiction to sanction the prosecution, as, under section 195 (1) (*a*) of the Criminal Procedure Code, such sanction could only be given by the public servant concerned or by some public servant to whom he was subordinate, and, with reference to section 182 of the Penal Code, the proper officer to sanction the prosecution was the Magistrate of the district. **A** EMPEROR *v.* MOHOMED NAQI HUSAIN, 20 CR. L. J. 702; 17 A. L. J. 1054 **670**

——— **s. 202**—*Police enquiry, scope of—Magistrate, duty of—Accused member of Police force—Procedure.*

The Police enquiry contemplated by section 202 of the Code of Criminal Procedure cannot take the place of such evidence as the complainant may desire to produce before an adjudication is made of his or her complaint. Such an enquiry can be ordered before evidence is recorded to enable the Magistrate to determine how far the complaint was *prima facie* well founded. When the Magistrate decides to record the evidence himself, he should complete the enquiry and determine upon the evidence adduced how far the complaint is borne out.

Where a person accused of a criminal offence is a member of the Police force, it is desirable that the inquiry should be conducted by the Magistrate himself. **O** MAHADEI *v.* RAM SAHAI, 6 O. L. J. 325; 20 CR. L. J. 728 **888**

——— **ss. 234, 235, 476, 537 (b)**—*Order directing prosecution in respect of one offence—Joinder of charges—Jurisdiction of Magistrate—Objection not taken during trial—Sanction, want of, in respect of second charge—Irregularity.*

Accused instituted two suits against two different persons in two different Courts, one in the Court of the City Munsif and the other in the Court of the Subordinate Judge. Both suits were tried on the Small Cause side and dismissed. The Sub-Judge directed under section 476, Criminal Procedure Code, the prosecution of the accused under section 209 of the Penal Code and of three other persons under section 193 of the same Code. The Magistrate taking cognizance of the case framed charges against the accused in respect of both the suits, and the accused entered upon his defence. Evidence was recorded for both prosecution and defence without any objection to the jurisdiction of the Magistrate to take cognizance of the offences, or as to the validity of the procedure adopted in trying both charges at one and the same trial. After he was convicted, the accused appealed to the Sessions Judge protesting against the joinder of the two charges, and also against the action of the Magistrate in taking cognizance of the offence alleged to have been committed in respect of the suit filed in the Court of the City Munsif, urging that he had been taken by surprise at the course adopted by the Magistrate, as he believed he was on his trial for the offence in respect of the suit in the Court of the Sub-Judge, and was greatly prejudiced in his defence by this belief. The Sessions Judge declined to interfere and the accused moved the High Court in revision:

Held, that the case was covered by section 537 (*b*) of the Criminal Procedure Code, as the accused, who had every opportunity of doing so and who had full warning from the date on which the charge was framed of the fact that he was being put upon his trial in respect of both offences, had acquiesced in the view taken by the Magistrate and had never at any stage of the trial in that Court raised the question of the Court's jurisdiction in respect of the offence alleged to have been committed in the City Munsif's Court; that at most the Magistrate had committed an error, but the error had not in any way prejudiced the accused by the procedure adopted. **A** BABU RAM *v.* EMPEROR, 17 A. L. J. 883; 20 CR. L. J. 642 **418**

——— **s. 235, 239**—*Joinder of charges—Preparation of false balance sheets on two different occasions, whether same transaction.*

Accused, who were the Agents, Secretaries and Treasurers of a Company, were convicted upon charges of (1) cheating and criminal misappropriation in relation to the balance-sheet of the Company for 1912, inasmuch as in that sheet a profit was shown, which they had taken, whereas the Company had not earned a profit, and (2) wilfully making a false balance-sheet of the Company for 1913. The accused were tried jointly on five charges, four of which related to the balance-sheet of 1912 and one to the balance-sheet of 1913. In the trial Court it was objected on behalf of the accused that there could not be a joint trial of the charges relating to the two balance-sheets, but the objection was disallowed on the ground that the offences relating to these balance-sheets formed part of the same transaction. On appeal to the High Court:

Held, that the trial was illegal and the convictions could not be maintained. The different acts attributed to the accused in respect of the two balance-sheets did not form part of the same transaction within the meaning of sections 235 and 239 of the Criminal Procedure Code, and the joinder of the charges was contrary to the provisions of the Code. **B** RAMNARAYAN AMARCHAND *v.* EMPEROR, 21 BOM L. R. 752; 20 CR. L. J 651 **481**

——— **s. 239**—*Joint trial of persons charged with attempting to use forged document and abetment of same, legality of*

Where two persons are jointly concerned in the production in evidence of a forged document and

Criminal Procedure Code—contd.

are tried the one as the principal and the other for abetment, the trials should be separate. The Court ought not, in such a case, to assume that the evidence against the two accused is the same and that it must necessarily come to the same finding in the two cases. **A** KADHE MAL *v.* EMPEROR, 17 A. L. J. 893; 20 CR. L. J. 634 **394**

——— **s. 250**—*Workman's Breach of Contract Act (XIII of 1859), ss. 1, 2—Complaint against workman, dismissal of—Compensation, whether can be awarded*

A Magistrate has no jurisdiction, when dismissing a complaint under section 1 of the Workman's Breach of Contract Act, to direct the complainant to pay compensation to the accused. **A** JAMIL AHMAD *v.* MUHAMMAD ISHAQ, 17 A. L. J. 165; 41 A. 322; 20 CR. L. J. 570 **58**

——— **s. 266**—*Oudh Criminal Digest, para. 49—Penal Code (Act XLV of 1860), ss. 395, 396—Dacoity with murder—Offence, whether triable by Jury—Trial under s. 396—Acquittal—Conviction under s. 395, legality of.*

An offence under section 396 of the Penal Code is not one of the offences made triable by a Jury under the Government order which is embodied in paragraph 49 of the Oudh Criminal Digest.

Accused were charged with an offence under section 396 of the Penal Code and were tried by a Jury. The Jury acquitted them of the offence under section 396 of the Code but returned a verdict of guilty under section 395 of the Code:

Held, (1) that the offence with which the accused were charged being an offence which was not triable by Jury, the trial should not have been by Jury at all.

(2) that the accused, having been acquitted of the offence with which they were charged, could not be convicted of another offence on the same charge. **O** SRIPAL SINGH *v.* EMPEROR, 22 O. C. 130; 20 CR. L. J. 691 **659**

——— **s. 297, 298**—*Jury trial—Charge to Jury—Judge, duty of—Criminal trial—Defences, alternative, whether permissible.*

In delivering a charge to a Jury care should be taken to place the defence set up fairly before the Jury and to ensure that the Jury appreciate the issue or issues which they have to try. The charge should include the usual warning as to the duty of the Jury to the prosecution on the one hand and to the prisoner on the other.

General rules as to the form a charge should take indicated.

Where the Jury was not made fully acquainted with the nature of the case for the prosecution and the nature of the case for the defence:

Held, that the mode in which the case was placed before the Jury was defective and that the convictions of the accused in accordance with the verdict of the Jury and the sentences passed upon them should be set aside and the case re-tried by another Judge.

It is not desirable that a Judge should resort to the services of the Public Prosecutor for the purpose of delivering his charge to the Jury.

It is open to an accused person to adopt a defence in the alternative, such as that he was not present at the occurrence and did not strike the complainant but that if he did strike him he acted in self-defence. **C** AFIRUDDI CHAKDAR *v.* EMPEROR, 29 C. L. J. 571; 23 C. W. N. 833; 20 CR. L. J. 661 **485**

——— **s. 350**—*Transfer of Magistrate—Trial de novo—Re-transfer of Magistrate—Trial proceeded with from where he had left it—Procedure, legality of.*

The accused were charged with certain offences under various sections of the Penal Code and the Cattle Trespass Act. The case was assigned to Mr. *T.*, the Joint Magistrate, who, however, was transferred from the district before he was able to complete the case. The Sub-Divisional Officer transferred the case to his own file and heard the case *de novo*, disregarding all the evidence recorded by Mr. *T.* Before the Sub-Divisional Officer had concluded the case, Mr. *T.* was re-transferred to the district, whereupon the Sub-Divisional Officer transferred the case to Mr. *T.'s* file with a direction that Mr. *T* should take it up from where he had left it before being transferred. This was done, and resulted in the accused being convicted;

Held, that the trial was illegal and must be set aside, and the accused tried *de novo*: that the order of the Sub-Divisional Officer was *ultra vires* and without jurisdiction, because all that had taken place before Mr *T*, had been superseded, and formed no part of the record in the proceeding then actually pending and being prosecuted against the accused, and that, as a consequence, Mr. *T* had no authority or jurisdiction to act on the record of the proceedings which had been antecedently taken before him, the result being that the accused were gravely prejudiced in their trial. **Pat** DAROGA CHOWDHURY *v* EMPEROR, 20 CR. L. J. 638 **398**

——— **ss. 367, 427** *Criminal appeal—Judgment of Appellate Court, contents of*

The law requires an Appellate Court to write a reasoned and considered judgment, setting out the facts and points arising for determination and stating the reasons and grounds for its decision. A judgment which omits to do this, the Judge in appeal contenting himself with saying that he adopts the reasons given by the trial Court to support the grounds of his decision for maintaining the conviction of an accused person, is erroneous in form, as such a judgment cannot be read as supplementary or additional to, or to be explained and deciphered by the aid of, the judgment of the trial Court. **Pat** DAROGI CHAMAR *v.* EMPEROR, 20 CR. L. J. 645 **421**

——— **s. 403**—*Acquittal on charge of cheating—Trial on charge of falsification of accounts on same record, legality of—Penal Code (Act XLV of 1860), ss. 420, 477A.*

Two persons *AR.* and *NK* were convicted, the former under section 420 and the latter under sections 420/109 of the Penal Code. They appealed, and *NK.* was acquitted *AR.* moved the High Court in revision, which held that the conviction should have been under section 477A of the Penal Code and directed the Magistrate to commit the case to the Court of Session under that section The Magistrate issued a notice to both *AR* and *NK.* requiring their attendance before him to show cause why they should not be committed to the Court of Session *NK.* protested, relying on the fact that he

had been acquitted by the Sessions Judge and that until such acquittal was set aside, the Magistrate could not commit him again, on the record of the proceedings as they then stood, to take his trial for an offence under section 477A of the Penal Code. The Magistrate, however, expressed his intention of committing both accused to the Sessions. *NK.* then moved the Sessions Judge to set aside the Magistrate's order in so far as it affected his commitment. The Sessions udge referred the case to the High Court for directions as to the propriety of the Magistrate's order:

Held, that *NK.* could not, so long as his acquittal under section 420 of the Penal Code stood, be properly tried again, upon the record as it then stood, for an offence under section 477 and that if the Crown wished to proceed against him, they must do so in a proper manner and by a separate proceeding, and not upon the original record. **Pat** EMPEROR *v.* NAND KISHORE PRASAD, 20 CR. L. J. 667 **491**

——— s. 403—*Plea of previous acquittal- Procedure—Court, duty of.*

On a charge of cheating and criminal breach of trust where the plea taken by the accused was that he had already been tried and acquitted in another Court on a charge involving the same set of facts:

Held, ( ) that this was a matter to be ascertained after hearing the evidence and ascertaining what the facts in both the cases were;

(2) that if it was found necessary to frame a charge, the accused would be able to set up his previous acquittal as a plea in defence. **C** M. N. MUKHERJEE *v* MATANGI CHARAN PALIT, 23 C. W. N 599; 20 CR. L. J. 572 **60**

——— s. 435—Revision—High Court, power to interfere with order calling upon party to show cause for contempt of Court. *See* GOVERNMENT OF INDIA ACT, s. 107 **279**

——— s. 437—*Further enquiry after discharge, when to be ordered—Evidence recorded and considered by Magistrate, effect of.*

Further enquiry into the case of a discharged person should not be ordered, unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete

Where, therefore, the Magistrate recorded the evidence of all the witnesses whom the complainant wanted to produce in support of his complaint and, after considering the evidence, being of the opinion that the story told by them was an improbable one, dismissed the complaint; but the Sessions Judge, holding that the story might be improbable but was by no means impossible, ordered a further enquiry:

Held, that this was not a valid ground for dissenting from the conclusion of the Magistrate and for directing further enquiry. **L** RADHE SHAM *v.* EMPEROR, 20 CR. L. J. 592 **208**

——— s. 439 - *Revision—Enhancement of sentence—Sentence not in accordance with law—High Court, power of—Sentence of imprisonment for period already undergone, legality of.*

The High Court can interfere, under section 439 of the Criminal Procedure Code, to enhance a sentence, only in those cases in which a legal sentence has been passed. A sentence for a period already

undergone in the lock-up is not a legal sentence. **P** EMPEROR *v.* ASGHAR ALI, 27 P. R. 1909 CR.; 20 CR. L. J. 684 **604**

——— s. 439—*Revision—High Court, power of interference of—Acquittal, whether can be set aside at instance of private prosecutor—Offence, personal—Defamation.*

Although, as a general rule, it is inexpedient to interfere in revision at the instance of a private person with an acquittal after trial by a competent tribunal, yet, section 439 of the Criminal Procedure Code undoubtedly confers power on the High Court to set aside an order of acquittal at the instance of a private prosecutor, especially in a case of defamation where the offence is of so essentially personal a character that the Local Government would seldom be willing to appeal from an acquittal. **N** SUNDERABAI *v* KISHORE SINGH, 20 CR. L. J. 708 **788**

——— ss. 488, 489 *Maintenance, order directing payment of, to wife—Restitution of conjugal rights, decree for, effect of.*

Where a wife obtains an order against her husband under section 488 of the Criminal Procedure Code and subsequently thereto the husband obtains a decree against the wife for restitution of conjugal rights, such decree determines and puts an end to the order of maintenance notwithstanding the fact that the husband does not execute the decree and continues to pay the maintenance. The wife in such a case is not in a position to make an application under section 489 of the Code. **B** CHANDULAL RANCHHOD, *In re*, 21 BOM. L. R. 766: 20 CR. L. J. 687 **607**

——— s. 526 - *Transfer of case—Complainant, whether competent to apply for transfer.*

Ordinarily, the only persons who are recognised by the Criminal Procedure Code as parties to a criminal case are the persons who have the right to control the proceedings; these are, the Crown, the accused and parties engaged in conducting certain proceedings within the meaning of the Code. The Code does not recognise a private prosecutor, who is a complainant, as a party to the case, and he, consequently, is not competent to apply for a transfer as a party interested. **Pat** JAMUNA KANTH JHA *v.* RUDRA KUMAR JHA, 20 CR. L. J. 648 **424**

——— s. 526—*Transfer of case—Error of judgment, whether ground for transfer—Refusal to supply accused with copies of confidential documents, effect of.*

The mere fact that a trial Court has committed an error of judgment in admitting evidence, is no ground for transferring a case from such Court.

Similarly, it cannot be said that the trial Court entertains any bias against the accused, or that the accused should reasonably apprehend that there is such bias, if, when addressed by that Court, the District Magistrate refuses to produce papers called for by the defence on the ground that some are missing and that the rest are confidential. **Pat** BASHIR ALI *v* EMPEROR, 20 CR. L. J 609 **273**

——— s. 526—*Transfer of case, principles governing—Bias, apprehension of—Case pre-judged by Magistrate—Criminal trial—Procedure—Defence of accused, consideration of—Court, duty of—Intimidation of accused or Counsel, whether permissible—*

Criminal Procedure Code—concld.

Evidence Act (I of 1872), s. 151—Indecent or scandalous questions, when can be asked.

A long series of cases has established the guiding principles upon which Courts should invariably act in dealing with applications for transfer, These are—

(1) that it is expedient for the ends of justice to transfer a case from the file of one Magistrate to that of an another competent to try it, if, by reason of the words or conduct of the Magistrate before whom the case is pending, any party reasonably apprehends that there is bias against him in the mind of the Magistrate, though there may not be in fact actual bias;

(2) the transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him.

An accused is entitled to ask the Court to consider his defence, whether true or false, and the Court acts illegally in shutting out questions which tend to establish this defence.

Indecent and scandalous questions may be put either to shake the credit of a witness or as relating to facts in issue, or to determine whether or not a fact in issue existed. If they are put merely to shake the credit of a witness, the Court has complete dominion over them and may forbid such questions, even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no discretion to forbid such questions, though they may be indecent or scandalous

Where questions are put in cross-examination to some of the witnesses for the prosecution which have not been put to earlier witnesses, it is the weight to be attached to the case that is affected and not the admissibility of the questions, and it is no ground for disallowing them even though they are scandalous or indecent

Advocates have ample discretion in the conduct of the case of which they are in charge, and the Court cannot fetter their discretion by insisting that their case should be put to this witness or that

It is highly improper for persons in charge of a prosecution to threaten or intimidate either the accused persons or the Pleaders appearing for them The position of accused persons is at all times of grave anxiety and persons in charge of a prosecution should remember that nothing should be done by them which may have the effect of intimidating the defence or adding to its anxiety. **Pat** MAHAMMAD MIAN *v.* EMPEROR, 20 CR L J. 566 **54**

Criminal trial—*Complainant, death of—Abatement of proceedings—Compoundable and non-compoundable offences*

On the death of a complainant during the pendency of a trial the proceedings abate if the offence complained of was personal to the complainant, that is, if it was one which could be compounded without the sanction of the Court In other cases, the proceedings do not abate **P** LABHU *v.* EMPEROR, 25 P. R. 1919 CR, 20 CR. L. J. 717 **797**

Criminal trial—concld.

————, whether alternative defences permissable. *See* CRIMINAL PROCEDURE CODE, ss. 297, 298 **485**

Cross-decrees—Set off, direction as to, in one decree—Application for execution, whether necessary before set-off can be allowed. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R. 18 **746**

Currency Notes, goods paid for in—Shopkeeper, refusal of, to give face value of notes, whether an offence **604**

Custom—*Alienation—Reversioners cultivating portion of land sold during lifetime of alienor, effect of—Estoppel.*

The fact that the reversioners of a vendor cultivate a portion of the land sold, during his lifetime, as tenants of the vendee, does not operate to estop them, on the death of the vendor, from contesting the sale by suing for possession. **P** BAHAR KHAN *v.* KISHEN CHAND, 72 P. R. 1919 **845**

————, burden of proof on parties setting up *See* HINDU LAW—MAINTENANCE **333**

————, *extinguishment of—Non-user, effect of—Wajib-ul-arz, entry in, whether binding on tenants.*

If a custom has been in existence for a long series of years, it cannot be extinguished by non-user. The fact that it has not been exercised for a long period may be a reason for doubting its existence, but that fact cannot be said to have put an end to it.

Although a tenant may be bound by an entry in the *wajib-ul-arz* which was made in his absence, such entry is not necessarily conclusive proof against the tenant **O** HAMID FATIMA *v.* BHOLA, 6 O. L. J. 349 **869**

———— *Succession*—Jats *of Jullundur District—Daughters* versus *Collaterals of 5th degree—Gift to daughter, validity of.*

Among Jats of the Jullundur District a daughter is not entitled to succeed as against collaterals of the 5th degree, and a gift of ancestral property by the widow of the last male owner to her daughter in the presence of such collaterals is invalid. **L** ISHRI *v.* BHOLA SINGH **152**

Damages for breach of promise of marriage, suit for, under Burmese Buddhist Law, whether maintainable. *See* BUDDHIST LAW—BURMESE **653**

———— Interest, whether can be claimed. *See* PAKKA ADATIA **519**

————, *suit for—Title, question of, whether can be gone into—Jurisdiction of Small Cause Court.*

Plaintiff brought a suit in the Small Cause Court for damages against the defendant for wrongfully taking away fish from the tank in which the plaintiff said he had an 8-annas share and of which he was in possession. The defendant having raised issues on the questions of title and possession, the plaint was returned by the Small Cause Court for presentation to the ordinary Court. The first Court decided those questions, but the lower Appellate Court threw out the suit on the ground that the question of title could not be gone into in such a suit:

Held, that the Court could go into the question of title in such a suit, though it could not finally determine it.

In a suit for damages for trespass on land a Small Cause Court is competent to investigate the question of title for the purpose of determining the

Damages - concld.

defendant's liability for damages, though it cannot determine the question of title finally. **C** SAHERALI MOLLA *v* BHOLA MOLLA, 23 C. W. N. 647 **265**

Declaration *of right to half share in cultivatory holding—Mesne profits, whether can be claimed—Joinder of claims.*

Where a plaintiff sues for a decree declaratory of his right to a half share in a cultivatory holding he is also entitled to ask for mesne profits, and it is open to the Court in granting a declaratory decree to also decree mesne profits. **A** GANGA SAHAI *v.* BANSI, 17 A. L. J. 493 **649**

Decree, *construction of—Conditional decree, what is—Decree for possession, non-execution of, effect of—Suit for possession, whether maintainable.*

A conditional decree is one in which it is provided that the decree-holder will be entitled to the relief granted only on condition of his doing something.

In a suit for possession of certain property and for recovery of its rent, it appeared that a previous suit had been compromised on the condition that the defendant was to remain in possession for three years and pay rent and perform service, and that, on the defendant's failure to do so, the plaintiff would be entitled to take possession before the expiry of three years, otherwise he could obtain possession by execution of the decree On 15th March 1910, a decree was passed in accordance with the compromise and the defendant not having paid rent and having refused to vacate, the present suit was brought, it being alleged that the cause of action arose on the 16th March 1913, the date of the expiry of the three years:

Held, (1) that the decree of 1910 was not a conditional decree, but became absolute from the date on which it was passed;

(2) that the remedy of the plaintiff was by execution of the decree obtained by him and not by a suit based on that decree. **L** KANSHI RAM *v.* TAGRA **165**

———, failure of Court to prepare, effect of. *See* CIVIL PROCEDURE CODE, s. 33 **479**

———, instalment, execution of—Payment out of Court—Admission by parties—Certification, whether necessary. *See* CIVIL PROCEDURE CODE, O. XXI, R. 2 **362**

——— Order refusing to execute, whether decree. *See* CIVIL PROCEDURE CODE, s. 2 **356**

——— for possession, non-execution of, effect of—Suit for possession, whether maintainable. *See* DECREE, CONSTRUCTION OF **165**

Defence of India Consolidation Rules, 1915, rr. 21A, 28, 30— *Consent in writing, want of, effect of—Consent authorising proceedings against one person—Initiation of proceeding against several persons, legality of—Offence not specified, effect of—Attempting to melt sovereigns—Proof—Presumption.*

A person cannot be convicted under the Defence of India Consolidation Rules of 1995, without the written consent of the authority mentioned in rule 30 of the rules to initiate proceedings against him

The shop of accused No 1 was raided by the Police who found a furnace ready heated, and on it a crucible containing molten silver and near it a large number of sovereigns in an open dish or receptacle so placed as to be ready for transfer to the crucible: he was convicted of attempting to melt sovereigns under

Defence of India Consolidation Rules - concld.

rules 21A and 28 of the Defence of India Consolidation Rules 1915. On revision to the High Court:

Held, that he had been rightly convicted

A and *B* were tried and convicted of offences under rules 21A and 28 of the Defence of India Consolidation Rules, 1915. It was found that the consent in writing required by rule 30 authorised proceedings against *A* alone and that it did not specify the offence for which he was to be tried:

Held, (1) that *B's* conviction was illegal and must be set aside;

(2) that the defect in the consent did not invalidate the proceedings as regards *A*. **B** ABU HASAN *v.* EMPEROR, 21 BOM. L. R. 747; 20 CR L. J. 677 **597**

Easement, *natural—Water, flow of, from higher to lower level—Higher and lower owners, rights of.*

Where there is a competition between the rights of the owner of land on a higher level to let his water pass in its natural flow without obstruction and the right of the owner of the lower land to deal with it as he likes, the latter right must give way to the former specially where its free exercise would obstruct the passage of water and would cause damage to the *abadi*. In such a case the owner of the lower land has no right to erect a *bund* and thus to obstruct the flow of water. **O** KANHAIYA LAL *v.* MUNNA **128**

Ejectment, whether can be allowed to prevent accrual of occupancy rights. *See* LANDLORD AND TENANT **446**

———, whether permissible on failure to agree to amount of Nazarana fixed. *See* AGRA TENANCY ACT, ss. 4, (3), 67 **409**

Election—Remedies, several—Choice of one, whether bars rest. *See* TRANSFER OF PROPERTY ACT, s. 55 (4) (b) **363**

Equity of redemption belonging to two brothers, attachment of—Permission to one brother to raise money by private sale, whether title of the other brother affected **956**

———, sale of portion of, whether suit to set aside maintainable if brought subsequent to suit for redemption. *See* EVIDENCE ACT, s. 115 **513**

———, sale of portion of, in favour of mortgagee, effect of *See* TRANSFER OF PROPERTY ACT, ss. 54, 58 **558**

Estoppel **100**

———, *question of, how to be raised—Pleading—Landlord and tenant—Admission by landlord, whether binding on tenant—Compromise between landlord and third party, whether binding on tenant—Execution of decree—Sale—Purchaser, whether bound by statement in sale certificate as to situation of property—Appeal, second—Finding of fact, erroneous, whether can be interfered with.*

A question of estoppel can only be raised by pleading, and where no facts are pleaded which would enable a Court to come to a conclusion whether the principle of estoppel is or is not applicable to the suit, the Court will refuse to go into the matter.

An admission made by a landlord is not binding on his tenant, and this being so, a compromise entered into between the proprietors of certain land and others, whereby the parties to the compromise

Estoppel—concld.

become joint proprietors of the land, has no binding effect upon tenants of the land.

An auction-purchaser of land is not bound by a statement in the sale certificate as to the situation of the land purchased by him.

A finding of fact by a lower Appellate Court, however erroneous, will not be disturbed in second appeal. **Pat** PURGAN PANDE *v.* DHANPAT TEWARI **739**

Evidence—Unlawful assembly, common object of. *See* PENAL CODE, S. 147 **494**

Evidence Act (I of 1872), ss. 8, 25, 26—*Statement made by accused to Police Officer, admissibility of—Conduct, evidence of—Statement made by Police Officer to complainant in presence of accused, admissibility of.*

Statements made to a Police Officer or to a complainant in the presence of a Police Officer are inadmissible in evidence under sections 25 and 26 of the Evidence Act.

Similarly, evidence, which is substantially evidence of the confession of an accused person in the presence of a Police Officer, is inadmissible as evidence of conduct apart from the accompanying statements under section 8 of the Act.

The second explanation to section 8 of the Evidence Act does not apply to a statement made by a Police Officer to a complainant in the presence of an accused person. **B** HIRA GOBAR *v.* EMPEROR, 21 BOM. L. R. 724; 20 CR. L. J. 651 **601**

——— s. 23—*Admission before arbitrator, admissibility of.*

B brought a suit against *A* to recover specific articles alleged to have been taken by *A* or for their value. Prior to the institution of the suit, the matter in dispute was referred to a *panchayat* before which *A* admitted *B*'s claim and undertook to return the articles *B* produced one of the members of the *panchayat* to prove *A*'s admission, but the lower Appellate Court excluded from its consideration the evidence of this witness and dismissed the suit:

Held, that the lower Appellate Court was wrong in excluding the evidence from its consideration.

An admission before an arbitrator is admissible in evidence, although it is for the Court dealing with the facts to attach whatever weight it thinks proper to such an admission. The rule enunciated in section 23 of the Evidence Act does not apply to such admissions. **Pat** PUNJAB SINGH *v.* RAMAUTAR SINGH **348**

——— ss. 23, 92 proviso (6)—*Admission, whether can be explained—Construction of document—Ambiguity—Oral evidence, admissibility of.*

Where a deed of transfer raises an ambiguity as to the nature of the interest in the property it purports to convey, extrinsic evidence (including evidence as to the course of dealing with the property) may be taken into consideration in construing the deed.

Where in a petition there is an inadvertent admission as to the nature of certain property, it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement. **C** DINABANDHU NANDI *v.* MANNULAL PARIK **443**

Evidence Act—contd.

——— s. 33—*Statement in civil suit, admissibility of, in criminal case between same parties after death of deponent.*

Accused, when defendant in a civil suit brought against him to recover a certain debt, produced a receipt purporting to have been signed by the plaintiff, showing that the debt had been discharged The plaintiff was examined as a witness in the suit and he deposed that the receipt was a forgery The prosecution of the accused was thereupon ordered, but before the trial came off the plaintiff died and his statement in the civil suit was admitted in evidence in the criminal case against the accused. The accused was convicted and the question in appeal before the High Court was, whether the statement of the deceased plaintiff was admissible in evidence and whether the Court was justified in believing that statement:

Held, that the statement had been rightly admitted; as the accused had an opportunity of cross-examining the deponent at the time the statement was made, and the proceedings were between the same parties within the meaning of the explanation to section 33 of the Evidence Act, and that if the Court was satisfied on a review of the entire evidence that the deponent had spoken the truth, his statement in the civil suit was sufficient to prove that the receipt was a forgery. **A** DEBI SINGH *v.* EMPEROR, 20 CR. L. J. 625 **385**

——— ss. 34, 160, *scope of—Books of account, entries in, value of—'Sure' in s. 160, meaning of*

Section 34 of the Evidence Act only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. No particular form or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in books of account, if true.

The expression 'sure' in section 160 of the Evidence Act, in the sentence "if he is sure that the facts were correctly recorded in the statement", does not mean that the degree of conviction postulated by it can be treated as equivalent to any on which the witness may choose to say that he is sure, whether or not it is too fantastic or illogical to commend itself to reasonable men. The meaning of the expression is that the witness must satisfy the Court, with reference to ordinary probabilities, of his right to be sure that the record relied on by him is correct. **M** YESUVADIYAN *v.* SUBBA NAICKER **704**

——— ss. 35, 114, ill, (e)—*Death register, entry in, admissibility of—Register, entry in, value of—Presumption as to regularity of judicial acts—Evidence, contrary, effect of*

An entry made in the register of deaths, maintained under paragraph 367 of the Police Regulations, is an official entry made by a public servant in the discharge of his official duty and as such is admissible in evidence under section 35 of the Evidence Act.

Evidence Act—contd.

An entry in such register is, as a rule, reliable to within a few days, and even where the date is not absolutely exact, the entry is often most valuable evidence where the question is as to the relative order in which certain deaths took place.

The principle that all Acts of a Court should be presumed to have been regularly done is a correct principle, where there is no evidence to the contrary. Where, however, on an examination of the record itself, it appears that a party was not properly served, the principle has no application. **O** ZAIBUNNISSA *v.* HASARATUNNISSA, 1 U. P L. R. (J. C.) 1; 22 O. C. 124 **162**

——— **s. 71**—*Mortgage—Execution, proof of—Attestation, valid, what is.*

Where the execution of a mortgage has been proved in the manner prescribed by section 71 of the Evidence Act, and, on the face of it, it appears to have been executed in the presence of more persons than one, it is a good mortgage. **A** NARAIN DAS *v.* DILAWAR, 17 A. L. J. 141; 41 A. 250 **830**

——— **s. 90**—*Document more than thirty years old—Copy, admissibility of—Execution, proof of.*

Where a *dar-mokarari* lease granted in 1830 was not in existence and there was no proof of its execution and a certified copy of the document obtained in 1861 and since then produced in Court on several occasions was received at the trial in evidence:

Held, that the certified copy was admissible in evidence, though there was no proof of the execution of the original document which had been lost. **C** BANWARILAL SINGH *v.* DWARKANATH MISSIR, 29 C. L. J. 577 **825**

——— **s. 90**—*Presumption, whether applies to documents executed by illiterate person.*

The presumption arising under section 90 of the Evidence Act can be applied to a deed executed by an illiterate person whose signature has been made by some other person on his behalf. **C** SHED AHMAD *v.* IBRAHIM **314**

——— **s. 90**—*Will 30 years old—Presumption—Registration, effect of.*

Where a contest ranged round the genuineness of a Will executed by a *talukdar*, and the party contesting the Will pleaded that it had not been proved and that the testator was not of sound disposing, mind and the objectors failed to produce the Will although they had undertaken to do so, but a certified copy, obtained from the Registration Department was produced by the propounder of the Will, and there was evidence that the Will had been acted upon:

Held, that the Will having been duly registered and the document being over thirty years old, it must, under section 90 of the Evidence Act, be presumed that it was a genuine document, and the fact that it was registered raised the presumption that the testator was of sound mind at the time of the execution of the Will **O** BADRI PARSAD SINGH *v.* ANPURNA KUAR, 6 O. L J. 311 **837**

——— **s. 103**—Burden of proof of wilful neglect or theft. *See* RAILWAY **516**

——— **s. 114, Ill. (1)**—*Pro-note in possession of maker—Presumption—Allegation of theft—Burden of proof.*

Evidence Act—concld.

If a pro-note is in the hands of the maker, there is a presumption that it has been paid off If the drawee alleges that the maker came into possession of the note unlawfully, the onus is on him to prove it. **L B** AUNG MYAT *v.* HLA MAY, 10 L. B. R. 26 **650**

——— **s. 115.** *See* CIVIL PROCEDURE CODE, O. XXII, R. 9 **465**

——— **s. 115**—*Estoppel—Institution of suit in Small Cause Court—Jurisdiction, objection to—Return of plaint for presentation to ordinary side—Order not appealed against—Revision against decree—Objection to jurisdiction, maintainability of.*

Plaintiff instituted a suit on the Small Cause Side of the Munsif's Court. The defendant pleaded want of jurisdiction by the Small Cause Court and, on his objection, the Court returned the plaint for presentation on the ordinary side. Against the decree of the District Munsif, there was an appeal to the Subordinate Judge and against the appellate decree of the latter a revision petition was filed in the High Court The defendant raised the objection in the High Court that the suit was of a small cause nature and that no appeal lay to the Subordinate Judge.

Held, that the defendant was estopped from raising the objection **M** AIYATHURAI PILLAI *v.* GNANAPRAKASA ODAYAR. **829**

——— **s. 115**—*Estoppel by conduct—Mortgage—Sale of portion of equity of redemption—Mortgagor joining purchaser in suit for redemption—Suit, subsequent, to set aside sale of equity of redemption, maintainability of.*

A sold a share in the equity of redemption of certain property to *B*. *B* brought a suit to redeem the mortgage and impleaded *A* as a defendant *A* applied to the Court stating that he also had a right in the equity of redemption and asked to be joined with *B* as co-plaintiff. This was allowed and the redemption suit fought out by the two as co-plaintiffs. Subsequently to the filing of the redemption suit. *A* brought a suit for cancellation of the sale of the equity of redemption on the ground of fraud:

Held, that as by his conduct in the redemption suit *A* had elected to affirm the sale and to act upon it, he was not entitled to the relief he now was seeking. **O** CHAUHAN *v.* BIHARI LAL, 1 U. P. L. R. (J. C.) 14 **513**

——— **s. 151**—Indecent or scandalous questions, when can be asked. *See* CRIMINAL PROCEDURE CODE, s. 526 **54** **82**

Execution of decree—*Attachment set aside by mistake—Restoration of attachment, effect of—Sale during interval, validity of.*

Where property is attached before judgment, and under a misunderstanding the order of attachment is set aside, but the attachment is subsequently restored, the restoration of the attachment has the effect of reverting the parties to the position they occupied when the property was originally attached, and a private sale of the property in the *interim* is void. **A** GOPAL PRASAD *v.* KASHINATH, 17 A. L. J. 901 **343**

——— Rent decree—Whether tenant can object to sale of holding **380**

Ex parte decree, whether operates as *res judicata*. *See* CIVIL PROCEDURE CODE, 1908, s. 11

Fancy rates. *See* AGRA TENANCY ACT, ss. 43, 44 **405**

Final decision. *See* CIVIL PROCEDURE CODE, s. 11 **258**

Forest, whether agricultural land. *See* PUNJAB PRE-EMPTION ACT, s. 3 **563**

Fraud—*Decree, suit to set aside, on ground of fraud—Proof—Plaint, allegations in, whether must be adhered to—Failure to prove specific fraud alleged, effect of.*

Where a decree is sought to be set aside on the ground of fraud, it must be shown that the plaintiff was prevented from putting his case before the Court or that some trickery or deceit was practised in connection with the proceedings.

Where the plaintiff fails to establish the fraud alleged in his plaint, he cannot be allowed to adduce evidence to show that the claim decreed against him was otherwise wrongly decreed.

A Court's decision cannot be called in question by a mere allegation of fraud in the pleadings or evidence, when the Judge after giving full opportunity to the parties to produce their evidence has decided rightly or wrongly in favour of one set of facts.

When the parties have had the opportunity of putting their respective cases before the Court and the Court after weighing the evidence has come to a decision the rule of *res judicata* comes into operation, and subject to the law as to appeal and review the decision is final between the parties. It is not open to the defeated party to re-open the matter merely by alleging that the evidence and the averments which the Court believed were untrue. **O** AJUDHIA PRASAD *v.* GUR DAYAL, 22 O. C. 60 **101**

Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 107—*Criminal Procedure Code (Act V of 1898), s. 435—Munsif, order by, calling upon party to show cause why he should not be committed for contempt of Court—Revision—High Court, power of interference of—Contempt of Court—Proceeding described as contrary to law, whether contempt.*

Although the Court of a Munsif is not an inferior Criminal Court within the meaning of section 435 of the Criminal Procedure Code, the High Court has ample power under section 107 of the Government of India Act to entertain an application for revision of an order made by a Munsif in a proceeding in which a suitor is called upon to show cause why he should not be committed for contempt of Court.

An application was made to a Munsif by a Vakil on behalf of certain minor plaintiffs to set aside an order dismissing their suit in default, the said order being described in the application as one "against rules and against law." The Munsif stigmatised this as contempt of Court and issued notice to the minors to show cause why they should not be committed for contempt of Court in respect of the application. On an application made to the High Court in revision:

Held, that there was nothing in the application for restoration to which exception could possibly be taken. **A** KADHORY *v.* EMPEROR, 17 A. L. J. 89; 20 CR. L. J. 615 **279**

Guardian, *admission by, whether binding on minor.*

Admissions made by the guardian of the person of an infant as to the property rights of the latter are not binding on the infant, but such admissions may be receivable in evidence for other purposes. **C** BANWARILAL SINGH *v.* DWARKANATH MISSIR, 29 C. L. J. 577 **825**

Guardians and Wards Act (VIII of 1890), s. 24—*Muhammadan Law—Shia Law—Minor girl—Guardian appointed of person and property—Marriage of minor—Sanction of Court, whether necessary—Right of minor to select bridegroom.*

Where a guardian has been appointed by the Court of the property and person of a minor girl, it is within the competency of the District Judge to sanction her marriage with a particular bridegroom. Such sanction is not only ordinarily desirable, but is necessary for the purpose of determining the suitability of the proposed bridegroom. Under the Shia Law such a minor girl, who has attained puberty and the age of discretion, has an absolute right to marry the man of her choice, subject always to the superintendence, and, if necessary, the veto of the District Judge in his capacity of *parens patriæ* by delegation from the Sovereign. **Pat** ABBASI BEGUM *v.* MUSTAFA BEGUM **998**

——— **ss. 29, 30.** *See* HINDU LAW—JOINT FAMILY **616**

——— **ss. 29, 30**—*Limitation Act (IX of 1908), s. 28, Sch. I, Art 4—Sale of immoveable property by guardian in contravention of sanction, validity of—Minor, suit by, to set aside sale—Purchaser from minor, position of.*

A sale by the certificated guardian of a minor not in accordance with the Court's sanction is voidable, but it is good until it is avoided.

Where a minor does not, within three years after attaining majority, take action for repudiating a sale made by his certificated guardian, his right to set aside the sale and recover possession of the property is barred by the provisions of Article 44 of Schedule I and section 28 of the Limitation Act, and, therefore, a transferee from him cannot successfully sue the purchaser from the certificated guardian for recovery of possession of the property after declaration of title. **C** KANOK DASI *v* SRIHARI GOSWAMI **269**

——— **ss. 29, 30, 31**—*Sale by guardian with permission of Court, validity of—Necessity, want of—Fraud.*

A sale, with the permission of the Court, effected by a duly certificated guardian of the property of his ward, cannot be impeached by the ward on the ground that there was no necessity for it, and, unless the Court's permission was obtained by fraud, such a sale transfers a good title to the vendee. **P** RAHMUN *v.* HUSAIN BI, 73 P. R. 1919 **841**

——— **ss. 29, 30**—*Transfer, voidable, by guardian—Suit to set aside transfer, whether necessary.*

A suit is not necessary to set aside a disposal of property voidable under section 30 of the Guardians and Wards Act. In a suit to enforce such a transfer it is open to the person seeking to avoid it to exercise the option given to him by that section by resisting the suit on the ground that the transfer is not binding upon him. **U P B R** NARSINGH BAHADUR SINGH *v.* SURAJ DIN, 1 U. P. L. R. B R. 3 **137**

——— **s. 41 (2) (3)**—*Order directing delivery of property, when can be made.*

Guardians and Wards Act—concld.

A Court has no power to order the guardian of the person and property of a minor to deliver possession of the property in respect of which he has been appointed guardian under the Guardians and Wards Act, unless the powers of the guardian have ceased for any of the reasons enumerated in section 41 (2) of the Act.

The power of compelling a guardian to deliver possession of the minor's property is meant for the protection of the minor, and can only be exercised in the interests of the minor. It cannot be invoked by persons claiming adversely to the minor, who have their remedy in a regular suit. **N** SITABAI *v.* SHANKAR **365**

——— **s. 41 (3)**—*Death of minor—Court, power of, to direct guardian to deliver up property of minor to his widow.*

A Court has no jurisdiction under section 41 (3) of the Guardians and Wards Act to make an order, on the death of a minor, directing his guardian to deliver up the property, papers and accounts in his possession to the widow of the minor. **A** CHANDRA BHUKHAN SINGH *v.* SUJAN KUAR, 17 A. L. J. 861 **167**

Hindu Law—Adoption—*Son given in adoption, whether acquires any rights in property of natural father—Execution of decree—Decree obtained by father—Adopted son, whether can execute decree after death of father.*

A son given in adoption cannot, for any purpose, be regarded as having existed so as to acquire a vested interest in the property of his natural father Where, therefore, the natural father obtains a decree and dies before its execution, such son must be treated as non-existent for the purpose of executing the decree. **B** RAMCHANDRA *v* MANUBAI RAMDAS, 21 BOM. L. R. 7 6 **695**

——— **Alienation** *by father—Antecedent debt, transfer in consideration of, whether can be enforced during life-time of father—Mortgage, whether constitutes antecedent debt—Sale-deed executed under order of Court, effect of—Necessity, proof of—Part of consideration not for necessity, effect of.*

It is not correct to say that a conveyance by a Hindu father in consideration of antecedent debts can in no case be enforced during the father's lifetime.

Where there is a personal debt enforceable apart from a prior mortgage, there is no reason why it should not have the same effect as any other antecedent debt

Where it is found that the purpose for which a Hindu father agreed to effect an alienation of family property was one which would be binding on the sons and that a complete contract had been entered into by the father from which he could not legally withdraw, the liability of the sons cannot be affected by the fact that the father committed a breach of contract and that the vendee was compelled to resort to the Court to enforce its execution.

Where it is found that the bulk of the consideration for an alienation of family property by a Hindu father was for antecedent debt or valid necessity so that it would have been impossible to raise the required amount except by effecting the sale in dispute, the fact that the vendor was able to obtain from the purchaser something over and above the

Hindu Law—contd.

amount binding on the estate is not a sufficient ground for setting aside the deed. **O** GURU SAHA *v.* GIRDHARI LAL, 22 O. C. 84; 1 U. P. L. R. (J. C.) 54; 6 O. L. J. 411 **75**

——— **Antecedent debt**—*Creditors, prior and subsequent, whether should be different—Father alive at time of suit, effect of—Joint family property, mortgage of, debt secured by, effect of—Sons, position of.*

Under the Hindu Law in order to constitute an antecedent debt binding on the sons, it is not necessary that the prior and the subsequent creditors should be different persons or that the father should be dead at the time the subsequent creditor claims his debt which the father incurred to satisfy the prior debt, but it is necessary that such debt should not have been secured by a mortgage of the joint family property and that the prior and the subsequent debts should not be contemporaneous in fact. **O** MUHAMMAD BAQAR ALI KHAN *v.* HAZARI LAL, 6 O. L. J. 297 **108**

———, what is. *See* SIKHISM **449**

——— **Debt** *due by husband for wife's* stridhanam *—Wife in possession of husband's assets after husband's death—Appropriation of debt—Testamentary bequest of debt—Intention to keep debt alive—Right of legatee—Transfer of Property Act (IV of 1882), s. 101—Merger, doctrine of, applicability of.*

A Hindu died leaving a widow and a daughter born of a former wife and about Rs 25,000 The widow was a creditor to her husband's estate to the extent of Rs 473 for her *stridhanam* Shortly before her death, she made a Will deviding this debt to the plaintiff, who sued to recover the amount from the daughter who succeeded to the estate after the widow's death. The suit was dismissed on the ground that the widow having become possessed of assets whereby she could have paid off her debt, the debt became extinguished:

Held, (1) that the widow's possession of the assets did not amount to a payment of her *stridhanam* debt, there being no analogy between executors who are creditors to the estate paying their debts out of the estate, and a widow who is entitled to enjoy the whole of the income of the estate;

(2) that the widow's *stridhanam* not being at law a charge or incumbrance within the meaning of section 101 of the Transfer of Property Act, there was no merger because in the case of a limited owner the presumption was against merger. **M** CHIDAMBARAM PILLAI *v.* MEENAKSHIAMMAL **842**

——— **Gift** *in favour of female—Presumption—Restraint against alienation, absence of—Absolute interest, passing of, to donee—Construction of document—Transfer of Property Act (IV of 1882), s 8—Right of donee to make testamentary disposition of properties gifted.*

There is no presumption that in all cases where gifts are made to Hindu females the donors intend to give them only estates for life. No difference should be made between a male and a female, provided the words of gift are sufficiently clear to convey the property. Unless there is an expressed or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was

Hindu Law—contd.

possessed of in the property granted. If the language of the instrument is capable of conferring an estate of inheritance, considerations regarding the sex of the donee should be discarded. Where, however, the language is ambiguous recourse can be had to ordinary notions of Hindus, as a rule of construction in finding out what the intention of the donor was.

The rule laid down by the Privy Council in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram*, 2 I. A. 7; 22 W. R. 409: 14 B. L. R. 226 (P. C); 3 Sar. P. C. J. 405; 3 Suth P. C. J. 43 is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument of gift.

Properties in which a Hindu widow has an absolute estate can be disposed of by her by a testamentary instrument. **M** RAMACHANDRA RAO *v.* RAMACHANDRA RAO, 36 M. L. J. 305; 42 M. 283 **94**

——— **Joint family**—*Debt created by decree, whether illegal or immoral—Necessity, proof of.*

A debt created by a decree against a Hindu father of a joint family is not an illegal or an immoral debt, especially when there is a finding that there was legal necessity for incurring the debt so created, and it may be recovered from the ancestral property belonging to the joint family. **Pat** GANESH RAI *v.* DEO SARAN AHIR **271**

——— ——— *Debt incurred by father on security of family property—Antecedent debt, what is—Liability of sons.*

An independent debt, not immoral or illegal contracted by a Hindu father on the security of the joint family estate antecedent to the mortgage-debt which is being sued on may be treated as an antecedent debt, so as to support the charge on the sons' shares also to the extent of the sums secured on the prior mortgage. **M** ARUMUGHAM CHETTY *v.* MUTHU KOUNDAN, 9 L. W. 565; (919) M. W. N 4 9; 37 M. L. J. 165; 26 M L. T. 96; 42 M. 711 **525**

——— ——— *Debt incurred by father to help relative—Sons, liability of.*

A debt, not being illegal or immoral, incurred by a Hindu father to help a relative, which he expects will be repaid and out of which he expects to get some benefit, is binding on his sons and they are liable for its payment **Pat** BARAIK RADHA NATH SINGH *v.* DEVENDRA NATH SAHI DEO, (1919) PAT 278 **681**

——— ——— *Debt incurred to defend member against criminal charge, whether binding on joint family property*

The stigma of a criminal charge against a member of a joint family being regarded among the Hindus as a disgrace to all the members of the family, any expense incurred to protect the family from such a threatened disgrace is necessarily in the interests of all the members of the family. Where, therefore, the *karta* of a joint family raises money to defray the expenses of defending a criminal case against him, the family property is liable for the debt so incurred **Pat** HANUMAT MAHTON *v.* SONADHARI SINGH, 4 P. L. J. 653 **734**

——— ——— ——— *Female member, property acquired by—Presumption*—Benami *transaction effected in order to defeat creditor—Real owner, whether can attack* benami—*Fraud.*

Hindu Law—contd.

Where property is acquired by a lady, whose husband is a member of a joint Hindu family, for her own benefit, and for the benefit of her children, the acquisition cannot be held to be for the benefit of the entire joint family.

Where a *benami* transaction is effected in order to defeat a creditor and the creditor is defeated, the real owner cannot subsequently attack the *benami* transaction. **Pat** SHIVA NARAIN RAM *v.* PHULJHARIA **402**

——— **Joint family**—Karta, payment made by, whether binds other members of family **436**

——— ——— Karta, *powers of, with regard to shares of minor members—Guardians and Wards Act (VIII of* 1890*), ss.* 29, 30.

A *karta* of a joint Hindu family, who is appointed guardian of a minor member of the family under the Guardians and Wards Act, comes under the control of the Court and so cannot exercise the powers of a *karta* in mortgaging the minor member's property.

Where a guardian of a minor appointed by Court executes a mortgage on behalf of the minor without obtaining any sanction from the Court which appointed him guardian, the mortgage is not binding on the minor, and the latter can be equitably held liable only if it is shown that the debt or any portion of it was actually applied for the benefit of the minor. **C** UPENDRA NATH BISWAS *v.* SHIB KUMARI DEBI, 23 C. W. N. 634 **616**

——— ——— ——— *Manager, whether can sue in his own name as representing family—Mortgage by manager and junior member of family—Redemption, suit for, by manager alone, maintainability of—Civil Procedure Code (Act V of* 1908*), O XXXIV, r.* 1.

The father or managing member of a Hindu family is not legally incapacitated from solely representing the family in a suit, by the fact that the transaction out of which the litigation arises is embodied in a deed in which a junior member of the undivided family had joined as obligee or obligor. The addition of the name of a junior member is sometimes made to avoid disputes in future but it does not make the document legally more valid than if it had been executed by the managing member alone. In the case of a mortgage executed by the managing member and a junior member of the family, the former is entitled to redeem in his own name. **M** SUBRAHMANYA IYER *v.* SIVA SUBRAHMANYA IYER, 19 L. W. 180; (1919) M. W. N 537 **931**

——— ——— *Widow, position of—Partition, widow whether can enforce.*

In a joint Hindu family, a widow has no right to claim a partition of the share which belonged to her husband, because by reason of survivorship that shar lapses or devolves on the remaining male members of the family and the widow is only entitled to maintenance. In a separate family the widow inherits the share of her husband and can, subject to any equities which may arise, claim a partition in the same way as any other co-sharer, though her interest is in certain respects of a limited nature.

A Hindu widow, however, who inherits a share in any property from her husband and succeeds in getting mutation of names effected in her favour, is for the time being a recorded co-sharer of that pro-

perty, for she represents the estate as against the other co-sharers, though her interest is limited to one for life and she has no power of alienation except in case of necessity. She has the right to obtain a partition of the share recorded in her name, unless by reason of bad faith or other cause there is a bar on equitable grounds. **O** RAGHUBIR SINGH *v.* JANKI KUAR, 11 O. L. 282 **11**

——— **Maintenance,** *right to—Impartible zemindari—Junior members of family of holder, whether entitled to be maintained out of estate—Custom—Burden of proof.*

Apart from custom and from certain near relationships to the holder, the junior members of the family of a *zemindar* entitled to an impartible *zemindari* have no right to maintenance out of it.

There is no invariable custom by which any members of the family beyond the first generation from the last holder can claim maintenance as of right.

Where, therefore, the son of a brother of the last holder claimed maintenance, and the defendants under an erroneous view that by the general law he was entitled to maintenance alleged a custom excluding his claim:

Held, that the burden of proof was on the plaintiff, and it was for him to prove a custom entitling him, not for defendants to prove one disentitling him. **P C** MAHARAJA OF JEYPORE *v.* VIKRAMA DEO GARU, 37 M. L. J. 138; 21 BOM. L. R. 910; 30 L. W. 436; 17 A. L. J. 1011 **333**

——— **Mitakshara Law** *prevailing in Madras Presidency—Joint family—Mortgage by coparcener of his share, validity of.*

A mortgage of his undivided share by a member of a joint Hindu family is valid according to the Hindu Law prevailing in the Madras Presidency. **M** BOGISETTI AKKA NAGAMMA *v.* PANGANAMMA KRISHNA RAO, 10 L. W. 154; (1919) M. W. N. 56 **746**

——— ———, *Nagar Brahmins of Gujrat domiciled in Benares, whether governed by Mayukha or Mitakshara Law.*

Where a family of Nagar Brahmins of Gujarat was domiciled for over a century in Benares, and it was found that they were ignorant of any rules to be found in the Mayukha commentary and were unable to depose to a single instance of special succession under that commentary:

Held, that the family was governed by the Mitakshara law which prevailed in Benares. **A** LAKSHMI RAM JANI *v.* HARI RAM DUBE, 1 U. P. L. R. H. C. 13 **25**

——— ——— *Succession to maiden's* stridhanam—*Father's brother's son, whether to be preferred to sister*

Where a maiden's mother and father are dead, the heirs to her *stridhanam*, under the Mitakshara School of Hindu Law, as followed in Madras, are her father's *sapindas*, the father's brother's son being preferred to the maiden's sister, who only comes in after the male *sapindas* **M** SUNDARAM PILLAI *v.* RAMASAMIA PILLAI, 26 M. L. T. 115; (1919) M. W. N. 615 **821**

——— **Partition** *preliminary decree for, against father—Death of father—Sons, position of*

Where a preliminary decree is passed against a Hindu father for partition it is presumably passed against him as representing his undivided family and binds his sons, and on his death the plaintiff is entitled to add his sons as his legal representatives or even as parties whose names should be deemed to be already on the record as represented by their father till his death and which names are merely sought to be inscribed on the record openly after his death **M** ALUR LAKSHMI NARASIMHA SASTRULU *v.* VENKATA NARASAMMA **614**

——— **Sale** *by one brother—Knowledge of other brother—Consent Presumption.*

Where one brother in a Hindu family sells his property and there is no evidence of any quarrel, there is a strong probability that the other brother knows of the sale. **A** MADHO RAM *v.* JAGAT SINGH, 1 U. P. L. R. H. C.) 7 **18**

——— **Succession.** *See* OUDH ESTATES ACT **2**

——— ——— *Lameness, whether disqualification—Murder committed to hasten succession, effect of.*

According to the Hindu Law lameness which is congenital is a disqualification for purposes of succession. Lameness which is not complete, as where a person is able to move about with the assistance of crutches, is not a disqualification.

A person is not debarred from succeeding merely on the ground that a member of his family committed murder to hasten the succession, where the former was not a party to the murder and the benefit to him was not present in the mind of the murderer. **P** RAWEL SINGH *v.* JAI RAM, 69 P. R. 1919 **919**

——— ——— *Full sister, whether should be preferred to half-sister.*

Under the Mitakshara as between a full sister and a half-sister the former is the preferential heir to her deceased brother. **B** JANA APPA SUTAR *v.* RAKHMA NARAYAN BADIGER, 21 BOM. L. R. 208; 43 B. 46 **8**

——— ——— Sister, whether heir. *See* CIVIL PROCEDURE CODE, O. XXII, R. 3 **591**

——— **Widow,** *alienation by—Rent, payment of, whether legal necessity*

The payment of rent is clearly a legal necessity, but a sale of immoveable property for the purpose of discharging an obligation to pay rent is not necessarily justified on such grounds and unless it can be shown that there was no other ostensible means of satisfying a rent decree except by allowing the property to be sold at auction, it cannot be held that the sale of the property, as distinguished from the obligation to pay the rent decree, was justified by legal necessity

A widow executed a *zarpeshgi* lease of certain property and out of the consideration for the *zarpeshgi* left a sum in the hands of the *zarpeshgidar* to pay off a previous rent decree. The *zarpeshgidar* failed to discharge the rent decree, with the result that the property was sold to satisfy the decree and was ultimately purchased by the *zarpeshgidar*. In a suit by the reversioners of the widow to challenge the validity of the *zarpeshgi*:

Held, that the sale in execution of the rent decree was not, in the circumstances of the case, justified by legal necessity. **Pat** DHANIA *v.* HAKAYAT PANDEY **316**

Hindu Law—concld.

——— **Widow,** *power of, to gift property for benefit of husband's soul—Reversioner, right of objection of—Burden of proof.*

A gift of family property by a Hindu widow for the benefit of her husband's soul is permissible and is just as valid and binding on the reversioners as if the gift had been made for purposes of legal necessity. But a gift for such a purpose must not amount to an exorbitant or excessive portion of the whole property.

Where in such a case the donor adduces evidence showing a *prima facie* case which would justify such a gift, it is for the objecting reversioner to prove that the property alienated was excessive and that, therefore, the gift was not justified. **Pat** GOPALJI SAH *v.* MANBIRTI KUER, (1919) PAT. 396 **996**

———, *Surrender by, of her interest in favour of reversioners, validity of—Agreement to reconvey in favour of third parties—Consideration, effect of.*

A surrender by a Hindu widow to her reversioners of practically the whole of her husband's estate is valid, though the actual consideration paid is small and very much below the value of the estate and though a part of the consideration is an agreement to reconvey the property to third parties.

The fact that a small and inappreciable portion of the estate is not included in the deed of surrender will not invalidate it. **M** VADLAMUDI GOPALAKRISHNAYYA *v* VADLAMUDI GANGAYYA **749**

——— **Will** - *Gift in favour of nephew—Bequest, subsequent, in favour of donee, describing him as adopted son—Adoption not proved—Bequest, validity of.*

N., a separated Hindu, made a gift of the bulk of his property to *K.*, his nephew, who had lived with him since boyhood and had been brought up and married by him, and who, subsequently to the gift, had assisted *N.* in his business and lived jointly with him. Before his death, *N* executed a Will bequeathing the remainder of his property to *K.* Upon *N.*'s death some distant collaterals of his brought the present suit against *K.* claiming all *N.*'s property *K.* in reply asserted the gift and the Will in his favour and also stated that he was the adopted son of *N.* At the trial the adoption was denied by the plaintiffs, and no evidence was led by *K.* on the issue relating thereto. The trial Court found that the gift was genuine and had been acted upon and that it was *N.*'s intention under the Will to pass the remainder of his property to *K.*, and dismissed the suit. The lower Appellate Court, while upholding the gift, decreed the claim in respect of the property dealt with by the Will, on the ground that *K.* could only derive benefit thereunder if he were the adopted son of *N.* but as he had abandoned the plea of adoption, he could derive no benefit under the Will. On appeal to the High Court:

Held, that the plaintiffs were not entitled to a decree, the simple fact that the Will described the donee as an adopted son, did not mean that, unless in law and in fact he was an adopted son, the testator intended that he was to get no benefit under the Will, **A** KHUB SINGH *v.* RAMJI LAL, 17 A. L. J. 853 **311**

Hindu Widow, permission to sell granted to—Sale, validity of, as against reversioners. *See* PROBATE AND ADMINISTRATION ACT, s. 90 **309**

———, power of, to make adoption. *See* WAJIB-UL-ARZ **851**

Homestead land, tenant of, holding over. *See* TRANSFER OF PROPERTY ACT, s. 106 **180**

Ijaradar, *right of, to create tenancy—Tenants, position of—Occupancy rights, acquisition of.*

An *ijaradar* has power to induct a tenant on to the land which is the subject of his *ijara*, apart from any stipulations in his document of title which may prevent him from so doing; and, where there are no such stipulations and the persons inducted are settled *raiyats* of the village in which the land is situated, once they become tenants under the *ijaradar* they acquire an occupancy right in the land which they hold under the *ijaradar*. **Pat** SHEO BALAK SINGH *v.* RADHEY SINGH **501**

Illegality. *See* CIVIL PROCEDURE CODE, s. 115 **767**

Improvements effected by mortgagee in possession, cost of, whether can be allowed. *See* MORTGAGE - REDEMPTION **862**

Inam, *grant of, for services rendered and to be rendered—Wilful default—Resumption—Landlord and tenant—Adverse possession during currency of lease—Ouster of tenant by stranger, effect of.*

Where lands are granted on account partly of services already rendered and partly of services to be rendered in the future, the grantor is entitled to resume the lands by reason of the wilful default of the grantee in the service which was a condition precedent to his enjoyment of the lands.

Ordinarily, during the currency of a lease no adverse possession can be obtained by a third party against the landlord, but it is otherwise where, to the knowledge of the landlord, his tenants are ejected by a stranger after open conflict with him, and the new tenants pay their rents to the stranger. In such a case the landlord's rights are openly invaded and his rights openly challenged and jeopardised and adverse possession begins to run against him. **B** YAMUNABAI NARAYAN *v.* LAGMANNA BASANNA, 21 BOM. L. R 820 **770**

In forma pauperis, application for leave to sue, scope of **610**

Injunction, interlocutory, whether can be granted. *See* ARBITRATION **588**

Insolvency Court, exclusive jurisdiction of. *See* PROVINCIAL INSOLVENCY ACT, ss. 36, 37 **519**

Insolvent. *See* PROVINCIAL INSOLVENCY ACT, ss. 35, 36, 37 **761**

Interest, future, whether can be awarded in suit for arrears of rent. *See* CIVIL PROCEDURE CODE, s. 24 **865**

———, high rate of, in mortgage-deed, whether can be reduced. *See* MORTGAGE **722**

———, *post diem*, absence of provision for—Liability of debtor, extent of. *See* MORTGAGE **313**

———, *post diem*, whether recoverable—Intention of parties. *See* MORTGAGE **320**

———, whether included in mortgage money. *See* TRANSFER OF PROPERTY ACT, ss. 67, 68, 72 **433**

Interest Act (XXXII of 1839), *scope of—Interest, right to, in cases not covered by Act—Claim for unascertained amount due as plaintiff's share of trade—Interest awardable as damages—*

Interest Act—concld.

Rate of interest—Suit by Muhammadan sharer for his share of assets Interest, right to.

The Interest Act is not exhaustive of all claims as to interest and it is open to the Courts in India to award interest in cases not coming within the purview of the Act, on principles of equity, justice and good conscience.

To attract the provisions of the Interest Act, the amount in dispute must be a debt or a certain sum payable at a certain time or otherwise It has no application to an unascertained sum claimed as the profits of a trade.

Where a Muhammadan minor sued for the recovery of her deceased father's share in a family trade, which was utilized by her co-heirs in a separate business from which they derived a profit:

Held, that the plaintiff was entitled to interest on her share at the ordinary current rate of six per cent. per annum from the date of her father's death. **M** MUHAMMAD ABDUL GAFFUR *v.* HAMIDA BEEVI AMMAL, 25 M. L. T. 242; 36 M. L. J. 456; (1919) M. W. N. 484; 42 M. 661 **505**

——— **s. 1**—Sum payable under written instrument—Interest, whether can be allowed **953**

Interlocutory order, interference with, by High Court in revision. *See* ARBITRATION, REFERENCE TO **859**

Irregularity. *See* CIVIL PROCEDURE CODE, s. 15 **767**

Joint possession, when can be obtained *See* JOINT PROPERTY **543**

Joint property—*Co-sharers—One co-owner dealing with joint property—Rights of other co-owners—Injury, proof of—Ouster, what constitutes—Joint possession, when can be obtained.*

Before a Court will, in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-owners without the consent of the others should be restored to its former condition, the plaintiff must show that he has sustained by the act he complains of some injury which materially affects his position.

Where there is a denial of the title of one co-owner by the other co-owners there is in law an ouster, and where there is an ouster, the co-owner ousted is entitled to a decree for joint possession. **Pat** RAM NANDAN SAHAY *v.* JAI GOBINDA PANDEY **543**

Joint tenants, male and female—Female tenancy. *See* AGRA TENANCY ACT, 1901, s. 25 (4) **178**

Joint trial of persons charged with attempting to use forged document, and abetment of same, legality of. *See* CRIMINAL PROCEDURE CODE, s. 239 **394**

Judgment, *construction of—Counsel's fee, apportionment of—Civil Procedure Code (Act V of 1908), ss. 151, 152—Amendment of decree—Inherent power of Court.*

Where two defendants are jointly represented by one Pleader, and the suit as against one is *dismissed* with costs and as against the other *decreed* with costs, and the judgment is silent as to how the costs are to be apportioned, the reasonable construction to be put upon the judgment is that the Court intended to allow half the Counsel's fee to the successful defendant.

Judgment—concld.

The Courts in India have an inherent power to mend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within section 152 of the Civil Procedure Code. **P** MANGAT RAI *v.* ALIA, 92 P. R. 1919 **574**

——— of Appellate Court based on result of local investigation made by trial Court, legality of. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R. 9 **241**

——— of Criminal Appellate Court, contents of. *See* CRIMINAL PROCEDURE CODE, ss. 367, 427 **421**

Judicial proceeding, what is. *See* CRIMINAL PROCEDURE CODE, s. 195 **390**

Jurisdiction, whether Judge bound to prove his. *See* REVISION **32**

——— *of Civil and Revenue Courts—Suit decided by Revenue Court—Submission of parties to decree—Civil suit to set aside decree, maintainability of—Remedy, proper.*

Where a Revenue Court decides a suit brought before it, holding that it has jurisdiction, and the parties submit to the decree and it becomes final, it is not open to one of them subsequently to ask a Civil Court to set aside the decree of the Revenue Court on the ground that it had wrongly decided the question of jurisdiction. If the suit has been decided wrongly, the remedy is by way of appeal. **O** BIPATI *v.* RAM BAKHSH SINGH, 1 U. P. L. R. (J. C.) 7 **98**

——— *of Small Cause Court—Damages, suit for—Title, question of, whether can be gone into.*

Plaintiff brought a suit in the Small Cause Court for damages against the defendant for wrongfully taking away fish from the tank in which the plaintiff said he had an 8-annas share and of which he was in possession. The defendant having raised issues on the questions of title and possession, the plaint was returned by the Small Cause Court for presentation to the ordinary Court. The first Court decided those questions, but the lower Appellate Court threw out the suit on the ground that the question of title could not be gone into in such a suit:

Held, that the Court could go into the question of title in such a suit, thought it could not finally determine it.

In a suit for damages for trespass on land a Small Cause Court is competent to investigate the question of title for the purpose of determining the defendant's liability for damages, though it cannot determine the question of title finally. **C** SAHERALI MOLLA *v.* BHOLA MOLLA, 23 C. W. N. 647 **265**

Jury, trial by—Charge to jury—Duty of Judge *See* CRIMINAL PROCEDURE CODE, ss. 297, 298 **485**

———, whether offence of dacoity with murder triable by, in Oudh. *See* CRIMINAL PROCEDURE CODE, s. 266 **659**

Lambardar, liability of, extent of, in respect of profits due before his appointment but collected by him. *See* PROFITS **836**

Land Acquisition Act (I of 1894), s. 11—*Compensation, apportionment of, between* pattadar *and tenants from year to year.*

Where land is compulsorily acquired, under the provisions of the Land Acquisition Act, the tenants from year to year in respect of such land are entitled to have their share of the compensation apportioned. **M** PONNIAH NADAN *v.* DEIVANAI AMMAL, 36 M. L. J. 468; 9 L. W. 453; 26 M. L. T. 311 **247**

"Landlord." *See* BENGAL TENANCY ACT, ss. 4, 105 **412**

———, whether can claim enhanced rent recorded by Settlement Officer. *See* BENGAL REGULATION VII OF 1822, s. 9 **90**

Landlord and tenant—*Co-sharer landlord seeking to recover rent of more holdings than one in one suit without joining co-sharers Decree, whether rent decree—Execution of rent decree—Tenant, whether can object to sale of holding on ground of non-transferability.*

Where a plaintiff sues as a co-sharer proprietor to recover in one suit his share of the rent of more holdings than one without joining his other co-sharers as parties to the suit, the decree obtained by him in such a suit is a money decree and not a rent decree.

A tenant is entitled to assert in execution proceedings the right that the landlord is not entitled to bring a holding to sale in pursuance of a rent decree, if the holding is not transferable. **Pat** ABDUL AZIZ *v.* BIBI TAUHIDUNNISSA **380**

——— Decree directing tenant to pay a sum of money to landlord - Power of Court to extend time. *See* BENGAL TENANCY ACT, 1885, s 155 **137**

——— *Ejectment, suit for* - Zerait *land—Burden of proof—Settlement records, entry in, value of—Rebuttal of entry—Adverse possession of tenant, effect of—Rent, assessment of, suit for—Remedy of landlord.*

Plaintiff, the proprietor of an estate within which were situated certain lands in the occupation of the defendants, brought a suit to recover possession thereof, alleging that they formed his *zerait* lands. The defendants resisted the claim on the ground that the disputed lands were not the *zerait* lands of the proprietor, but were part and parcel of the *raiyati* holding for which they paid rent to the landlord. The entries in the Settlement *khatian*, by which the plaintiff was not bound, were against the plaintiff and he failed to prove that the lands were *zerait* as alleged by him. The lower Appellate Court, without considering the question of the length of the time during which the defendants were in occupation, held that, although the plaintiff had failed to establish the specific case alleged by him, he should get a decree for ejectment on the ground that he was entitled to recover possession as the defendants had failed to discharge the burden that lay upon them to establish a tenancy under the plaintiff in respect of the disputed lands. The defendants appealed to the High Court and contended, first, that the lower Appellate Court had on an erroneous ground considered the Settlement proceedings to be a nullity:

Held, that though the entries in the Settlement *khatian* afforded *prima facie* evidence in support of the defendants' case, the plaintiff had, as he was bound to do, rebutted that evidence.

Landlord and tenant—contd.

It was next urged that the burden of proof had been erroneously thrown on the defendants:

Held, that the decision of the lower Appellate Court could not be supported and the case must be remitted to it for re-decision.

Lastly, it was objected that the question of the defendant's possession ought to have been tried:

Held, that the lower Appellate Court was wrong in not considering the length and character of the defendants' possession, for if they had been in possession for over twelve years and had treated the disputed lands as part of their tenancy, the only remedy of the landlord was by a suit for assessment of rent, because the claim for recovery of actual possession had been extinguished by the adverse possession of the defendants.

Where the defendants in an action in ejectment are tenants of the plaintiff and the only dispute is whether the disputed lands are within or without the boundaries of that tenancy, the burden of proof depends upon the relative situation of the land in controversy and the admitted lands of the tenancy held by the defendant. **C** AZMAT *v.* BISHUN PRAKAS, 29 C. L. J. 607 **650**

——— Khas *possession, suit for*—Raiyati *holding, claim of—Burden of proof*

Where, in a suit for *khas* possession of certain lands which the defendant contests are his *raiyati* holdings, the plaintiff establishes his title which *prima facie* entitles him to possession, it is on the defendant to identify the land which he claims as his *raiyati* land. **Pat** SUNDARBAS KUERI *v.* DILWAR SAHU **701**

——— *Lease, construction of—Surrender, option of, on six months' notice—Notice given by lessee—Surrender, deed of, execution of, after expiry of date of notice—Determination of lease, date of—Rent, liability for.*

The Raja of Jeriah granted a mining lease to the defendant firm upon certain terms and conditions as to the payment of rent and royalty upon coal excavated. The lease was for a term of 999 years and contained a clause giving the lessees a right to surrender the lease upon giving six months' notice and satisfying the conditions as to rent and royalty. The lessees, not finding the business profitable, gave the Raja notice that upon the expiration of six months from the date thereof their rights and obligations under the lease would cease, and they went out of possession and informed the Raja of the fact. The Raja's agent demanded a deed of surrender, and negotiations for the execution of this deed and for the payment of rent and royalty were carried on till after the period of six months had expired. When, eventually, the deed was executed and delivered, payment of the rent and royalty was tendered, the same being calculated up to the date of the expiry of the notice, but the Raja refused to accept payment, and instituted the present suit for rent and royalty due up to date of the execution of the deed of surrender. The High Court held that the lease had been determined by the notice and dismissed the suit. On appeal by the plaintiff to the Privy Council:

Held, that the suit had been rightly dismissed, that the request by the Raja's agent for the execution of a deed of surrender merely transferred the

payment to the date when the surrender was executed and delivered, the fact that that date was subsequent to the date of the expiration of the notice would make no difference for its operation would take effect from the date when the notice expired whenever it was executed, and payment upon this date was all that was required. **P C** SIVA PRASHAD SINGH *v.* TATA IRON AND STEEL CO., LTD., 23 C. W. N. 466; (1919) M. W. N. 278; 46 C. 752 **909**

——— Lease—Covenant against alienation in agricultural lease, validity of. *See* BENGAL TENANCY ACT, s. 11 **19**

——— *Lease in favour of one person—Subsequent lease in favour of another—Rent, suspension of.*

Where a lessor dispossesses the lessee from a portion of the holding the rent due by the lessee to the lessor is suspended Similarly, where a landlord having let out a portion of the land to one person lets it out again with other lands to a subsequent lessee the rent is also suspended. The landlord having failed to perform the duty he had undertaken, the suspension of rent is equitable **C** MANINDRA CHANDRA NANDI *v.* NARENDRA CHANDRA LAHIRI, 23 C. W. N. 585; 46 C. 956 **13**

——— *Lease stipulating permanent rent—Reverter to waram, landlord's right of—Grant, construction of, principles of.*

Where a lease-deed provided for a permanent rate of rent being paid by the lessee 'for ever and ever' and the same was coupled with words of inheritance, that the property shall descend to the heirs of the essee:

Held, that the lease was not only for a fixed period, but conveyed an absolute estate, and that it was not open to the lessor or his assignee to revert to *waram*.

Prima facie, the terms of a document must be looked at to ascertain the nature of the estate granted by it, and it is only where there is any doubt about its import that other considerations, as the extent of the right possessed by the grantor, can be taken into consideration. **M** CHOCKALINGA NAYAKAN *v.* ARUNACHALAM CHETTIAR, (1919) M. W. N. 353; 26 M. L. T. 262 **23**

——— Maurusi *tenancy, whether transferable—Occupancy holding, transfer of—Estoppel, whether can validate void transfer.*

A *maurusi* tenancy which is transferable is unknown to the law.

A transfer of an occupancy holding which is void cannot be validated by estoppel. **U P B R** SHEO SHANKAR SINGH *v.* RAO BATUK PRASADA, 4 U. P. L. R. (B. R.) 1 **100**

——— *Non-occupancy tenant obtaining mortgage of holding, effect of—Redemption—Tenant, position of.*

Where a non-occupancy tenant of a holding obtains a mortgage of the holding, his tenancy falls into abeyance during the existence of the mortgage and, although he cannot reckon the period of the mortgage towards the acquisition of occupancy rights, on redemption he reverts to his position of tenant and is not a trespasser. **U P B R** TEJ PRASAD *v.* RAM JAS PANDE, 1 U. P. L. R. (B. R.) 9 **236**

——— *Occupancy holding, non-transferable, transfer of—Transferee, recognition of, by landlord—Rent, arrears of, liability for—Sale of holding in execution of decree against old tenant, legality of.*

D. purchased a non-transferable occupancy holding from the tenant; the landlord, however, brought a suit for arrears of rent against the tenant and obtained a decree in 1910. In 1902 *D* paid the *salami* for mutation and was recognised as tenant by the landlord. In 1904 the landlord sued out execution of the decree he had obtained in 1901 against the old tenant, and brought the holding to sale and it was purchased by *E*, who transferred the holding by conditional sale to *F*. The plaintiff obtained a lease from *F* and brought the present suit for possession on establishment of his title:

Held, that the landlord having recognised *D.* unconditionally as the tenant, the latter was not liable for the arrears of rent, and the old tenancy having come to an end, the landlord was not entitled to bring to sale the holding as the holding of the old tenant, and that, consequently, the suit must fail. **C** GIRISH CHANDRA MONDAL *v.* NARENDRA NATH HALDAR, 23 C. W. N. 654 **759**

——— *Occupancy rights, acquisition of—Ejectment to prevent accrual of occupancy rights, whether can be allowed—Colourable transaction, effect of—Appeal, second—Finding of fact based upon inference which contravenes Statute, whether binding.*

The law allows a Zemindar to eject a tenant in order to prevent the accrual of occupancy rights, but the ejectment must be effective and must last at least for one year.

A colourable transaction intended to defeat the provisions of the law cannot be given effect to by the Courts

Where in arriving at findings of fact the Court puts an inference upon the facts which, if accepted, would defeat the provisions of the law, such findings can be questioned in second appeal **U P S R** GIRWAR *v.* BEHARI LAL, 1 U P L R (B. R.) 22 **446**

——— Ouster of tenant by stranger. *See* INAM, **770**

GRANT OF

——— *Permanent tenancy Presumption.*

In an action in ejectment the 1st defendant, who claimed the property as purchaser of the right, title and interest of the other defendants who had been in possession of the disputed property by right of inheritance from their father, produced a certified copy of a *dar-mokarari*, purporting to have been executed in 1830 and containing a recital of the existence of the tenancy, and a certified copy of a mortgage-bond of 1861 in which the *factum* of the permanent character of the tenancy was acknowledged by the grantor of the mortgage, and also other proofs showing that the tenancy which had descended from father to son for three generations was effectively transferred from time to time and was held at a uniform rate for at least eighty years before the institution of the suit:

Held, 1) that from these circumstances the Court could legitimately infer that the tenancy, which was of unknown origin, was in its inception of a permanent character;

2) that the inference to be drawn was one of law from facts found or admitted **C** BANWARILAL SINGH *v.* DWARKANATH MISSER, 29 C. L. J. 577 **825**

Landlord and tenant—contd.

——— *Possession, long, effect of—Tenancy, whether can be presumed—Agra Tenancy Act (II of 1901), s. 34, suit under—Limitation.*

Where a person has been in possession of land for a long period without payment of rent, according to the records, it is permissible to infer that the fact of such occupation did at sometime or other come to the knowledge of the landholder, but no inference would arise that the actual occupation was with consent. The fact that the landholder took no steps to eject the occupier would not justify the inference that he had entered into an express or implied contract of tenancy with him.

No period of limitation is prescribed for a suit under section 34 of the Agra Tenancy Act. **U P B R** MURLI DHAR SINGH *v.* GYASI RAM, 1 U. P. L. R. (B. R.) 18 **469**

———, relationship of, whether created by usufructuary mortgage. *See* MORTGAGE, USUFRUCTUARY **473**

——— *Religious trust—Lease, permanent, by trustee, validity of—Ejectment, suit for—Compensation for improvements, right of lessee to—Transfer of Property Act (IV of 1882), s. 51—Mesne Profits and Improvements Act (XI of 1855), s. 2.*

The trustee of a religious trust cannot grant a permanent lease of the trust properties.

A lessee holding under an invalid lease cannot claim compensation for improvements before eviction under section 51 of the Transfer of Property Act or under section 2 of the Mesne Profits and Improvements Act. **M** VENKATAPPIER *v* RAMASWAMI AIYAR, 0 L. W. 137; (19 9) M. W. N. 548 **517**

——— Rent, suit for—Non-registration of name of proprietor, effect of—Registration before decree, whether cures defect **267**

——— *in* ryotwari *land—Occupancy right, acquisition of—Burden of proof.*

The Government, in adopting the *ryotwari* system, must be deemed to have made their settlement with the cultivating *ryot* whom the Government found on the land and treated him as the cultivating owner and intended him to remain as such.

Where, therefore, a tenant under a *ryotwari, pattadar* sets up a permanent right of occupancy, the burden of proving such right lies on him **M** AIYAPPA NAICKER *v* MEDAI THALAVOI THIRUMALAYAPPA UDALIAR, 10 L. W. 7; 37 M. L. J. 238; (1919) M. W. N. 654 **986**

——— Ryotwari *village—Occupancy right, claim of, requisites of proof of—Burden of proof.*

Where a person claims to have acquired occupancy rights under a *ryotwari pattadar*, the onus lies heavily on him to establish his claim.

Mere continuity of possession for sometime, the payment of a uniform rate of rent where it is not inappreciable, or alienations made by the tenant behind the back and without the knowledge of the landlord, are not sufficient to establish a claim to occupancy rights

History of *ryotwari* system and nature of the *ryotwari pattadar's* rights examined by Seshagiri Aiyar, J. **M** PONNIAH NADAN *v* DEIVANAI AMMAL, 36 M. L. J. 463; 9 L. W. 453; 26 M. L. T. 311 **247**

——— *Settlement—Holding wrongly described as occupancy—Status of occupier, whether can be contested—Landlord, whether can confer occupancy rights on tenant.*

Where a plot of land is misdescribed in the proceedings of a settlement as an occupancy holding, such misdescription would not prevent the *zemindar* from afterwards contesting the occupier's status.

A landlord cannot confer occupancy rights upon a tenant. **U P B R** SHEO RATAN SINGH *v* GUR PRASAD SINGH, 1 U. P. L. R. (B. R.) 13 **192**

——— Tenant of homestead land, holding over. *See* TRANSFER OF PROPERTY ACT, s. 105 **180**

——— Tenant paying at higher rate—Presumption as to future rate **951**

——— *Under*-raiyati *interest, transferee of, position of—Purchaser of holding at collusive sale, whether can eject transferee of under*-raiyati *interest.*

Apart from custom, a transferee of an under-raiyati interest has no interest in the land, and is liable to be ejected at the instance of a purchaser of the holding, even though the purchase is collusive. **C** BISWAMBHAR MANDAL *v.* NASARAT ALI **355**

——— Whether admission by landlord or compromise between him and third party binding on tenant. *See* ESTOPPEL **739**

——— Whether tenant can plead right of third party to receive rent. *See* BENGAL TENANCY ACT, s. 60 **523**

Lease, *construction of—Printed portion in conflict with manuscript portion, effect of.*

Where in a printed form of a lease there is a manuscript portion at the end of the printed portion, and there is a conflict between the printed portion and the manuscript portion, the manuscript portion must prevail over the printed portion. **Pat** MUKHLAL PANDEY *v* KESHO PRASAD SINGH **956**

Legal Practitioners Act (XVIII of 1879), s. 13, *order made under—Appeal to His Majesty in Council, whether permissible—Letters Patent (Patna), cls. 31 to 34.*

The Legal Practitioners Act contains no provision conferring a right of appeal to the Privy Council from an order passed by a High Court under section 13 of the Act Clauses 31 to 34 of the Letters Patent dealing with the right to appeal to His Majesty in Council do not apply to orders passed in exercise of the administrative or disciplinary powers conferred upon the High Court by Letters Patent or by Statute. **Pat** BIR KISHORE ROY *v.* EMPEROR, 4 P. L. J. 423; 20 CR. L. J. 679 **599**

——— **s. 13 (f)**—*Unprofessional conduct—Letter, abusive, addressed to Sub-Divisional Officer.*

A Mukhtar practising in a Sub-Division addressed certain letters to the Sub-Divisional Officer in connection with a copy for which he had applied The contents of the letters were grossly insulting, and the matter was reported to the High Court, where it was contended that, on the facts, there was nothing which would entitle the Court to take action under sections 13 and 14 of the Legal Practitioners Act:

Held, that the Mukhtar could be proceeded against under section 13 (*f*) of the Act. **A** AMRITA LAL, *In the matter of*, 20 CR. L. J. 78 (7 A. L. J. 0.0 **798**

Legal representative—*Decree obtained against person in possession of estate—Execution proceedings, whether binding on real heir.*

Where a creditor in good faith obtains a decree against a person in possession of his debtor's pro-

perty whom he believes to be, but who is not in fact, the legal heir of the debtor, execution proceedings taken in pursuance of that decree will bind the real heir.

Such a case must, however, be treated as an exception to the general rule that proceedings in execution of a decree do not bind the interest of any person who is not brought on the record as a party to the proceedings in the suit. **M** BACHU SOORAYYA *v.* TOOMULOORI CHINNA ANJANEYALU, 36 M. L. J. 106 **509**

Lessor and lessee—*Lessor, duty of, to secure possession to lessee—Possession not secured to lessee—Liability of lessor to refund money received by him from lessee.*

A lessor is bound to secure to the lessee the possession of the land leased with reference to its intended use which was made known to him at the time when the lease was granted, and if he is unable to secure possession to the lessee with reference to the use he wanted to make of it, he is liable to refund any money which he may have received from the lessee. **O** RAZZAQ ALI *v.* RAM AUTAR LAL, 6 O. L. J. 353 **836**

Limitation Act (IX of 1908), s. 5—*Appeal filed beyond limitation—Time spent in prosecuting remedy in wrong Court, exclusion of—Wrong advice—Sufficient cause.*

Where, acting upon mistaken advice as to the law, an appeal is presented to the wrong Court, and, when represented to the proper Court, the period of limitation has expired, the period during which the appeal was pending in the Court to which it was originally presented may be deducted from the period prescribed for appealing. **P C** SUNDERBAI *v.* COLLECTOR OF BELGAUM, 23 C. W. N. 75; (1919) M. W. N. 254; 43 B. 376 **897**

——— **s. 5**—*Appeal filed beyond time—Appellant misled by practice of Court—Sufficient cause—Time spent in prosecuting petition for review, exclusion of—Diligence, proof of.*

A petition under Order XXI, rule 90, of the Civil Procedure Code by a judgment-debtor was dismissed in default. He immediately instituted proceedings under Order IX, rule 9, of the Code asking that the case be reinstated and heard on the merits, but his application was rejected because, in the meantime, the High Court had held that Order IX, rule 9, did not apply to proceedings in execution of a decree, though before that decision the practice of the subordinate Courts had been to apply the provisions of the rule to proceedings in execution. The judgment debtor appealed to the High Court, and, under section 5 of the Limitation Act, applied that the time for appealing be extended:

Held, that, in the circumstances, the applicant was entitled to the extension, as he had been misled by the practice which had hitherto prevailed in the subordinate Courts but which had recently been held to be wrong.

An appellant applying under section 5 of the Limitation Act ought ordinarily to be deemed to have acted with ordinary diligence when the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for

presenting the appeal, and his appeal should, in such a case, be admitted under the section **Pat** RAM-CHARITA SAHU *v.* RAM NARAYAN SAHU **959**

——— **s. 5**—Appeal filed beyond time—Extension of time—Sufficient cause *See* APPEAL, SECOND **225**

——— **ss. 5, 12, Sch. I, Art. 151**—*Appeal from Original Side filed beyond limitation—Copy applied for after expiry of limitation Time spent in obtaining copy, whether can be allowed—Extension of time—Sufficient cause—Calcutta High Court Original Side Rule, Ch. XVI, rr. 7, 27, Ch. IV, r. 9, Ch. XXXII, r. 22 (4).*

Plaintiff instituted a suit on 24th June 1916 and obtained an *ex parte* decree on the 4th February 1918. On the 1st July 1918 defendant filed an application to set aside the *ex parte* decree, but this was refused on the 26th July. On the 5th August plaintiff applied to have this order drawn up. The draft order was served upon the defendant on the 7th August and was returned by his Solicitor after approval on the 6th. On the 30th August, the last day on which the Court sat before the vacation after 4-30 P. M., the defendant appeared before Chaudhuri, J., for leave to file a memorandum of appeal against the decree of the 14th February 1918, the order of the 23rd March 1918 and the order of the 26th July 1918 without office copies of the two orders. The Court permitted the appeal to be filed, subject to objections which might be raised. On 3rd September the order of 26th July was filed at the instance of the plaintiff, and defendant applied for a copy of that order on the 9th September and obtained it on the 12th September.

Subsequently, a question arising before the Registrar as to the appeal against the decree and the order of the 23rd March 1918 being within time, the memorandum of appeal was amended and the appeal remained as an appeal against the order of 26th July 1918:

Held, that under Article 151 of Schedule I to the Limitation Act the appeal was *prima facie* time-barred, and that neither section 12 (2) nor section 5 of the Limitation Act could be availed of by the defendant who was guilty of unreasonable and unnecessary delay, and who did not apply to have the order drawn up, and for a copy of the order in accordance with the rules of the Court.

Per *Chitty, J.*—An appellant, who does not, within the period of limitation, apply for a copy of the order appealed from and who takes no steps whatever towards procuring such copy, cannot be allowed after the period of limitation runs out to claim exclusion of time requisite for obtaining such copy.

In order to obtain the indulgence allowed by section 5 of the Limitation Act, an appellant must satisfy the Court that he had sufficient cause for not preferring the appeal within the prescribed time. **C** PRAMATHA NATH ROY *v.* W. A. LEE, 23 C. W. N. 553 **582**

——— **s. 5**—*Appeal to wrong Court under advice—Time spent in prosecuting appeal, exclusion of—Bona fides of appellant.*

Where an appeal is preferred to a wrong Court in good faith and under advice that that Court has jurisdiction, the time spent in prosecuting the appeal should be excused or added under section 5 of the Limitation Act. **O** MAHABIR SINGH *v.* BEHARI SINGH, 1 U. P. L. R. (J. C.) 9 **235**

Limitation Act—contd.

——— ss. 5, 6, 7, 8, 15 (2), Sch. I, Art. 127—*Joint property, exclusion from, what constitutes—Denial of co-parcenary rights, effect of—Applicability of Art.* 127 *to minors—Guardian, knowledge of, whether binds minor—Extension of time by reason of disability of minority, limits of, doctrine of—Notice, statutory requirement of, effect of, on period of minority.*

In order that lapse of time may deprive a co-parcener of his rights in the joint family property by the operation of Article 127 of Schedule I to the Limitation Act it has to be established that he has been excluded from the enjoyment of the property to his own knowledge. If exclusion for twelve years to the knowledge of the excluded co-parcener is established, his rights will be barred but not otherwise. The mere fact that a co-parcener has not enjoyed any portion of the family property for 12 years or more cannot deprive him of his rights. Possession of one co-parcener is deemed in law to be possession on behalf of all co-parceners, although other co-parceners may take no part in the management and may not even enjoy any of the income of the porperty. What amounts to exclusion in a given case must be determined in the light of its peculiar facts

If a person is allowed maintenance and permitted to live in the family house, not as a co-parcener but as a mere dependant, while his claim as co-parcener is distinctly denied, the enjoyment of such residence or maintenance is not sufficient to prevent time running against his claim.

Article 127 of Schedule I to the Limitation Act applies equally to minors as to adults.

The effect of sections 6, 7 and 8 of the Limitation Act is that time runs against a minor just as against a person *sui juris* but in the case of a minor, he will have three years more after the cessation of the disability if the period of time allowed for the suit or application expired before he attained majority.

The knowledge of the guardian must be imputed to the minor within the meaning of Article 127. The Article contemplates that in the case of minors, the knowledge of the guardian is quite sufficient.

Section 15, sub-section 2, of the Limitation Act has nothing to do with the extension of time allowed to persons under disability under sections 6 and 8 of the Act. The period of limitation is calculated according to the Article applicable to a particular case, and, therefore, the period of notice required is to be added to the time allowed by the Article applicable to such a case. What sections 6 and 8 allow to a minor or a person under disability is 3 years and no more from the cessation of the disability and the 3 years' extension cannot be made into 3 years and 2 months by reason of section 15, sub-section 2 of the Act.

Per *Spencer, J.*—The concession which section 6 of the Limitation Act allows to minors is that they may sue within the same period after the disability has ceased as would be allowed by the appropriate Article of the Schedule to the Act. This concession is, however, limited by section 8 to a maximum of three years from attainment of majority. Where the 2nd column of the Schedule provides for a longer period of limitation than three years, the disability of minority cannot have the effect of extending the period which is running during the minority of a plaintiff to more than three years. This is the effect of section 8, read with section 6. **M** NARASIMHA DEO *v.* KRISHNACHENDRA DEO, (1919) M. W. N. 440; 10 L. W. 156; 37 M. L. J. 256 **725**

Limitation Act—contd.

——— ss. 5, 6, 7, 14—*Pre-emption suit—Vendee, one of several, death of, before institution of suit—Legal representatives brought on record after limitation, effect of—Extension of time.*

On 7th October 1914 the plaintiff brought the present suit to pre-empt certain lands sold by her father on 7th November 1913. One of the vendees had died before the suit was instituted and his heirs were impleaded as co-defendants on 8th December 1914. The suit was dismissed as time-barred on the ground that the sale was one jointly in favour of the vendees and as the suit was barred against the representatives of the deceased vendee, it was equally barred against the surviving vendee Plaintiff appealed, pleading minority and ignorance of the vendee's death:

Held, that sections 5 and 14 of the Limitation Act were not applicable to the case, and as sections 6 and 7 of the Act did not extend to suits to enforce a right of pre-emption, the suit had been rightly dismissed. **P** HUSAIN BIBI *v.* HAKIM, 86 P. R. 1919 **587**

——— s. 10, *applicability of—Money deposited as security—Payment to make good defalcations—Suit to recover money paid—Limitation.*

The plaintiff, while filling the office of *gomasta* under the Court of Wards, deposited as security his Post Office Savings Bank Pass Book with the defendant, then manager of an estate under the Court of Wards In 1910 plaintiff was dismissed, and it was found that a sum of money was due from him to the estate on account of defalcations he had committed. On 8th July 1913, the sum so due was, with the sanction of the Collector and the consent and authority of the plaintiff withdrawn from the Savings Bank and credited to the estate. The plaintiff demanded the money from the defendant, and this was refused on 14th September 1913 The estate was released in 1917 and the plaintiff on 25th February 1918 brought the present suit to recover the money from the defendant, who contended that the suit was barred by limitation, more than three years having elapsed since payment was refused. The trial Court overruled the objection and gave the plaintiff a decree, holding that section 10 of the Limitation Act was applicable to the case, as the money, or the Post Office Savings Bank Pass Book which the defendant converted into money, was trust property The defendant moved the High Court in revision reiterating his plea of limitation:

Held, that section 10 of the Limitation Act had no application to the case, as no property had vested in the defendant in trust for the plaintiff, as he had no control over it and could not withdraw the money without the consent and authority of the plaintiff, and that as the suit was instituted more than three years after the refusal to pay the money it was barred by limitation. **C** NANDA LAL BOSE *v.* ASHUTOSH GHOSH **65**

Limitation Act—contd.

——— s. 14—*Extension of time - Plaintiff in subsequent suit who was defendant in previous suit, whether can claim extension.*

An extension of time, under section 14 of the Limitation Act, can only be claimed if the plaintiff in the subsequent suit was the plaintiff in the previous suit: if he was the defendant, it cannot be said that he had prosecuted with due diligence another civil proceeding within the meaning of the section **P** NAZIM KHAN *v.* ALAM KHAN, 89 P. R. 1919 **561**

——— s. 14—*Insolvency proceedings - Creditor proving debt—Annulment of insolvency—Suit to recover debt—Limitation—Exclusion of time spent in proving debt in insolvency.*

A creditor who files a proof of his debt before the Official Assignee, prosecutes a civil proceeding within the meaning of section 14 of the Limitation Act, and is entitled to deduct the period during which he was so engaged in filing a suit to recover his debt on he insolvency being annulled **L B** N. K M. M. CHETTY *v.* LUTCHMAN CHETTY, 12 BUR L. T. 83 **934**

——— s. 14—Time spent in prosecuting wrong remedy, exclusion of. *See* CIVIL PROCEDURE CODE, O. XXII, R. 9 **465**

——— s. 15, Sch. I, Arts. 181, 182

Execution of decree—Stay of execution, effect of—Subsequent application, nature of—Time during which order remains in force, exclusion of—Oral application to proceed with sale, whether step-in-aid of execution.

Where an execution proceeding is stayed by an order of Court, a subsequent application for execution must be treated as virtually an application to continue the previous execution proceeding or to revive or carry through a pending execution suspended by no act or default of the decree-holder, and the limitation applicable to such an application is that contained in Article 181 of Schedule I to the Limitation Act

Where an execution proceeding is stayed by an order of Court, the decree-holder is entitled under section 15 of the Limitation Act to exclude the period from the date on which the order is made up to the date on which it is cancelled.

An application made by a decree-holder, whether orally or in writing, to the Court charged with the execution of his decree for the issue of a proclamation of sale is an application to take a step-in-aid of execution within clause (5) of Article 182 of Schedule I to the Limitation Act and forms a fresh starting point of limitation. From the mere fact of payment of process-fees, however, an application to take a step-in-aid of execution cannot be inferred; there must be an actual application to the Court, oral or in writing, to proceed with the sale. **O** GULZARI LAL *v.* RAM BHAJAN, 22 O. C. 75 **116**

——— s. 18, Sch. I, Art. 174—*Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Fraud—Person kept from exercise of right—Extension of time—Decree-holder failing fraudulently to certify payment—Application for certification by judgment-debtor—Limitation.*

Section 18 of the Limitation Act applies only to those cases in which a person has been kept from a knowledge of his rights, and has no application where he has been kept from the exercise of his right. So, where a decree-holder fraudulently promises to certify an adjustment out of Court and fails to do so, the judgment-debtor cannot claim the benefit of section 18, in order to extend the time for an application under rule 2 (2) of Order XXI of the Civil Procedure Code, which, owing to the fraud of the decree-holder, is made after the time prescribed therefor. **U B** MAUNG ON MYIT *v.* MAUNG SHWE PI, 3 U. B. R. (1919-1922) 169 **958**

——— s. 19—*Acknowledgment of liability under bond, effect of.*

Where a plaintiff, who is about to get a mortgage-bond assigned to himself, receives a notice from the defendant that "if you get an assignment, out of the sum of Rs. 100 that may still be due my liability will be only Rs. 50", the notice does not amount to an acknowledgment of liability to the plaintiff It is only an acknowledgment of liability under the bond. **M** MARUDAI MUTHIRIAN *v.* CHINNAKANNU MUTHIRIAN, 9 L. W. 82; 25 M. L. T. 295; 1919 M. W. N. 42. **243**

——— s. 20—*Hindu Law—Joint family*—Karta, *payment made by, whether binds other members of family—'Agent duly authorised,' meaning of.*

The defendant No. 1, as *karta* of a joint Hindu family, purporting to act for himself as well as for his minor brother, the defendant No. 2, made part payment of interest due on a debt contracted by himself and the father of the defendant No. 2 for joint family purposes:

Held, that in making the payment the defendant No 2, who as *karta* acted both for himself and for his minor brother, was an agent of the latter duly authorized to make the payment, and that the payment, therefore, had the effect of saving limitation in respect of the claim as against the defendant No. 2.

The words "agent duly authorized" in section 20 of the Limitation Act include authority given by law as well as authority given by act of parties. **C** CHANDRA KANTA *v.* BEHARI LAL **436**

——— s. 28 **269**

——— Sch. I, Art. 10, *applicability of—Pre-emption suit—Limitation, commencement of—Physical possession, delivery of, not possible, effect of.*

The first part of the third column of Article 10 of Schedule I to the Limitation Act does not apply to a case where the subject-matter of the sale consists of land or other tangible immoveable property, physical possession whereof at the date of the sale is with the holder of a particular or intermediate estate, *e g.*, an usufructuary mortgagee or a lessee, or a tenant for a time, owing to which circumstance the vendor is unable to give immediate physical possession to the purchaser. **N** JAIRAM *v.* SITARAM **940**

——— Art. 11. *See* CIVIL PROCEDURE CODE, O. XXI, R. 58 **720**

——— Art. 32—Mortgage payable on demand—Limitation, commencement of. *See* CONTRACT ACT, S 126 **634**

——— Art. 44 **269**

——— Arts. 48, 49, 141—*Misappropriation of materials of house—Suit to recover price of materials—Limitation, commencement of—*

Limitation Act—contd.

Suit to recover possession of property and for correction of entry in Record of Rights—Limitation.

A suit to recover the price of materials of a house removed and misappropriated by the defendants must be brought within the period of limitation prescribed by Article 48 of Schedule I to the limitation Act, and time begins to run from the date when the plaintiff first learns in whose possession the materials are.

A suit for possession and mesne profits in which the plaintiff asks for a declaration that an entry in the Record of Rights is incorrect is governed by the 12 years' rule of limitation. **Pat** TAFAZUL KHAN *v.* MOHAMMAD BAKSHI KHAN **361**

——— **Sch. I, Art. 49**—*Suit to recover moveables deposited for specified period—Limitation, commencement of.*

Where moveables are entrusted to any person on the condition that they will be returned on the expiry of a specified period, the fact that they are detained beyond that period and no demand is made for their return, does not render the detainer's possession unlawful. It is only when a demand is made and there is a refusal to comply with the demand that possession becomes unlawful, and the period of limitation for a suit for the return of the moveables, or, in the alternative, for their value, commences to run from the date of such refusal under Article 49 of Schedule I to the Limitation Act. **A** LADDO BEGAM *v.* JAMAL-UD-DIN, 17 A. L. J. 907 **332**

——— ——— **Arts. 49, 62**—*Suit to recover documents taken possession of and moneys realised by defendant—Limitation—Applicability of Art.* 62.

A.N carried on business in money lending and as a commission agent. He died on 3rd December 1905, leaving a widow, the present plaintiff. Upon *A.N*'s death his father *B.R.* carried on the business as the plaintiff's agent, till his death in February 1908, when *R.N.*, the brother of *A.N.*, took possession of the shop, all the *bahis* and account books, documents and a mortgage-deed. He realised certain sums of money due to the business, but refused to pay the amounts to the plaintiff and to give up the *bahis* and other documents. She, accordingly, on 2nd November 1912, brought the present suit (*a*) to recover the money realised by the defendant, (*b*) for an injunction prohibiting him from realising in future any debts due to *A.N.* and (*c*) for restoration of the *bahis* and other documents. The District Judge, being of opinion that the suit in respect of (*a*) was barred by time under Article 62, and in respect of (*c*) under Article 49, dismissed the suit. The plaintiff appealed and did not press her claim for an injunction:

Held, that the reliefs sought were rightly held by the District Judge to be barred under Articles 62 and 49 of Schedule I to the Limitation Act.

Article 62 applies to every case where a defendant, at the time of receipt, in fact, or by presumption or fiction of law, receives money to the plaintiff's use, and is not confined to cases where the defendant intended to receive the money to such use, and as, in this case, the plaintiff had alleged that she was in law solely entitled to the money, the defendant must undoubtedly have received the monies for her use, and therefore the Article applied to bar her claim. **P** DURGA DEVI *v.* RAM NATH, 85 P. R. 1919 **580**

Limitation Act—contd.

——— **Sch. I, Art. 60**—*Deposit with banker—Suit to recover deposit—Limitation.*

Where a deposit is in the nature of a banking deposit the depositee stands in a fiduciary relation to the depositor, and a suit to recover such deposit is governed by Article 60 of Schedule I of the Limitation Act. **A** LAKSHMI RAM JANI *v.* HARI RAM DUBE, 1 U. P. L. R. (H. C.) 13 **25**

——— ——— **Art. 61**—*Joint mortgage-bond—Payment by plaintiff - Contribution, suit for—Limitation, commencement of.*

A suit to recover excess payments made by the plaintiff towards a joint mortgage-bond executed by himself and the defendant, is a suit for contribution and must be brought within the period of limitation prescribed by Article 61 of Schedule I to the Limitation Act, the period counting from the date of the last payment made by the plaintiff any payment made by the defendant subsequently thereto would be of no avail to the plaintiff. **M** MARUDAI MUTHIRIAN *v.* CHINNAKANNU MUTHIRIAN, 9 L. W. 82; 25 M. L. T. 295; (1919) M. W. N. 429 **243**

——— ——— **Art. 61**—*Principal and agent—Agent borrowing money unauthorisedly and paying to principal's creditors—Suit by agent for recovery of amount paid—Limitation—Repudiation, absence of, whether amounts to ratification.*

A suit by an agent to recover from his principal money borrowed by the former without the latter's authority or ratification but which he paid to the latter's creditors is governed by Article 61 of Schedule I to the Limitation Act, the cause of action arising when payment is made to the principal's creditors.

A mere failure to repudiate in terms an unauthorised transaction does not amount to ratification. **M** KANDANA VENKATA VARADARAJA SOBANADHRI ROW *v.* ACHANTA VENKATA SUBBARAYUDU, 10 L. W. 33 **414**

——— ——— **Art. 61**—*Suit to recover revenue paid by plaintiff in respect of property of which he has been dispossessed—Limitation, commencement of.*

The period of limitation for a suit to recover revenue paid by the plaintiff while in possession of immoveable property, but of which he subsequently relinquished possession, is contained in Article 61 of Schedule I to the Limitation Act, and the period commences to run from the date on which the last payment was made. **A** ALAYAR KHAN *v.* BIBI KUNWAR, 17 A. L. J. 1025 **632**

——— ——— **Arts. 61, 120**—Suit by landlord to recover cess paid by him from tenant. *See* MADRAS LOCAL BOARDS ACT, s. 73 **468**

——— ——— **Arts. 62, 90**—*Suit by principal for account of profits earned by agent out of rival business, nature of—Limitation, commencement of.*

A firm instituted a suit against its former agent, (*a*) to re-open a settled account, and (*b*) for an account of the profits which the defendant had made in a business similar to that of the plaintiff firm and owned by the defendant. It appeared that the plaintiff firm were engaged in an extensive brick-making business, and had employed the defendant as one of their agents in charge of an agency After very many years' service, they discovered that the defendant was interested in, if not the actual proprie-

tor of, a brick-making business at a place some 5 or 6 miles from where the firm's agency was located, and which, in some respects, was adverse to the interests of the firm His services were accordingly dispensed with but, before he made over charge of the agency, a settlement took place between himself and an accredited representative of the firm, an entry being made in the ledger that the accounts had been checked and the cash balance found correct. Charge was then made over on that date of the stock and cash in hand, the entry being signed by the defendant and the representative of the firm. Subsequently, the firm instituted the present suit. The trial Court dismissed the suit. The lower Appellate Court, however, decreed the re-opening of the account, and for a rendition of accounts of the defendant's business, holding that in at least five instances fraud had been established against the defendant, and that in one instance an error of very great importance was shown. On appeal to the High Court:

Held, (1) that there was no legal justification for the finding of fraud, inasmuch as no specific instance of fraud had been alleged in the plaint and the finding was based on a superficial investigation and either on no evidence or on a careless view of the evidence;

(2) that, therefore, the claim for re-opening of the accounts was not sustainable:

(3) that as regards the claim for rendition of the accounts of the defendant's business, the suit was governed by either Article 62 or Article 90 of the First Schedule to the Limitation Act, and not having been brought within the period prescribed therein, it was barred by limitation

It is the duty of an agent not merely to do nothing to injure the interests of his principal, but to do all in his power to further them, and, therefore, not to place himself in a position in which his interests might be adverse to those of his principal. **A** PURAN MAL *v.* FORD AND MACDONALD & CO, LTD., 17 A. L. J. 105 **373**

——— Sch. I, Art. 64 —*Acknowledgment, whether statement of account—Endorsement promising to pay, whether agreement*

A mere acknowledgment is not a statement of account, and an endorsement expressed as follows:—"Will pay early next August" is not an agreement in writing of the nature contemplated by Article 64 of Schedule I to the Limitation Act It is nothing more than a proposal **O** VAKIL KHAN *v.* ANAND BEHARI LAL, U. P. L. R. (A. C. 13 **252**

——— ——— Arts. 73, 80 —*Promissory note, suit on—Agreement postponing date of payment—Limitation, commencement of.*

The period of limitation applicable to a suit upon a bill of exchange or promissory note, accompanied by a writing postponing the right to sue for a definite period, is contained in Article 80 of Schedule I to the Limitation Act, and the period commences to run from the date when such bill or note becomes payable **A** JWALA PRASAD *v* SHAMA CHARAN, 17 A. L. J. 950 **235**

——— ——— Art. 97—*Suit to recover money paid on existing consideration, which afterwards fails, maintainability of.*

A suit for money paid for an existing consideration which afterwards fails, such as is contemplated by Article 97 of Schedule I to the Limitation Act, lies if there is a contract between the parties **N** DEWAJI *v.* AMRITA, [illegible] L. R. 40 **818**

——— Sch. I, Art. 116 **269**

——— ——— Art. 120—*Declaration that property is not liable to sale in execution of mortgage decree, suit for—Limitation, commencement of.*

M. and *A.* mortgaged the suit property to *P.* *B.* brought a suit against *M.* and *A.* to recover possession of the property mortgaged and to this suit *P.* was not made a party. *B.* obtained a decree. *P.* then brought a suit on the basis of his mortgage against *M.* and *A.* in which *B.* was joined as a party, but the suit against *B.* was dismissed. *P.* applied in execution for the sale of the mortgaged property, but *B.* claimed it as her own and brought the present suit for a declaration that the property was hers and was not liable to sale in execution of *P's* decree. The suit was dismissed as barred by limitation, the trial Court holding that the cause of action accrued to the plaintiff on the date the mortgage was made, *i. e.*, on the 26th September 1907. On appeal to the High Court:

Held, that the fact of the mortgage having been made did not affect the plaintiff so long as no effort was made to sell the property in enforcement of the mortgage, and that the cause of action accrued to the plaintiff on the date on which the defendant attempted to sell the property, and that as the suit was instituted within six years of that date, it was not time-barred. **A** IMAM BANDHI *v.* PURAN PRASAD, 17 A. L. J. 973 **646**

——— ——— Art. 120—Suit for declaration of right to partition. *See* CO-SHARERS **73**

——— ——— Art. 120—*Trees, removal of, suit for—Limitation.*

The period of limitation prescribed for a suit by a landlord for the removal of trees newly planted by a person who had no right to plant them, is contained in Article 120 of Schedule I to the Limitation Act, and the suit must be confined to those trees which were planted within the six years immediately preceding the institution of the suit **O** BADAL *v.* NAGESHWAR BAKHSH SINGH, 6 O. L. J. 329 **858**

——— ——— Arts. 127, 144—*Joint family—Members in possession of specific items, whether exclude others from joint property—Co-tenancy—Co-tenant in possession of specific item—Adverse possession—English and Indian law.*

Where individual members of a joint family are in possession of specific items of joint property, such possession does not constitute an exclusion of the others from the family properties. To bar a plaintiff's right under Article 127 of Schedule I to the Limitation Act there must be exclusion from the whole of the joint family property.

In the case of a tenancy-in-common, the possession of one tenant is the possession of all, and is not adverse to his co-tenants in the absence of clear evidence of ouster

English and Indian Law on the subject of adverse possession among co-tenants reviewed by Seshagiri Aiyar, J. **M** KUMARAPPA CHETTIAR *v.* SAMINATHA CHETTIAR, 6 M. L. J. 612 42 M. 431; (1919) M. W. N. 328 **470**

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——— Sch. I, Arts. 131, 142—*Suit for possession of temple—Limitation.*

The period of limitation applicable to a suit for possession of a temple, the value of the temple itself being included in the plaint valuation of the suit, is contained in Article 142 of Schedule I to the Limitation Act. **M** SANKARALINGA MUDALIAR *v.* KUTHALINGA MUDALIAR **637**

——— ——— Art. 134—*Hindu Law*—Mutt—Mahant, *whether trustee—Property conveyed to* mahant *for benefit of* mutt, *nature of—Alienation by* mahant, *validity of—Suit to recover properties alienated—Limitation.*

The *mahant* of a *mutt* is a trustee, in law, of the *mutt* properties.

Where property is conveyed to the *mahant* of a *mutt* not for his personal use, but for the benefit of the *mutt*, the transaction is a conveyance in trust, within the meaning of Article 134 of Schedule I to the Limitation Act.

A permanent alienation of *mutt* properties by a *mahant* for purposes not beneficial to the *mutt* is beyond his powers, and a suit to recover properties so alienated must be instituted within 12 years of the date of the alienation, otherwise it will be barred under Article 134 of Schedule I to the Limitation Act. **M** DEIVASIKAMANI NATARAJA DASIKAR *v.* VALLIAMMAI ACHI, 37 M. L. J. 231 **914**

——— ——— Arts. 134, 148—*Mortgage—Mortgagee dealing with mortgaged property as owner, effect of—Auction-purchaser in execution of decree against mortgagee, position of—Redemption, suit for, by mortgagor—Limitation—Subrogation, doctrine of, applicability of.*

A mortgagee cannot, during the continuance of the mortgage, hold possession of the mortgaged property adversely to the mortgagor.

If, therefore, a mortgagee makes a temporary transfer of the mortgaged property by way of mortgage or lease, purporting to do so as proprietor, but recovers possession of the property before his mortgagee or lessee has acquired any adverse title, his position is just what it was before the mortgage or lease was made, and a suit for redemption of the mortgage by the original mortgagor would be governed by Article 148, Schedule I, to the Limitation Act.

It is only when a puisne mortgagee redeems a prior mortgage that the question of subrogation arises—the doctrine of subrogation has no application where the mortgagor himself, or his successor-in-interest, redeems the mortgage.

A purchaser at an auction-sale is not entitled to the benefit of Article 134 of Schedule I to the Limitation Act, even though the sale purports to transfer not merely the mortgagee rights which the judgment-debtor really possessed but the entire proprietary rights. **O** MOHAMMAD MOHSIN *v.* MOHAMMAD ABID, 22 O. C. 72 **159**

——— ——— Art. 144—*Adverse possession—Landlord and tenant—Dispossession of tenant, effect of—Knowledge of landlord—Trespasser, possession of, nature of.*

The general rule that where property is let out on lease the possession of a trespasser does not become adverse as against the lessor until the termination of the lease, is not applicable to a

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case where the tenant is holding over and the dispossession of the tenant is brought to the knowledge of the landlord. In such a case, the possession of the trespasser becomes adverse to the landlord's interest. **C** BAIKUNTHA NATH *v.* CHAITANYA CHARN **933**

——— Sch I, Art. 144—*Adverse possession—Trespasser, possession of, whether adverse to collaterals.*

R., prior to 1865, adopted *M.*, who predeceased him leaving an adopted son *J.* On *R.'s* death *J.* succeeded to the estate and a suit by certain collaterals of *R.* against him for possession was dismissed. On *J.'s* death his two sons succeeded. The plaintiff, another collateral of *R's*, brought the present suit for possession of *R.'s* land, but his suit was dismissed as barred by limitation. On appeal:

Held, that even if *J* was not the rightful heir of *R.* and his possession was that of a trespasser, it was, nevertheless, adverse to all the collaterals among whom was the plaintiff's father, and as plaintiff derived his title through his father, *J's* possession was adverse to him and his suit was barred by limitation. **P** MAHNU *v.* SHIHAN SINGH, 76 P. R. 1919 **857**

——— ——— Art. 144—*Co sharers—Adverse possession—Overt act.*

The entry on, and possession of, land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all the co-owners, for the reason that the possession of one co-owner is in itself rightful and does not imply hostility as does the possession of a mere stranger. A co-owner might, however, establish a plea of adverse possession, if it is clearly shown that he repudiated the title of his co-owners by an overt claim to exclusive ownership more than twelve years before the institution of the suit. **L B** HARI PRU *v* MI AUNG KRAW ZAN, 10 L B R. 45 **629**

——— ——— Art. 144—*Mortgage—Co-mortgagor redeeming entire mortgage—Possession, suit for, by other co-mortgagors—Limitation.*

Where one of several co-mortgagors redeems the entire mortgage and obtains possession of the mortgaged property, Article 144 of Schedule I to the Limitation Act applies to suits by the other co-mortgagors for recovery of possession of their shares from him. **O** SHEO GANGA BAKHSH SINGH *v.* RANJIT SINGH, 6 O. L. J. 361 **875**

——— ——— Art. 181. *See* PROVINCIAL INSOLVENCY ACT, 1907, ss. 16 (2) (*c*), 20 (*d*), 37 **188**

——— ——— Arts. 181, 182—*Pre-emption decree, execution of—Limitation, commencement of.*

A person who obtains a conditional decree for pre-emption or for redemption of a mortgage can execute his decree at any time as soon as he pays the purchase-money or the mortgage-money which the decree requires him to pay. But till he makes such a payment the decree is not capable of execution in his favour. The payment of the money is, therefore, a necessary step-in-aid of execution, and an application tendering the money in order that the decree-holder may be able to apply for possession forms a fresh starting point for limitation, whether Article 181 or 182 of Schedule I to the Limitation Act applies

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to the case. O CHANDIKA PRASAD SINGH *v.* KALU, 22 O. C. 82; 1 U. P. L. R. (J. C.) 41 **156**

——— **Sch. I, Art. 182** **362**

——— ——— **Art. 182 (5), (6)**—*Execution of decree—Notice under cl. (6)—Step-in-aid of execution—Limitation, starting point of.*

Where an application is made for a step-in-aid of execution which would entitle the applicant, under clause (5) of Article 182 of Schedule I to the Limitation Act, to a starting point for the computation of the period of limitation, the fact that a notice was issued previously under clause (6) of the Article would not prevent the applicant from taking advantage of the provisions of clause (5).

Where both clauses (5) and (6) of Schedule I to the Limitation Act are applicable to the facts of a case, the decree-holder is entitled to have the one which is most favourable to him applied. L B ISAHUT *v.* MI HLA PO WE, 12 BUR. L T 74 **937**

——— ——— **Art. 182 (5)**—*Execution of decree—Oral application to enter up partial satisfaction, whether step-in-aid of execution—Application, whether can be presumed.*

An oral application to the Court to enter partial satisfaction of the decree is a step-in-aid of execution within the meaning of clause (5) of Article 182 of Schedule I to the Limitation Act.

Even where there is no actual application on the record, such an application may be presumed in cases where the order made in execution is of such a nature that the Court would not have made it except upon an application for that purpose. L B ADIMUTHU PILLE *v* ADIAPPA, 10 L. B R 54 **656**

Lis pendens, *doctrine of, applicability of—Transfer in pursuance of compromise out of Court, whether protected.*

The doctrine of *lis pendens* cannot be applied so as to protect a transfer of land made during the pendency of a suit, when such transaction is not embodied in the final order or decree.

A purchaser from a litigant *pendente lite* cannot go behind the final order in the suit in order to show that the order would not have been made but for the fact that the land in dispute had been transferred to him by another party to the suit in pursuance of a compromise made out of Court. L B SUBRAMONIAN CHETTY *v.* MAHAIR ALI, 10 L. B. R. 43 **624**

Lunacy Act (IV of 1912), Ch. V—*Court, power of, to alienate portion of lunatic's estate.*

Under Chapter V of the Lunacy Act, where a manager is appointed of a lunatic's estate it is he alone who can, with the permission of the Court, alienate any portion of it. The Court has no power to do so. P BISHAMBAR NATH *v.* PARBATI, 83 P. R. 1919 **609**

Madras District Municipalities Act (IV Mad. of 1884), ss. 207, 264 (a), 278—*Latrine erected and located with approval of Municipality—Nuisance—Right of private owner to sue for removal of nuisance—Decree for demolition of latrine, legality of—Compensation, award of, under s 278, whether bars other remedies—Permissive and obligatory duties of Corporations.*

The erection of a latrine under the orders of a Municipality in a place approved by the latter does not render the owner immune from an action by a neighbouring owner or occupier for nuisance caused to him by the latrine.

Though the Municipal Act has authorized the Council to direct the location of the latrine in a particular place, the work should not be carried out so as to injuriously affect private interests more than is necessary.

The power given to a Municipality to supervise the erection by a private individual of a latrine must be regarded as a permissive obligation which should be exercised without unnecessary detriment to private rights and without creating an unreasonable nuisance.

The person complaining of the nuisance has a right of action to prevent the use of the building as a latrine, but no decree should be passed for the demolition of the building.

The provision in section 278 of the Madras District Municipalities Act for award of compensation by the Municipal Council for damage caused by the exercise of its powers does not interfere with the common law rights of injured parties.

Permissive and obligatory duties of Corporations explained M RAMA RAO *v.* MARTHA SEQUEIRA, 10 L. W. 147; 26 M. L. T. 122; 37 M. L. J. 224; (1919) M. W. N. 68; 42 M. 796 **921**

Madras Estates Land Act (I of 1908), ss. 3 (11), 13, (3), 143—*Landlord and tenant—Tenant paying rent at higher rates before passing of Act—Presumption as to future payment at same rate—Implied contract*—Pada nazzar, *levy of, legality of.*

Section 13 (3) of the Madras Estates Land Act does not preclude the Court from finding, from the payment by the tenant of higher rates for a long series of years prior to the passing of the Act, that an implied contract existed to pay at these rates in the future. The consideration for such an agreement may be presumed from the same facts as the agreement itself.

Pada nazzar, not being a art of rent, cannot be levied from a tenant. M K. RAMACHENDRA THEVAR *v.* S. V. VELAYATHA NADAN **951**

——— **ss. 131, 192, 205**—*Civil Procedure Code (Act V of 1908), s. 115—Order under s. 131—Revision—High Court, power of interference of—Deposit required by s. 131 not made on last day owing to absence of presiding officer—Delay, whether can be excused.*

Section 192 of the Madras Estates Land Act renders section 115 of the Civil Procedure Code applicable to all suits, appeals and other proceedings under the former Act, and thus vests the High Court with the power of revision in respect of orders passed under that Act.

The exercise of this power, however, is always discretionary, and where the petitioner has already applied to the Revenue Authorities without success, the High Court will decline to exercise its power of revision unless imperatively called upon to do so to prevent a miscarriage of justice.

Where the deposit required by section 131 of the Madras Estates Land Act cannot be made on the last day of the time allowed owing to the absence of the presiding officer, a deposit made the next day

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will satisfy the requirements of the section. **M** RAMASWAMI GOUNDAN *v.* KALI GOUNDAN, 36 M. L. J. 571; 42 M 310 **634**

Madras High Court Original Side Rules, r. 119—*Official Referee, disobedience of order of—Contempt of Court—Power of Court to commit—Form of order.*

A Judge presiding on the original side of the Madras High Court has power under rule 119 of the Original Side Rules to commit a person for contempt for disobeying the order of the Official Referee to produce certain documents alleged to be in his possession. **M** ORIGANTI VENKATARATHNAM *v.* DESIKACHARI, 36 M. L. J. 461; (1919) M. W. N. 368 **448**

Madras Local Boards Act (V of 1884), s. 73—*Cess paid by landlord—Tenant, liability of, extent of—Suit by landlord to recover cess paid by him from tenant—Limitation Act (IX of 1908), Sch. I, Arts. 61, 120.*

A landlord is primarily liable to Government under section 73 of the Madras Local Boards Act and a tenant is liable only to the landlord in respect of the portion of cess which the latter has actually paid and contingently on his having made the payment.

A suit by a landlord to recover from the tenant the cess actually paid by him must be instituted within the period prescribed by Article 120, and not by Article 61, of Schedule I to the Limitation Act. **M** RAJESWARA MUTHURAMALINGA *v.* MAHALINGA RAJU, 9 L. W. 287; (1919) M. W. N. 365 **468**

Magistrate directing arrest of accused, whether liable in suit for damages **609**

Maintenance, right to, whether transferable **953**

———, whether wife entitled to, after decree for restitution of conjugal rights **607**

Malabar Compensation for Tenants' Improvements Act (I Mad. of 1900), s. 5, scope of *See* TRANSFER OF PROPERTY ACT (IV OF 1882), ss 76 (1), 83 **834**

Malabar Law—*Husband and wife belonging to different* tarwads—*Wife, whether entitled to* "menchilavu" *from husband's* tarwad—*Maintenance, past, whether can be decreed.*

According to Malabar Law a wife who belongs to a *tarwad* different from that of her husband is not entitled to maintenance from her husband's *tarwad*, and, having no legal right to maintenance, she is not entitled to *menchilavu, i. e*, a luxurious form of maintenance.

A claim for compensation for *menchilavu* is on the same footing as a claim for past maintenance for which the Courts may give a decree. **M** RAVUNNI ACHAN *v.* KIZHAKKE NADUVATH, 10 L. W. 142; 37 M. L. J. 157; (1919) M. W. N. 571; 42 M. 789 **918**

——— Tarwad *property*—Karnavan *submitting to infringement of rights—Member, whether can take proceedings.*

If the *karnavan* for the time being of a *tarwad* submits to the infringement of the *tarwad's* rights of property, the next senior member may take proceedings.

Where a plaintiff *karnavan* died after a decree, and it was found that his successor was colluding with the defendants:

Malabar Law—concld.

Held, that the next senior member of the *tarwad* was competent to file an appeal. **M** KALLIANI AMMA *v* SANKARAN NAIR, 10 L. W 220 **688**

——— *Trustee of estate held by* devaswom—*Perpetual* kanom, *grant of, validity of—Construction of document*—Kanom-*deed stipulating for payment of renewal fee with rent and enjoyment by* kanomdars *'for ever and for ever,' whether creates permanent tenure—Adverse possession, claim of.*

The grant of a perpetual *kanom* by the trustee of a *devaswom* is not binding on the *devaswom*.

A *kanom* deed, after reciting that the *kanomdars* were to hold the properties 'for ever and for ever', stipulated for payment of a fixed renewal fee not at the end of 12 years but to be spread over the 12 years and paid along with the rent. This document was in renewal of a prior simple *kanom* under which the mortgagee took possession:

Held, (1) that the document should be treated as if it was a perpetual *kanom*;

(2) that the *kanomdars* could not set up an adverse title as they held possession under the earlier simple *kanom*.

The estate held by a trustee should not be regarded as analogous to that of a Hindu widow. **M** KUTTIPURATH KUNHUNNI PANIKKAR *v* RAMAN, 10 L. W 427; 26 M. L. T. 332; (1919) M. W. N 742 **675**

Malicious prosecution, *cause of action for, survival of.*

A. was prosecuted by *B.* and was acquitted, whereupon he brought a suit to recover damages for malicious prosecution which was dismissed by the trial Court. Shortly after this he died and his legal representatives appealed and obtained a decree. On second appeal to the High Court:

Held, that the Appellate Court was wrong in entertaining the appeal, as the cause of action did not survive to the legal representatives of the deceased plaintiff and they could not continue the action after his death. **Pat** PUNJAB SINGH *v.* RAMAUTAR SINGH **348**

——— *Prosecution by Police on information supplied by defendant—Informant, liability of—Damages, suit for.*

Where, upon a report to a Village Munsif, the Police, after investigation, launch a prosecution against certain persons, and it turns out that the communication to the Munsif was false and the persons are acquitted, the person who made the report is liable, at the instance of the persons prosecuted, in an action for damages for malicious prosecution. It is no answer to such a suit, and would make no difference to the defendant's liability for damages, that the prosecution was instituted and conducted by the Police, as the person primarily responsible for the prosecution is the person who furnished the false information. **M** PERIYA GOUNDAN *v.* KUPPA GOUNDAN, 26 M. L. T. 140; 37 M L. J. 234; 10 L. W. 235; (1919) M. W. N. 577; 42 M. 880 **782**

Maliki, *meaning of.*

The word "*maliki*" itself is a term of no special meaning. It may mean proprietary right or it may mean a lesser right superior to that of the actual cultivator of the land; even the right of a *ryot* who has let his land to an under-*ryot* is sometimes called *maliki*. **C** SHED AHMAD *v.* IBRAHIM **314**

Mandidhari rights, purchaser of, position of—Whether right transferable. *See* AGRA TENANCY ACT, 1901, s. 21 **238**

Matters substantially in issue. *See* CIVIL PROCEDURE CODE, s. 11 **258**

Mesne profits, whether can be claimed in suit for declaration of right to share in cultivatory holding. *See* DECLARATION **649**

Mesne Profits and Improvements Act (XI of 1855), s. 2, *scope of—"Other absolute estate," meaning of.*

The Mesne Profits and Improvements Act applies only to cases tried on the Original Side of the High Court.

The expression 'other absolute estate' in section 2 of the Mesne Profits and Improvements Act does not include the estate of a lessee with occupancy rights. **M** VENKATAPPIER *v* RAMASWAMI AIYAR, 10 L. W. 137; (1919) M. W. N. 548 **517**

Minor, *suit against—Guardian* ad litem, *duty of—Minor, whether bound by decree passed against him - Gross negligence of guardian—Burden of proof.*

If a minor is properly represented by a next friend or a guardian for the suit and there is no fraud or collusion on the part of the next friend or guardian or of the opposite party, and his next friend or guardian is not guilty of gross negligence, the minor is as much bound by a decree or order made in a suit or proceeding to which he is a party as if he were of full age, and it can be executed against him or his property, as the case may be, in accordance with law.

It is not the duty of a guardian *ad litem* to raise frivolous or untenable defences The amount of care and attention which the guardian of a minor is expected to bestow upon the case of his ward is the same as a reasonable person would devote to his own case.

Plaintiff's father executed a mortgage-deed by way of conditional sale in favour of the defendant on the 14th December 1896. It was stipulated that the mortgage-money would be paid within 3 years and that, in the event of default, the foreclosure clause would come into operation No payment having been made, the mortgagee, after making a demand and issuing a notice of foreclosure, brought the usual action for possession and obtained a decree against the minor sons of the mortgagor, who had died before the institution of the suit. The minors now brought the present suit to set aside the decree. It appeared that in the previous suit their mother acted as guardian *ad litem* and resisted it on various grounds:

Held, (1) that the onus lay upon the plaintiffs to establish gross negligence on the part of their guardian in defending the previous suit;

(2) that having failed to do so, they could not impugn the decree passed against them. **L** BIHARI LAL *v.* AMIN CHAND **346**

Misjoinder of parties, effect of—Irregularity. *See* CIVIL PROCEDURE CODE, 1908, s 99 **105**

Mortgage—*Consideration, failure to pay, effect of.*

The consideration for a mortgage may be money paid or promised to be paid afterwards. **O** NAROTAM PRASAD *v.* SHANKAR SINGH, 22 O. C. 112 **91**

——— *Covenants in favour of mortgagee in case of default—Waiver—Mortgagee, rights of.*

Where a mortgage-deed contains a specific covenant that the money due thereunder shall be payable within a certain period and that if it is not paid within that period the mortgagor shall pay the amount at the time of the redemption of an earlier possessory mortgage, which will not be capable of redemption until the money due under the subsequent deed is first paid, it is open to the mortgagee to waive one of the covenants and enforce the other **O** KALI CHARAN *v.* CHHAB NATH, 1 U. P. L. R. (J. C.) 39; 6 O L. J. 358; 22 O. C. 159 **413**

——— executed during pendency of attachment, effect of. *See* CIVIL PROCEDURE CODE, s. 73, O. XXXIV, R. 14 **645**

——— *executed by guardian of Hindu minor without sanction of Court, whether binding on minor.*

A testator by his Will gave away all his properties to his sons, defendants Nos. 1 to 6, and appointed his two elder sons defendants Nos 1 and 2, executors of his Will and guardians of their minor brothers, defendants Nos 3 to 6 The Will, which did not expressly impose any restriction on the executors' power to mortgage, stated that the testator had debts the interest payable whereon exceeded the income of his property and that, therefore, the executors should relieve him from the "sin of his debts" by granting permanent settlement of or by sale of certain properties specified in the Will. After the death of the testator, the executors, defendants Nos. 1 and 2, took a certificate of guardianship in respect of the properties of their minor brothers and about 10 years after the death of the testator executed a mortgage of the properties for selves and as executors to the estate of their father and also as certificated guardians of their minor brothers:

Held, (1) that the minors were not liable merely because the mortgage was executed by the defendants Nos. 1 and 2 as executors and as certificated guardians of the minors, but that the latter could be held liable only to the extent to which the debt was actually applied for their benefit;

(2) that, having regard to the terms of the Will, there was a restraint on the powers of the executors to mortgage the properties and that, as no permission of the Court under section 90, sub-section (2), of the Probate and Administration Act was obtained for mortgaging the properties, the defendants Nos 1 and 2 had no power to mortgage as executors under the Will:

(3) that at the date of the mortgage the real position of the defendants Nos 1 and 2 in relation to the defendants Nos 3 to 6 was that of guardians and managers and not that of executors. **C** UPENDRA NATH BISWAS *v.* SHIB KUMARI DEBI, 23 C. W. N. 634 **616**

——— in favour of minor, whether suit on by minor maintainable. *See* CONTRACT ACT, s. 11 **338**

——— *Interest, high rate of, whether can be reduced —Court, duty of.*

Where a deed of mortgage by way of conditional sale stipulates for the payment of interest at 30 per cent, the Court has no option but to allow this rate **C** EKTAR SIKDAR *v.* WAJUDDI TATI, 23 C. W. N. 980 **722**

——— *Interest,* post diem, *liability for—Stipulation for payment of principal and interest on certain day —Interest on arrears of interest, agreement for—*

Mortgage—contd.

Absence of provision for post diem *interest—Liability of debtor, extent of.*

Post diem interest is payable on a mortgage-bond on the general promise by the debtor to be liable for interest, though a definite term is fixed in the bond for repayment of principal and interest. If the liability under that general undertaking to pay interest is further extended by another undertaking which may be called appurtenant to the principal undertaking to pay interest upon arrears of interest and this further undertaking is found in the same document following the provision to pay interest, the intention of the parties must be deemed to be that both the principal and appurtenant undertaking should apply to the question of liability for *post diem* interest. **M** NARASIMHAYYA *v.* SRINIVASAYYA, 36 M. L. J. 118 **313**

——— Mortgagee dealing with mortgaged property as owner, effect of. *See* LIMITATION ACT, 1908, SCH. I, ARTS. 134, 148 **159**

——— *Occupancy rights, mortgage of, effect of—Death of mortgagor, effect of.*

A mortgage of occupancy rights prior to 1873, while valid as between the parties thereto, did not establish any relation between the mortgagee and the land-holder of the mortgagor. The mortgagee's right lasted only so long as the mortgagor's occupancy right was not extinguished. **U P B R** PARSHOTAM DAS *v.* DEONANDAN SINGH, 1 U. P. L. R. (B. R.) 19 **462**

———, payable on demand—Limitation commencement of. *See* CONTRACT ACT, s. 126 **684**

———, payment of part consideration for, whether mortgage good to extent of consideration paid *See* SPECIFIC RELIEF ACT **738**

———, whether constitutes antecedent debt. *See* HINDU LAW—ALIENATION **75**

——— *Redemption—Decree, proviso in, that right would be barred on default—Default, effect of—Suit, fresh, maintainability of—Civil Procedure Code (Act V of* 1908), *s.* 47—*Transfer of Property Act (IV of* 1882), *ss.* 89, 90.

Where a redemption decree, passed before the coming into force of the Transfer of Property Act, provided in terms that the right to redeem would be barred in case the amount provided by the decree was not paid within the time fixed by the decree and a default was committed in paying the said amount:

Held, that a fresh suit, brought after the period for executing the decree had expired, was not maintainable.

The Transfer of Property Act has no application to a decree passed before that Act came into force but the last instalment payable under which fell due after that Act came into force. **B** DINU YESU DESAI *v* SHRIPAD BAJI GARWARE, 21 BOM. L. R. 720; 43 B. 703 **463**

——— *Redemption—Mortgagee in possession, improvements effected by—Cost of improvements, whether can be allowed.*

Where a mortgagee in possession expends money on permanent works on the property which enhance the value thereof, and the cost of such works does not make it difficult to redeem the property, he is entitled to be repaid his expenditure on redemption. **P** RIKHI KESH *v.* JWALA SAHAI, 78 P. R. 1919 **862**

Mortgage—contd.

——— *Redemption—*Post diem *interest, whether recoverable—Intention of parties—Damages*

In order to ascertain whether a mortgagor on redemption is bound to pay *post diem* interest for the whole term during which the mortgage has been in existence, the instrument must be looked at as a whole and the intention of the parties gathered from the deed.

Plaintiff sued for possession by redemption of a certain shop on payment of the mortgage-money. The mortgage sued upon contained a covenant to redeem at the expiry of 5 years by payment of the *zar-i-rahn*, a covenant to pay interest at Rs. 5 per annum in the meantime and an agreement that, on failure to redeem, the mortgagee shall be at liberty to realise the principal mortgage money, interest, costs, etc, from the property mortgaged:

Held, (1) that the mortgagor did not contemplate paying interest indefinitely;

(2) that it was evident that interest for 5 years at all events was made a charge on the property;

(3) that the fact that 5 years' interest was made a charge on the property showed that that should be paid at the time of redemption;

(4) that under the circumstances the plaintiff must be allowed to redeem on payment of principal, interest for the specified term and interest by way of damages for six years prior to suit. **L** GHUMANDI LAL *v.* KANHAYA LAL **320**

——— *Redemption, partial, whether permissible—Mortgage, splitting up of, effect of.*

A purchaser of a portion of the equity of redemption who has been left out of a mortgage action, is entitled to claim partial redemption, and may also be compelled to redeem that portion of the mortgaged property in which he may be interested.

The general rule that a person who has any right to redeem has a right to redeem the whole of the mortgaged property and not a part of it, unless there is a special bargain, is subject to the exception that he has a right to redeem his own share only, where a mortgagee has acquired, in whole or in part the share of the mortgagor. The rule would not apply where the integrity of the mortgage is broken up, as where the equity of redemption is with two different persons. **Pat** SHEO NARAIN SAHU *v.* RAM NIREKHAN OJHA **512**

——— *Redemption, postponement of—Unconscionable bargain—Redemption, whether permissible before expiry of period—Undue influence—Contract Act (IX of* 1872), *s.* 16.

Where a mortgage-deed provides that redemption shall not take place before the expiry of a term of years, the fact that the terms of the deed are unconscionable will not entitle the mortgagor to avoid the contract and sue for redemption before the expiry of that period, unless he is able to prove that the contract was entered into under undue influence. **P** NIHAL *v.* SHIB SANT KUMAR, 94 P. R. 1919 **542**

——— *Redemption of proportionate share, when permissible*

When a mortgage is split up by the mortgagee buying up the equity of redemption from some of the heirs of the original mortgagor, anyone of the heirs of the mortgagor is entitled to redeem his share of the mortgaged property on the payment of a

Mortgage—concld.

proportionate sum due on his share. **A** MEWA RAM SINGH *v* GANGA RAM, 17 A. L. J. 910 **229**

——— *Redemption—Time-barred mortgage-deeds, whether must be redeemed along with deeds not barred.*

Where a person has executed several mortgages in favour of one party, some of which are barred, he can sue for redemption of such of the mortgage-deeds only as are not barred, and is under no obligation to redeem those which are time-barred. **M** KARNAVAN AND MANAGER OF THE TARWAD *v.* THAYAN KALLIANI **622**

———, *usufructuary—Landlord and tenant, relationship of, whether created—Transfer of Property Act (IV of 1882), s. 72—Mortgagee, power of, to grant leases—Tenant, position of—Redemption—Suit for ejectment of tenant—Limitation, commencement of—Bengal Tenancy Act (VIII B. C. of 1885), Sch. III, Art. 1 (a).*

In 1893 the plaintiffs mortgaged the *zemindari* interest in certain lands to defendants Nos. 1 to 5. The mortgage was in form a usufructuary mortgage. In 1913 the mortgagors redeemed the mortgage, but during the currency of the mortgage the mortgagees had let the land to defendants Nos. 6 and 7. The plaintiffs brought the present suit for a declaration that they were entitled to the land as their *khudkasht* land, and contended that defendants Nos. 1 to 5 had no right or title to settle the land with defendants Nos 6 and 7, who had not acquired occupancy rights in respect of the property and that in fact they were trespassers thereon. In appeal to the High Court the first contention put forward was that the *ijara zarpeshgi* mortgage did not create as between the mortgagors and mortgagees the relationship of landlord and tenant so as to make the defendants Nos 1 to 5 tenants of the plaintiff in the ordinary legal acceptation of the term:

Held, that the mortgage-deed in suit did not create the relationship of landlord and tenant between the mortgagors and mortgagees: the character of the deed was not a lease but a *mortgage*.

It was next contended that the defendants Nos. 1 to 5 were mortgagees only and had not the power or right to create an interest affecting the mortgaged premises of longer duration than their own interest in the same:

Held, that the defendants Nos. 1 to 5 were mortgagees in possession under a usufructuary mortgage of the *zemindari* right pledged as security for the mortgage-debt, and that they had the power in law to induct a tenant into the tenanted land subject to such mortgage when the whole or part of such tenanted land became unlet or vacant and without a tenant, and that such tenant when inducted by the mortgagees acquired non-occupancy rights in the tenanted land subject to such mortgage as aforesaid;

Held, further, that the plaintiff's suit was barred by limitation under Article 1, clause *a*) of Schedule III to the Bengal Tenancy Act The obligation in law upon the plaintiffs, if he desired to dispossess defendants Nos. 6 and 7, was to bring a suit in ejectment to eject them within six months after the expiration of the mortgage, or after the mortgage had been redeemed. **Pat** SHEO BARAT SINGH *v.* PADARATH MANTON **473**

Muhammadan Law—*Gift—Donor and donee residing on property—Delivery, whether necessary.*

In cases where the donor and the donee reside on the property, a gift of the property under the Muhammadan Law may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. **C** SHED AHAMAD *v.* IRRAHIM **314**

——— *Gift—Musha, doctrine of, applicability of—Donees, shares of, ascertainable, effect of.*

The Muhammadan Law doctrine of *Musha* is not applicable to a gift where the share of each of the donees can be ascertained. **C** GOHARADDI *v.* HASAIN KARIKAR **I**

——— *Guardian and minor—De facto guardian, power of, to transfer property belonging to minor—Transferee, position of—Suit by minor to recover property.*

A *de facto* guardian of a minor has no power to convey to another any right or interest in immoveable property belonging to the minor, which the transferee can enforce against the minor, nor can any such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. **N** AMIRBI *v.* SHAIKH KHAJA, 15 N. L. R. 154 **933**

——— *Marriage—Agreement that wife shall be at liberty to reside with her parents on certain contingencies arising, validity of.*

Conditions entered into at the time of marriage and contained in a *kabinnama* are enforceable although the *kabinnama* is executed subsequent to the marriage

There is nothing in Muhammadan Law opposed to an agreement entered into at the time of marriage which does not allow the wife to deny her husband's conjugal rights but permits her, on certain contingencies arising, to leave her husband's house and to insist on the conjugal rights being exercised in her parents' residence. **C** SABED KHAN *v* BILATUNNESSA BIBI **322**

——— *Minor—Guardian, de facto, of person and property of minor, powers of—Alienation by de facto guardian of minor's property, validity of—Ejectment, suit for, by purchaser, maintainability of.*

Under the Muhammadan Law a person who has charge of the person and property of a minor without being his legal guardian and who may be called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property belonging to the minor which the transferee can enforce against the minor; nor can such transferee, if let into possession of property under such unauthorized transfer, resist an action in ejectment on behalf of the minor as a trespasser. It follows, therefore, that, being himself without title, such person cannot seek to recover property purchased by him from the *de facto* guardian in possession of another equally without title. **C** DOOD MEHAR BIBI *v* ASRUB ALI **871**

——— *Minor—Mother, whether natural guardian—Act of mother, when binding on minor child.*

Although according to Muhammadan Law a mother is not a natural guardian, yet her action, when no natural guardian is in existence, which is obviously and manifestly to the advantage of her minor child, is binding on the minor. **P** MUHAMMAD RAMZAN KHAN *v.* SARDAR BEGAM, 71 P. R. 1919 **847**

Muhammadan Law—concld.

——— *Pre-emption—Partition*—Shafi-i-khalit—*Appurtenances, what are.*

When there has been a perfect partition of an estate and separate *mahals* with separate *tauzi* numbers are formed, although certain properties, such as wells, roads, tanks, etc., are left undivided, no right of pre-emption on the ground of common appurtenances exists.

The term "appurtenances" means facilities or amenities peculiar to the owner of an estate but derived not from the estate itself but by easement from the estate of another. Roads, wells, tanks, rent-free land occupancy holdings, etc, left undivided on the partition of an estate are not appurtenances. **Pat** KESHAB SINGH *v.* BANSI SINGH, 4 P. L. J. 420 **31**

——— Waqf—Mutwalli, *transfer of office of—Liability of old* mutwalli—*Power of* mutwalli *to restrain co*-mutwalli *from committing waste.*

Where the *mutwalli* of *waqf* property appoints another *mutwalli*, his responsibility remains unimpaired, unless such appointment or the transfer of the trust is confirmed by authority. Being so responsible, he is entitled to restrain his co-trustee from alienating or wasting any part of the *waqf* property. **A** ALI HUSSAIN *v.* MOHAMED HUSSAIN **628**

Native State, offence committed in—Trial in British India, when permissible. *See* CRIMINAL PROCEDURE CODE, s. 188 **668**

Nazrana, whether included in rent—Ejectment on failure to agree to amount of *Nazrana* fixed, whether permissible. *See* AGRA TENANCY ACT, ss. 4 (3), 67 **409**

Negotiable Instruments Act (XXVI of 1881), ss. 30, 32, 36, 64, 91, 92, 93, 94, 119—*Bill of exchange payable at sight or on demand—Dishonour by non-acceptance—Notice of dishonour by non-payment, whether necessary—Presumption on proof of protest, when arises—English Law.*

In the case of a bill of exchange payable at sight or on demand there can be dishonour by non-acceptance, though the law does not require that, in the case of such bill, there should be a presentment for acceptance. But if the drawee of such a bill refuses to accept it, it practically amounts to a refusal to pay and becomes dishonour by non-payment. That is to say, there is nothing in law which precludes a bill payable on demand being presented for acceptance although that may not be necessary In order, however, to sustain an action against the drawee, there must be dishonour and notice of dishonour given within reasonable time.

Under section 119 of the Negotiable Instruments Act, a Court is entitled to presume the fact of dishonour, but that is only so where there is a proper protest No such presumption would arise from a mere entry by a Notary Public of the words 'noted for non-payment' without giving the date of dishonour, and in the absence of a certificate of protest

Per *Oldfield, J* —The refusal to pay referred to in section 92 of the Negotiable Instruments Act includes a refusal to accept, such as is contemplated in section 91, which is a possible, though not an invariable or obligatory, preliminary to payment being demanded at all.

Negotiable Instruments Act—concld.

The Negotiable Instruments Act should be read conformably to the provisions of the English Law, which follows the general commercial law of the rest of the world. **M** VEERAPPA CHETTY *v.* VELLAYAN AMBALAM, 10 L. W. 39; (1919) M. W. N. 780 **370**

Non-admissible evidence—*Objection, failure to take, effect of.*

The omission to take objection to the admission of a document which is absolutely inadmissible does not make it admissible in law **C** BANWARILAL SINGH *v.* DWARKANATH MISSIR, 29 C. L. J. 577 **825**

Non-occupancy tenant obtaining mortgage of holding, effect of. *See* LANDLORD AND TENANT **236**

Notice to accused in sanction proceedings, whether necessary—Failure to give notice, effect of. *See* CRIMINAL PROCEDURE CODE, s. 195 **280**

Notification, Government—Restricting right of pre-emption, effect of, whether retrospective. *See* PUNJAB PRE-EMPTION ACT, s 3 **563**

Oaths Act (X of 1873), ss. 9, 10, 12—*Challenge to take oath—Oath not taken on appointed day on account of challenger's failure to pay charges—Oath taken on subsequent day—Challenger, whether bound by oath—Right to trial.*

The plaintiff challenged the defendant to take a particular oath on a specified day and the challenge was accepted including a term that, if plaintiff failed to pay the cost of taking the oath and the defendant did not take it, that should be treated as equivalent to his taking it. On the day fixed the plaintiff made default and defendant did not take the oath, but took it on a later day. The plaintiff objected and applied for a trial on the merits, but the trial Court made a decree in defendant's favour:

Held, that the plaintiff was not bound by the oath and that his default in his part of the agreement was not a foundation on which the law could allow any decree to be founded, and that it was for the defendant to show that his deviation from his agreement was immaterial and that the date specified in it was not of its essence **M** ATHERMANKUTTI *v.* CHANDROTH MOIDEENKUTTY, 10 L. W. 140; (1919) M. W. N. 535 **619**

Occupancy rights, acquisitition of. *See* IJARADAR **501**

———, claim of—Requisite of proof—Burden of proof. *See* LANDLORD AND TENANT **247**

———, mortgage of, effect of. *See* MORTGAGE **462**

, whether landlord can confer, on tenant. *See* LANDLORD AND TENANT **192**

Occupancy tenant, whether can challenge sale of occupancy rights or pre-emption sale. *See* PRE-EMPTION **525**

Opium Act (I of 1878), s. 9, cls. (c), (e)—*Possession of railway receipt by consignee with knowledge that parcel contains opium, whether amounts to possession of opium—Importation of opium, what amounts to.*

A railway receipt which covered a parcel of opium was traced to the possession of the accused. There was also found in his possession a letter addressed to him advising him of the despatch of the parcel:

Held, per *Richardson, J.*—That as the accused knew that the parcel sent to him contained opium, the

Opium Act—concld.

possession of the railway receipt constituted possession of the opium within the meaning of section 9 of the Opium Act.

Per *Shamsul Huda, J.*—That, although, under the circumstances of the case it was doubtful whether the accused was guilty of the offence of possessing opium under clause (*c*) he was clearly guilty of importing opium under clause (*e*) of section 9 of the Opium Act. **C** FONG KUN *v* EMPEROR, 23 C. W. N. 671; 29 C. L. J. 524; 20 CR. L. J. 624; 46 C. 810 **389**

Orissa Tenancy Act (II of 1913), ss. 3 (4), (6), 16, 31—Sarbarakari *tenure, transfer of—Landlord, consent of, whether necessary—Suit to recover fees—Consent, whether can be implied—Deputy Collector, person vested with powers of, status of.*

Section 16 of the Orissa Tenancy Act is applicable to cases in which a transfer is complete and valid as against the landlord, but a transfer of a *sarbarakari* tenure is not complete and valid as against the landlord until he has given his consent to it.

Where consent has not been given, the institution of a suit by the landlord to recover the amount of the fee payable to him for registration of a transfer is not an indication of consent, nor does any cause of action arise, and the plaint cannot be amended by adding a statement that the landlord is willing to acknowledge the transfer as valid against himself.

A person vested by the Local Government with powers to discharge any of the functions of a Deputy Collector under the Bihar and Orissa Act is a Deputy Collector within the meaning of section 3 (4) and (6) of the Act, and a Collector within the meaning of that section. **Pat** GOBIND RAMANUJ DAS *v.* DEBENDRABALA DASI, 4 P. L. J. 387 **231**

Oudh Civil Courts Act (XIII of 1879), s. 7—*Civil Procedure Code (Act V of 1908), ss. 24, 92- Suit under s. 92, whether can be transferred by District Judge to Additional District Judge.*

Section 7 of the Oudh Civil Courts Act permits a District Judge to assign, with the sanction of the Judicial Commissioner, to an Additional District Judge any of the duties connected with the trial of civil suits cognizable by a Civil Court.

Therefore, a District Judge has power to transfer a suit under section 92 of the Civil Procedure Code to an Additional District Judge, provided the assignment of such suits has been sanctioned in the manner required by law. **O** GAURI NATH *v.* RAM NARAIN, 22 O. C. 93 **45**

Oudh Courts Act (XIV of 1891), s. 8 **15**

Oudh Estates Act (I of 1869), ss. 22, 23—*Hindu Law—Succession to non-*talukdari *property of* talukdar, *regulation of—Law, applicable—Impartibility—Custom—"Ordinary law," whether includes custom—Burden of proof.*

Succession to the non-*talukdari* self-acquired property of a Hindu *talukdar*, entered in List II of the lists prepared under the Oudh Estates Act, is governed by the ordinary rules of Hindu Law, and not by the special rules laid down in the Act; in other words, in the absence of any custom established to the contrary, such property descends to the nearest collateral relative of that *talukdar* as against a remoter relative representing the senior line.

It does not follow that because there is a custom of impartibility in a family, therefore, there is a custom involving an order of descent different from that recognised by Hindu Law, nor can any such detailed custom be presumed from the mere fact of impartibility. Impartibility is a form of property perfectly well known to Hindu Law.

Oudh Estates Act—concld.

The words "the ordinary law to which members of the intestate's tribe and religion are subject", in section 23 of the Oudh Estates Act, include a custom where one is made out, but it is for the person who alleges a custom varying the ordinary law to establish it and, unless he does so, the ordinary personal law will prevail. **O** HAR BAKHSH SINGH *v.* NAGINDRA BAHADUR SINGH, 6 O. L. J. 266; 22 O. C. 68 **2**

Oudh Laws Act (XVIII of 1876), s. 9—*Pre-emption—Under-proprietary village, division of, into* mahals *and* pattis, *effect of.*

Where an under-proprietary village is divided and sub-divided into *mahals* and *pattis*, the sub-divisions must be recognised as separate entities for the purposes of section 9 of the Oudh Laws Act, although there is no separate engagement for the payment of the revenue in consequence of the division.

Therefore, a co-sharer in such an under-proprietary *mahal* falls under the category of the persons referred to in section 9, clause *e*, of the Oudh Laws Act and can enforce his right of pre-emption, if he is related to the vendor as against a person who is a co-sharer in the same *mahal* but is not related to the vendor or is a co-sharer in another under-proprietary *mahal*. **O** MOHAMMAD SARFARAZ HUSAIN *v.* MOHAMMAD SHAHIN KHAN, 22 O. C. 97; 6 O. L. J. 420 **69**

Oudh Rent Act (XXII of 1886), s. 67 (2)—*"Settlement", meaning of—U. P. Land Revenue Act (III of 1901), s. 57—Settlement records, correctness of—Presumption—*Sir, *plot recorded as, effect of.*

The phrase "settlement" in clause 2 of section 67 of the Oudh Rent Act refers to the last settlement prior to the passing of that Act.

Section 57 of the U. P. Land Revenue Act authorises the presumption that the latest settlement and current records are true. Where in the settlement records a plot of land is recorded as *sir*, it must be assumed that the record was made after proper inquiry that the plot had become arable and had been in the personal cultivation of the proprietor for seven years prior to the passing of the Land Revenue Act. **U P B R** TEKA RAM *v.* GAYADIN, 1 U. P. L. R. (B. R.) 20 **478**

Pada Nazar, levy of, legality of **951**

Pakka adatia, *position of—Suit by* pakka adatia *against principal—Contract, breach of—Damages—Interest, whether can be claimed.*

A *pakka adatia* can at will become a principal to enforce any contract which has been entrusted to him as agent by his original principal against that principal, and, when he sues relying upon his character as principal, his claim differs in no respect from that upon an ordinary contract between two principals and he is entitled to demand interest upon the amount which he claims as ordinary damages for breach of contract. **B** HUKAMCHAND SARUPCHAND *v.* ABRAHAM, 21 BOM. L. R. 783 **519**

Partition proceeding—Civil suit, maintainability of. *See* U. P. LAND REVEUNE ACT, 1901, s. 233 (*k*) **162**

Pauper, application for leave to sue as—Application to withdraw dismissed—Subsequent application for leave, whether maintainable. *See* CIVIL PROCEDURE CODE, s. 115, O. XXIII, R. 1, O. XXXIII, RR. 5, 7, 15 **562**

Penal Code (Act XLV of 1860), ss. 34, 111, 394, *applicability of—Robbery committed by four persons—Abetment—Death caused by one alone, whether probable consequence—Liability of others.*

A robbery was committed by 4 men; two, one of whom was the accused, went from house to house bullying and ill-treating the inmates and making them give up their valuables, while the other two kept guard on the house tops. Of the latter pair one was armed with a gun which he fired off several times, and towards the close of the affair when the villagers began to make it unpleasant for the robbers by stone throwing, he aimed at one of the villagers who took a prominent part in stone throwing, and shot and killed him. The accused, having been convicted of murder, appealed to the Chief Court:

Held, (1) that inasmuch as the fatal shot was fired by one man alone, the accused could not be convicted of murder by reason of section 34, Indian Penal Code;

(2) that in order to apply section 111, Indian Penal Code, it must be found (1) that the appellant was an abettor of the robbery and (2) that the murder was a probable consequence of the abetment and was committed in pursuance of the conspiracy to commit the robbery;

(3) that the appellant was one of the principals in the robbery and not merely an abettor;

(4) that even assuming that he was an abettor, it could not be said that murder was a probable consequence of the abetment to commit robbery;

(5) that the accused was guilty of an offence under section 394, Indian Penal Code. **P** HARNAM SINGH *v.* EMPEROR, 21 P. R. 1919 CR.; 20 CR. L. J. 635 **395**

——— ss. 34, 302, 325—*Attack made by two persons—Death caused by one—Offence—Murder—Intention—Grievous hurt.*

Where two persons armed with deadly weapons make an attack upon another and it is proved that death was caused by a blow inflicted by only one of them, both cannot be convicted of the offence of murder under section 302, read with section 34 of the Penal Code; to make both equally liable for the murder it ought to be established that both of them struck the deceased. The one who struck the blow is guilty of murder and the other, who must have known that grievous hurt would in all probability be caused, is guilty of having abetted an offence under section 325, read with section 109, of the Penal Code. **P** BAHAL SINGH *v.* EMPEROR, 24 P. R. 1919 CR.; 20 CR. L. J. 711 **791**

——— ss. 59, 395—*Dacoity—Punishment—Transportation, term of, length of—Approver, statement of, value of—Corroboration, absence of, effect of.*

When an offence is punishable with transportation for life or imprisonment for a term of ten years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment, namely, ten years.

Where, therefore, an accused, on conviction for an offence under section 395, Penal Code, was sentenced to transportation for 15 years, the High Court reduced the sentence to transportation for a term of ten years, that being the period of imprisonment provided for the offence.

Though the absence of any corroboration of the statement of an approver is not fatal to the conviction of a person named by him as one of the participators in an offence, it is nevertheless sufficient to cast doubt upon its justice and the accused is entitled to the benefit of the doubt. **A** ALLA-UL-DIN *v.* EMPEROR, 20 CR. L. J. 561 **49**

——— s. 97—*Person impressed for service against his will—Private defence, right of.*

A person is perfectly justified, under section 97 of the Penal Code, in offering resistance to his being taken away against his will with the object of being impressed for service or employment. **O** PANCHAM *v.* EMPEROR, 6 O. L. J. 327; 20 CR. L. J. 727 **887**

——— s. 147—*Rioting—Common object—Evidence—Proof.*

The alleged common object of an assembly which renders it unlawful must be established by evidence; it is not a matter that can be inferred.

In the absence of a clear finding as to how a fight originated, a conviction for rioting cannot be maintained **Pat** JADUBAR SINGH *v.* EMPEROR, 20 CR. L. J. 670 **494**

——— ss. 147, 148—*Rioting with common object of causing obstruction to measurement of* khas mahal *land—Burden of proof—Possession of disputed land not affirmatively proved, effect of.*

In a criminal case the burden of proving the charge substantially as drawn lies on the prosecution.

The common object of the unlawful assembly of which the petitioners were said to have been members and for which they were convicted by the lower Court under sections 147 and 148, Indian Penal Code was to cause obstruction to measurement and demarcation of *khas mahal* land by a *kanungo* and a *khas mahal tahsildar*. The land in question had lain fallow up to the date of the occurrence, and there was considerable doubt whether the prosecution had established that on the date of the occurrence actual possession of the land was with the Government:

Held, that having regard to the condition of the land and the nature of the acts of possession on which the parties relied, it was not established affirmatively that the land on which the alleged riot took place was in the actual possession of the Government, and that, therefore, the charge as alleged was not proved, and the petitioners were not guilty of rioting with the common object stated in the charge. **C** PANCHANON BOSE *v.* EMPEROR, 23 C. W. N. 693; 30 C. L. J. 19; 20 CR. L. J. 721 **881**

——— s. 193—*Fabricating false evidence—Witnessing service of summons on wrong person—Offence*

In a rent suit summonses were issued to, amongst others, one *S.* Accused No 1 identified a person as *S.* and the summons was served on him; accused Nos. 2 and 3 were witnesses to the service. It appeared, however, that *S.* had died some years before the suit was instituted. The three accused were accordingly convicted of an offence under section 193 of the Penal Code:

Held, that the conviction of accused Nos. 2 and 3 could not be maintained, as it was not proved that they were aware that service was to be effected upon *S.* **Pat** PRAYAG SINGH *v.* EMPEROR, 20 CR. L. J. 641 **417**

——— ss. 193, 423—Kabuliyat, *whether document, within meaning of s.* 423.

It is doubtful whether the language of section 423 of the Penal Code could be so interpreted as to include a *kabuliyat* within its scope.

The accused executed a registered document purporting to be a *kabuliyat* in favour of the complainant which contained recitals designedly false According to the accused this *kabuliyat* was accepted by the complainant:

Held, that as the recitals in the *kabuliyat* would be evidence against the complainant, the accused was guilty of an offence under section 193 of the Penal Code. **C** MOHAMMAD KAJIM ALI *v.* JARABDI NASHKAR, 29 C. L. J. 522; 20 CR. L. J. 574; 46 C. 986 **62**

——— ss. 209, 210—*Dishonestly making false claim—Fraudulently obtaining decree—Court not having jurisdiction, effect of—Offence.*

In order to bring a case under section 209 of the Penal Code, it is immaterial whether the Court in which the false claim was instituted had jurisdiction to try the suit. The words in the section are "a Court of justice," and not "a Court of justice having jurisdiction." Similarly, if a person obtains a decree fraudulently for a sum not due the case would fall under section 210 of the Code, whether the Court had, or had not, power to pass the decree. **A** BADRI *v.* EMPEROR, 20 CR. L. J. 698 **666**

——— s. 211, acquittal of accused whether sufficient ground for sanctioning prosecution under. *See* CRIMINAL PROCEDURE CODE, s. 19 **219**

——— ss. 300, 302—*Murder—Death caused by* lathi *blow—Offence—Burden of proving exception.*

In order to take a case out of the category of murder, it is for the accused to show that his act was covered by one of the exceptions to section 300 of the Penal Code.

If a man takes a *lathi* and deliberately assaults another on the head with the result that the skull is fractured, that act is murder unless the accused can show that it was removed from the category of murder by one of the exceptions to section 300. **A** PIARE *v.* EMPEROR, 17 A. L. J. 866; 20 CR. L. J. 678 **224**

——— s. 376—*Rape—Punishment, measure of, how to be determined.*

The measure of punishment for an offence of rape, under section 376 of the Penal Code, should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal and to the defenceless and unprotected state of the injured female The fact that the family of the injured girl have condoned the offence on being paid a sum of money should not be taken into consideration in determining the heinousness of the offence, or of the punishment to be inflicted. **N** LOCAL GOVERNMENT *v.* PYARELAL, 20 CR. L. J. 617 **423**

——— s. 379—*Theft—Tenant removing trees belonging to landlord—Custom set up by tenant—Burden of proof.*

The accused, tenants of a village, removed certain trees which had been uprooted in a duststorm. The trees were the property of the *zemindar*, and the accused admitted having removed them, but alleged that under a custom in the village they had the right to do so, and produced certain extracts from the *wajib-ul-arz* in support of their allegation. The Court held that the removal of the trees amounted to the offence of theft, and convicted the accused accordingly:

Held, that the extracts from the *wajib-ul-arz* did not evidence a custom authorising the removal of fallen trees by tenants without the consent of the landlord that the accused had failed to prove that the removal was not dishonest, and as the removal caused loss to the landlord which was wrongful to him and caused wrongful gain to the accused, the case fell within illustration (*a*) of section 378 of the Penal Code, and the conviction was justified **A** DUNYAPAT *v.* EMPEROR, 20 CR. L. J. 710; 17 A. L. J. 974 **790**

——— ss. 395, 396—Dacoity with murder—Offence, whether triable by Jury. *See* CRIMINAL PROCEDURE CODE, s. 268 **659**

——— ss. 403, 406—*Criminal breach of trust—Agent receiving money on behalf of principal and subsequently refusing to return it—Offence.*

Where an agent receives money on behalf of his principal, the money so received is the property of, and is owned by, the principal, and if such agent refuses, at the request of the person paying the money to refund it, he is not criminally liable, and, consequently, cannot be prosecuted for the offence of criminal breach of trust, as the gist of that offence is the dishonest misappropriation or the conversion by one to his own use of the property of another which has been entrusted to him. **Pat** RAM KHELAWAN *v.* EMPEROR, 20 CR. L. J. 654 **430**

——— ss. 420, 477A. *See* CRIMINAL PROCEDURE CODE, s. 103 **491**

——— s. 420—*Cheating—Goods paid for in currency notes—Shopkeeper, refusal of, to give face value of notes—Offence—Guilty, plea of—Admission of facts alleged, effect of*

Where a customer paid for goods in currency notes and a dispute arose as to the amount of change due to him, the shopkeeper stating that the notes were not worth their face value and in consequence gave less change than was due:

Held, that the shopkeeper did not commit the offence of cheating.

Where an accused person admits the facts alleged such admission does not necessarily amount to an admission of the offence with which he is charged.

Penal Code—contd.

B MURARJI RAGHUNATH GUJARATI v. EMPEROR, 21 BOM. L. R. 764; 20 CR. L. J. 684 **604**

——— **s. 430** – *Mischief—Guilty knowledge, whether necessary—Riparian owners, rights of, extent of*

Guilty knowledge is essential to a conviction for the offence of mischief, and, in the absence of any consideration or discussion of the circumstances and the reasonableness or otherwise of the act of an accused person, it is impossible to uphold a conviction for that offence.

A riparian proprietor can only take for the purpose of irrigation so much water as is necessary without materially diminishing what is to be allowed to descend, and the quantity of water that can be abstracted and used without infringing that essential condition must in all cases be a question of circumstances, depending mainly upon the size of the stream and the proportion which the water taken bears to the entire volume. **Pat** HARI SINGH v. KANCHAN MAHTO, 20 CR. L. J. 612 **276**

——— **ss. 447, 457, 511** – *Attempt and preparation, distinction between—Scaling roof in order to commit theft—Offence—House-breaking—Criminal trespass.*

Accused was detected on the roof of a bazaar with an open clasp knife in his hands and two gunny bags. It was found that he had come there with the intention of committing theft:

Held, that the matter not having proceeded beyond the stage of preparation, the accused could not be convicted of an offence under sections 457 and 511 of the Penal Code, but that he was guilty of an offence under section 447 of the Code. **L B** BATWA KHAN v. EMPEROR, 20 CR. L. J. 571 **59**

——— **s. 448** – *Criminal house-trespass—Annoyance, causing of—Intention—Offence.*

A person who has no intention of causing annoyance to any one and takes measures to avoid it cannot be convicted of an offence under section 448 of the Penal Code, even though a feeling of annoyance be the inevitable consequence of his being found out.

A house was occupied, only by the owner and his concubine who had an intimacy with the accused. The accused entered the house at her invitation in the absence of the owner and took measures to conceal himself as soon as the owner arrived, who, however arrested him:

Held, that the accused was not guilty of an offence under section 448 of the Penal Code. **O** EMPEROR v. RUPA, 22 O. C. 121; 20 CR. L. J. 610 **274**

——— **ss. 464, 471** – *Using false document—Alteration of date—Dishonesty or fraud, absence of, effect of—Offence.*

The accused altered the date of a document for the purpose of having the document received in evidence, but the alteration did not in any way help him as by altering the date he ruined his case. He was, nevertheless, convicted of an offence under section 471 of the Penal Code. In appeal to the High Court:

Held, that inasmuch as the element of "dishonesty" or "fraud" required under section 464 of the Penal Code was wanting, the conviction under section 471 could not be maintained **A** KALI DIN v. EMPEROR, 17 A. L. J. 872; 20 CR. L. J. 573 **61**

Penal Code—concld

——— **s. 466,** offence under, whether included in section 195, Criminal Procedure Code. *See* CRIMINAL PROCEDURE CODE, S 195 **390**

Period of limitation. *See* CIVIL PROCEDURE CODE, S 48 **742**

Petroleum Act (VIII of 1899), ss. 11, 15 (a)—*Transporting petroleum, what amounts to—Unlawful possession of petroleum, what is.*

A person who purchases petroleum from the agent of a company who, in order to give delivery, has to procure it from another place, cannot be convicted of "transporting" petroleum, within the meaning of section 11 of the Petroleum, Act.

A person who takes delivery of a quantity of petroleum in excess of the quantity allowed by law, and is unable to prove that he did not continue for a reasonable time to be in possession of the entire quantity of which he took delivery, is guilty of the offence of being in possession of petroleum in excess of the quantity allowed by law, within the meaning of section 15 (*a*) of the Petroleum Act. **P** HOSHNAK RAM-GANGA RAM v. EMPEROR, 28 P. R. 1919 CR.; 20 CR. L. J. 686 **606**

——— **s. 15 (a)**—*Storing petrol for person not licensed to deal in petrol—Offence—Abetment.*

The accused *A* and *B* were the manager and servant of a firm holding a license for storing petrol, who undertook to receive and store petrol for *C* (also an accused in the trial Court). Several drums of petrol were consigned to the firm from various places by *C* and were received and stored by *A* and *B*. *C* had no license to deal in petrol and he was convicted of importing, transporting and possessing petrol without a license. *A* and *B* were convicted for having abetted him. *C* appealed to the Sessions Judge and *A* and *B* moved the High Court:

Held, that in storing the petrol the firm in no way infringed the law, as they were under no obligation to inquire whether or not *C* had received the petrol in a licensed or unlicensed way, and that, therefore, *A* and *B* had committed no offence **B** BEHRAMSHA RATANJI v EMPEROR, 21 BOM L. R. 742; 20 CR. L. J. 665 **489**

Plaint, amendment of, when to be allowed *See* CIVIL PROCEDURE CODE, O. II, R 2, O. VI, R. 17 **464**

———, order of Appellate Court returning, whether appealable *See* CIVIL PROCEDURE CODE, ss. 21, 107, O VII, R. 10, O. XLI, R 33, O. XLIII, R 1 (*a*) **801**

Police Act (V of 1861), ss. 9, 29—*Failure to return to duty after leave, conviction for—Order to return to duty, disobedience of—Offence—Conviction for failure to obey order, legality of.*

Accused, a Police constable, failed to return to duty on the expiry of leave which he had obtained. He was prosecuted under section 9 of the Police Act and fined Rs 30. During the pendency of this case he was placed under suspension, and on the conclusion thereof he was reinstated and directed to appear in the Police lines and there to give two months' notice as required by section 9 of the Act, if he did not wish to continue in the Police force. He failed to comply with this order and was again prosecuted under section 29 and sentenced to

Police Act—concld.

undergo imprisonment. The Sessions Judge recommended that the conviction and sentence be set aside on the ground that the accused's failure to return to duty was one single offence and he could not legally be again convicted merely because he still failed to return:

Held, that the second conviction was not for the same offence but for another similar offence—the first conviction being for failure to return to duty after leave and the second for failure to return after he had been reinstated. **A** EMPEROR *v.* NURUL HASAN, 17 A. L. J. 873; 20 CR. L. J. 575 **63**

——— **s. 34**—*"Causes", meaning of—C. P. Municipal Act (XVI of 1903), s. 110—Act complained of under s. 34, Police Act, also offence under s. 110, C. P. Municipal Act—Conviction under Police Act, legality of—Revision—Interpretation of Statutes—Court, whether can consider policy underlying enactment*

The word "causes," as used in section 34 of the Police Act, is not a word of art but a word used in ordinary English, meaning "allows to exist"

A conviction for an offence under section 34 of the Police Act is not illegal merely because the act complained of also constitutes a breach of section 110 of the C P. Municipal Act, and as such is punishable under that Act as well.

Obiter—A Court of revision is not concerned with the policy underlying a legislative enactment, it is only concerned with the legality of the proceedings sought to be revised. **N** GOVIND *v.* EMPEROR, 20 CR. L J 671 **405**

Police Officer, *benami* purchase by, while in service, validity of. *See* CONTRACT ACT, s. 2 **153**

———, report by, whether "Police report" or 'complaint" **595**

Police report. *See* CRIMINAL PROCEDURE CODE, S 1 1 *b* **595**

Possession, prayer for, whether can be joined in suit for specific performance. *See* SPECIFIC PERFORMANCE **710**

Post Office Act (VI of 1898), s. 44 (1) *Post Office Rules, r 94—Provident Funds Act IX of 1897, s. 4—Money remitted through Post Office, whether belongs to remitter or payee—Provident Fund remitted through Post Office, whether can be attached in execution of decree against payee*

Money remitted by money-order through the Post Office does not cease to be the property of the remitter until it is actually paid to the remittee. Therefore, money standing to the credit of a person in the Railway Provident Institution as a compulsory deposit does not lose its character as such by the mere fact of its being remitted by money-order to the depositor, and it retains that character until it is actually delivered to the depositor. **L B** CHANCE *v.* BISWANATH, 12 BUR. L T 105 **925**

Pre-emption—Decree, execution of—Limitation, commencement of *See* LIMITATION ACT, 1908, SCH I, ARTS. 18, 182 **156**

——— *Denial of vendor's title in previous mutation proceedings, whether extinguishes right.*

The fact that the plaintiff in a pre-emption suit had, in mutation proceedings previous to the institution of the pre-emption suit, denied the title of the vendor to a part of the property does not deprive him of his right of pre-emption. **O** THEPAI *v.* MAHABIR PRASAD, 22 O. C. 144; 6 O. L. J. 318 **621**

——— *Occupancy rights, sale of—Occupancy tenant, whether can challenge or pre-empt sale.*

An occupancy tenant cannot challenge a sale of occupancy rights by another occupancy tenant in favour of the landlord and cannot successfully maintain a suit to pre-empt on such a sale. **P** SUBA *v.* KUTBA, 95 P. R. 1919 **525**

———, right of, limitation on. *See* PUNJAB PREEMPTION ACT, s 3 **563**

——— *Sale—Withdrawal of suit on payment of money, whether amounts to sale.*

Where one person is in possession of certain property and another person claiming title to the property is out of possession, and the latter brings a suit and withdraws it on terms, the withdrawal cannot be considered as a sale of the property in dispute so as to give rise to a right of pre-emption. **O** LACHHMAN PRASAD *v.* CHAMELA, 1 U. P. L. R. (J. C.) 11 **170**

——— *Suit—Sale of endowed property—Idol, whether necessary party.*

In a suit for pre-emption in respect of property endowed to an idol, the idol is a necessary party, and unless it is impleaded as a defendant, the suit must fail on the ground that a decree cannot be recorded against a party who is not actually before the Court. **A** MADHO RAM *v.* JAGAT SINGH, 1 U. P. L. R. (H. C.) 7 **18**

——— *Vendee, co-sharer in land purchased by virtue of previous sale—Previous sale set aside, effect of—Priority.*

The question of priority as between a pre-emptor and the vendee must be decided with relation to the state of things existing at the time of the sale, and not at any later period. Thus, where a vendee at the time of a sale is a co-sharer in the land purchased by him by virtue of a previous sale and has, therefore, a right of pre-emption, that right cannot be affected by the fact that the sons of the vendor in the previous sale subsequently sue and avoid that sale. **P** HIRA *v.* BANSI LAL, 27 P. W R. 1919; 90 P. R. 1919 **557**

Preliminary decree, appeal from, whether can be maintained after passing of final decree. *See* CIVIL PROCEDURE CODE, s 9 **697**

Presidency Towns Insolvency Act (III of 1909), s. 21—*"Payment in full," meaning of—Discharge of debts, whether payment—Annulment of adjudication.*

The payment by an insolvent to his creditors of four annas in the rupee and obtaining a full discharge of their debts is not a 'payment in full" within the meaning of section 2 of the Presidency Towns Insolvency Act, and such payment is not sufficient in law to entitle him to an order annulling the order of adjudication **M** BRIJI KESSOOR LAUL *v* OFFICIAL ASSIGNEE OF MADRAS, 37 M L J. 244; 26 M L. T. 221; (1918) M. W. N. 780 **979**

Press Act (I of 1910), ss. 3 (1), 4 (1), 17, 22—*Printing Presses and Newspapers Act (XXV of 1867), ss. 4, 5—Liberty of press—Control of printing presses—Declaration by owner of printing press—Deposit of security—Magistrate, power of, to dispense with security or to cancel or vary order relating to security, whether judicial or administrative—Notice to person affected, whether necessary—Order forfeiting deposit—Criminal Procedure Code (Act V of 1898), s. 435—Civil Procedure Code (Act V of 1908), s. 115—Revision*—Certiorari, *writ of, issue of—High Court, power of—Bringing into hatred or contempt—Attack upon system as distinguished from attack upon class—Press Act and Penal Code, provisions of, comparison between—Appeal to His Majesty in Council—Practice of Privy Council in criminal cases—Limitations on Committee's powers.*

The Indian Press Act contemplates that in ordinary cases security shall be deposited by the owner of a printing press used for printing a newspaper and the only duty of the Magistrate is to fix the amount and to receive it. The proviso to section 3, sub-section (1), gives him the power, for special reasons, to dispense with any deposit, but the same proviso also gives him the power to cancel any such order of dispensation, and the necessary consequence of such cancellation will be that security will have to be deposited according to the amount thereupon fixed by him within the limits prescribed by the Act, as would be done in normal course on the first making of the declaration required from every person who keeps in his possession a printing press.

The action of the Magistrate in requiring or dispensing with a deposit or in cancelling an order dispensing with a deposit is administrative and not judicial, nor is he bound, strictly speaking, to hear the person affected by his order, though it may be more discreet to do so.

The power of the High Courts, which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court, to issue writs of *certiorari* has not been taken away by the provisions of section 435 of the Criminal Procedure Code and section 115 of the Civil Procedure Code of 1908. But *semble*, that, assuming the order of the Magistrate to be a judicial order, the power to issue a writ of *certiorari* against any such order would be taken away by section 22 of the Indian Press Act (I of 1910).

The provisions of the Indian Press Act, section 4, as to the forfeiture of deposits are closely analogous to those of sections 124A and 153A of the Indian Penal Code. Both sets of provisions attempt to balance two important public considerations, the undesirability of anything tending to excite sedition or to excite strife between classes and the undesirability of preventing any *bona fide* argument for reform.

In substance, the question under clause (*c*) of section 4, sub-section (1), of the Indian Press Act comes to this, are the words used such as in fact to excite, or do they disclose an attempt which implies intention to excite hatred, contempt or disaffection towards the Government or of any class or section of His Majesty's subjects in India, and, in judging the question of intent, the publisher must be deemed to intend that which is the natural result of the words used having regard, among other things, to

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the character and description of that part of the public who are to be expected to read the words.

An attack upon a school of opinion does not necessarily involve an imputation upon the class who hold or give effect to that opinion. But one is apt to lead to the other, and in judging whether the second exists regard must be had to the fact that the words in clause (*c*) which refer to the hatred or contempt of a class or section are not limited by Explanation 2. In this respect the Press Act differs from the Penal Code.

The Board, in this case, observed that as they found that the Statute applicable had not been misconstrued by the local tribunal they would not, in any event, having regard to the constitutional limitations on their functions in criminal cases, have considered themselves justified in interfering, but that if they had thought it proper to look into the matter in detail, they would have held that on the merits the Court appealed from was right in supporting the declaration of forfeiture. **PC** ANNIE BESANT *v.* ADVOCATE-GENERAL, MADRAS, 37 M. L. J. 139; 20 CR. L. J. 593; 17 A. L. J. 925; 23 C. W. N. 986; 21 BOM. L. R. 867; (1919) M W. N. 555 10 L. W. 451; 46 I. A. 176 **209**

Presumption, *when arises—Corroboration, whether necessary.*

Where the law provides that a presumption arises under certain circumstances, that presumption must arise independently of whether there is any corroboration or not. **C** CHANDRA KISHORE HADI *v.* SHEIKH KUDRAT **480**

Principal and agent—*Tahsildar of landlord, failure of, to inform landlord of arrears of rent—Arrears barred through neglect of Tahsildar—Damages, suit for, maintainability of—Cause of action, accrual of*

A Tahsildar appointed by a landlord, whether he has or has not the power to institute suits for arrears of rent, is certainly under an obligation to take steps in proper time to give information to the landlord that unless suits are brought in respect of certain arrears of rent, they would become barred by limitation.

The omission of the Tahsildar to do so would make him liable for damages in respect of the arrears of rent thus becoming barred by limitation.

The cause of action for a suit against the Tahsildar for such damages arises when the arrears of rent become barred by limitation. - RAMESH CHANDRA ACHARJEE *v* EASIN SARKAR **71**

Principal and surety—Suit against surety without impleading principal whether maintainable. *See* CONTRACT ACT, S. 134 **870**

——— *Surety, liability of, extent of—Principal contract found to be void, effect of*

The liability of a surety is co-extensive with that of the principal debtor, except in so far as the contract may otherwise provide. In other words, the quantum of the obligation of a surety is the same as that of the principal debtor, whether he signs the document executed by the latter as a surety or as a co-executant, unless there is a contract to the contrary It does not, however, follow that a surety can never be liable where the principal debtor cannot be held liable. The creditor can fall back on the contract of indemnity and enforce

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the liability of the surety, if the contract entered into by the principal debtor is found for any reason to be void or voidable.

M. and *H.* mortgaged certain separate and distinct properties in favour of the plaintiff, but there was a condition in the mortgage-deed that the property mortgaged by *H.* would not be liable till for any reason the mortgage-money was found to be not recoverable from the property mortgaged by *M.* It was found that *M.* was of unsound mind at the time of the execution of the mortgage-deed:

Held, that the property mortgaged by *H.* was in the circumstances liable for the mortgage debt **C** GANGA PRASAD *v.* HAYAT MOHAMMAD, 22 O. C. 103 **88**

——— Surety paying off whole debt, position and remedies of. *See* CONTRACT ACT, s. 126 **684**

Printing Presses and Newspapers Act (XXV of 1867), ss. 4, 5 209

Priority—Previous oral sale with knowledge of donee—Donee, whether can claim priority. *See* REGISTRATION ACT, 1908, s. 48 **245**

Probate and Administration Act (V of 1881), s. 89.

Section 89 of the Probate and Administration Act expressly excludes from its operation all causes of action in respect of personal injuries not causing the death of the party.

Therefore, a cause of action for malicious prosecution does not survive to the legal representatives of the deceased plaintiff. **Pat** PUNJAB SINGH *v.* RAMAUTAR SINGH **348**

——— **s. 90**—*Permission to sell granted to Hindu widow—Sale, validity of, as against reversioner—Order granting permission, whether can be questioned in land acquisition proceedings*

Permission to sell, granted under section 90 of the Probate and Administration Act to an administratrix, who is a Hindu widow and heiress of her husband, is sufficient to prove the validity of the sale against the reversioner. To hold otherwise would be to introduce an unwarrantable qualification into the express provisions of the Probate and Administration Act with regard to Hindu widows.

There is nothing in the Probate and Administration Act which would justify a differentiation between the powers of an administratrix who happens also to be a Hindu widow and heiress of her husband and those of any other administrator under the Act.

In proceedings under the Land Acquisition Act it is not open to the Court to go behind an order of the District Judge passed in his probate jurisdiction or to review his order to see if it was correctly made **C** CHUNI LAL HALDAR *v.* MAKSHADA DEBI, 3 C. W. N. 652 **309**

——— **s. 90 2)**—*Will restraining power of executors to mortgage property—Mortgage without sanction of Court, validity of.*

When a testator says in his Will that the proceeds of a sale are to be applied in a particular manner, he practically points out very distinctly that the property is not to be mortgaged, more especially that it is not to be mortgaged at a high rate of interest, which must almost necessarily be injurious to the estate.

Where a Will contains an implied restriction on the power to mortgage the property, the executor has no power to mortgage the property without the

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sanction of the Court obtained under section 90, sub-section (2), of the Probate and Administration Act. **C** UPENDRA NATH BISWAS *v.* SHIB KUMARI DEBI, 23 C. W. N. 634 **616**

Procedure—*Pleadings—Case not put forward in pleadings sought to be proved by evidence—Court, duty of.*

One *T.* consigned 51 tins of *ghee* to the plaintiffs and signed a risk-note in form H in respect of them. When the plaintiffs went to take delivery, it was found that out of the 51 tins of *ghee*, 25 were empty, 25 were full, and one was leaking. The plaintiffs thereupon refused to take delivery and brought a suit against the Railway Company for damages. *T.* was examined on commission on behalf of the plaintiffs, but during his examination no suggestion was made by the plaintiffs that the 25 empty tins were substituted for the 25 full tins, and no such case was made in the plaint. More than a month after the examination of *T*, one of the plaintiffs wanted to examine himself for the purpose of proving that the 25 empty tins had been substituted for the 25 full tins, but the Court did not allow him to do so:

Held, that the Court was quite justified in declining to allow the plaintiffs to embark on a new case at such a late stage of the proceeding. **C** GOVINDA RAM DAS *v.* AGENT, EAST INDIAN RAILWAY **47**

——— *Point not raised in pleadings, whether can be argued.*

A Court ought not to allow a point to be argued before it which is not founded on facts, and in respect of which no definite issue is raised **C** GOHARADDI *v.* HASAIN KARIKAR **1**

Profits, *suit for share of, against* lambardar—Lambardar, *liability of, extent of, in respect of profits due before his appointment but collected by him.*

If a *lambardar* after his appointment collects the rents in respect of a particular crop, he is liable in respect of them to his co-sharers notwithstanding that he had not been appointed *lambardar* when the rents actually fell due. If he actually realises the rents, he is liable for the amount so realised. If he only recovers decrees, he is liable for the amount realised under the decrees or for the ascertained value of the decrees **A** BHARAT INDU *v.* MOHAMMAD MUSTAFA KHAN, 17 A. L. J. 167; 41 A. 116 **836**

Provident Funds Act (I of 1897), s. 4—Provident Fund remitted through Post Office, whether can be attached in execution of decree **925**

Provincial Insolvency Act (III of 1907), s. 16—*Transfer of Property Act (IV of 1882), s. 53—Adjudication, order of—Suit by creditor to set aside transfer by insolvent without leave of Court, maintainability of.*

After an order of adjudication has been passed under section 16 of the Provincial Insolvency Act, a creditor of the insolvent is debarred by sub-section (2) *b* of that section from suing under section 53 of the Transfer of Property Act to set aside a transfer by the insolvent without first obtaining the leave of the Insolvency Court **M** VASUDEVA KAMATH *v.* NATTOJI LAKSHINARAYANA RAO, 35 M. L. J. 453; 9 L. W. 475; 26 M. L. T. 90; (1919) M. W. N. 612; 42 M. 684 **442**

Provincial Insolvency Act—contd.

——— ss. 16 (2) (c), 20 (d), 37—*Application to avoid sale—Right to apply, when accrues—Creditor, whether can make application—Receiver, whether necessary party—Limitation*—Terminus a quo—*Limitation Act (IX of 1908, Sch I, Art. 181—Insolvency Court, powers and duties of.*

Before the right to make an application under section 37 of the Provincial Insolvency Act accrues, two conditions precedent have to be fulfilled, firstly, the application for insolvency must be made within three months of the transfer sought to be avoided, and, secondly, the debtor must be adjudged an insolvent.

The limitation for such an application is three years from the date when the right to apply accrues.

One *L* sold certain property of his on the 5th November 1913. An application for insolvency was made on the 30th of January 1914 and *L* was declared an insolvent on the 29th April 1914. An application to set aside the sale as against the Official Receiver, was made on the 9th December 1916:

Held, that the starting point for limitation was the 29th April 1914 and the application was not time-barred.

An Insolvent Estates Court is not only competent to entertain an application under section 37 of the Provincial Insolvency Act, but it is bound to enquire judicially into the matter when it is brought to its notice. The proper procedure is for the Receiver to make the application or at least to be a party to it.

Where, however, the Receiver fails to move in the matter, it is competent to a creditor to make the application. **L** NIKKA MAL *v.* MARWAR BANK, LTD. **188**

——— ss. 16 (6), 36—*Order of adjudication, date of operation of—Property transferred by insolvent within two years before presentation of petition of insolvency, whether liable to claims of creditors—Transfer, validity of*

Section 6 of the Provincial Insolvency Act should be read along with section 16 6 of the Act Therefore, for the purpose of making the properties of the insolvent liable to the claims of his creditors, an order of adjudication relates back to, and takes effect from, the date of the presentation of the petition for insolvency.

Under the provisions of section 36 of the Provincial Insolvency Act, read with section 16 6) of the Act, a transfer made by an insolvent more than two years before the date of the adjudication order out within two years before the date of the presentation of the petition for insolvency, may be void against the Receiver and annulled by the Court **C** RAKHAL CHANDRA PURKAIT *v.* SUDHINDRA NATH BOSE, 46 C. 991 **747**

——— ss. 35, 36, 37—*Transfer by debtor's transferee, avoidance of—Official Receiver, right of—Applicability of s. 36 where first transferee is only benamidar for his transferee—Colourable transaction—Enquiry by Court Joinder of subsequent transferee as party—Appeal against Court's order by creditor, legality of—Remand, order of Right of creditor appellant to be represented in further proceedings—Enquiry on report of Official Receiver, validity of—Madras High Court Rules under Provincial Insolvency Act, r. 2 (7)—Procedure.*

Provincial Insolvency Act—contd

It is not competent to a Court to institute an enquiry under section 36 or 37 of the Provincial Insolvency Act on a report by the Official Receiver, but where such proceedings are taken without objection they are not invalid *in toto*, and may be validated by the Official Receiver converting his report into a properly stamped petition.

The Court has jurisdiction under section 36 of the Provincial Insolvency Act to enquire into a petition by the Official Receiver for the avoidance of a transfer by the debtor's transferee, where the second transfer is only a colourable transaction and the debtor's transferee is only a *benamidar* for his subsequent transferee. In such an enquiry the second transferee is a necessary party.

Quære.—Whether the word 'insolvent' in sections 36 and 37 of the Provincial Insolvency Act would not include persons who have derived title from him and whether the sections do not contemplate action being taken against the transferees from the first transferee.

An appeal against an order passed under sections 36 and 37 of the Provincial Insolvency Act need not necessarily be presented by the Official Receiver but may be presented by a creditor of the insolvent. But the creditor will not be entitled to conduct proceedings had in pursuance of an order of remand by the Appellate Court.

Per *Seshagiri Aiyar, J.*—Having regard to the provisions of section 53 of the Transfer of Property Act, there must, ordinarily, be a suit against the subsequent transferee to recover possession. **M** JAGANNATHA AYYANGAR *v.* NARAYANA AYYANGAR **761**

——— ss. 36, 37—*'Court,' 'void,' meanings of—Transfer by insolvent—Fraudulent preference—Sale by Official Receiver—Suit by alienee of insolvent impugning sale—Validity of transaction, whether open as defence—Annulment of transfer—Insolvency Court, exclusive jurisdiction of*

The expression 'the Court' in section 37 of the Provincial Insolvency Act signifies the Court exercising jurisdiction under that Act.

The word 'void' in section 36 of the Provincial Insolvency Act means 'voidable'

A special statutory provision whereby District Courts and other Courts are invested by notification of the Local Government under section 3 (1) of the Provincial Insolvency Act with the power, among other powers, of invalidating certain defined transactions of insolvents, should not be extended to all Courts of original jurisdiction, whether notified under the Act or not

No Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference or a voluntary transfer made within two years of an adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, insolvent by a petition duly presented under the Act

It is only the Official Receiver who can set the Court in motion to annul a transfer under section 36 or section 37 of the Provincial Insolvency Act

Per *Sadasiva Aiyar, J.*—The Full Bench decision in *Lakshmi Dass* v. *Roop Laul*, 30 M. 169 (F. B.); 17 M,

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L. J 19: 2 M L. T. 4 should not be extended so as to enable a defendant to raise an equitable defence, if the Court before which it is raised would not have jurisdiction to entertain a suit if brought by the defendant to obtain the relief of cancellation based on the right put forward as the basis of the equitable defence Where the right to grant such a relief is, by Statute Law, vested in a Special Tribunal, the defence cannot be pleaded before another Tribunal not vested with such power. A transfer, therefore, falling under section 36 of the Provincial Insolvency Act remains valid till set aside by the Insolvent Court at the instance of the Receiver and the voidability of the transfer cannot be pleaded as a defence in any Court till it is set aside. **M** MARIAPPA PILLAI *v.* RAMAN CHETTIAR, 42 M. 322; 10 L. W. 59 **519**

——— **s. 42**—*Annulment of insolvency, application for—Payment of debts, proof of—Payment through Official Receiver, whether necessary.*

Where a person who has been adjudicated an insolvent applies for the adjudication to be annulled on the ground that his debts have been paid in full, the fact that such payments were not made through the Official Receiver is no justification for refusing to grant the annulment. The petitioner should be put to proof of the allegations made by him. **M** VELAYUDHAM PILLAI *v.* OFFICIAL RECEIVER, TINNEVELLY, 26 M L T 139: 919 M. W. N. 622 **689**

Provincial Small Cause Courts Act (IX of 1887), s. 35—Ex parte *decree passed by Small Cause Court—Application to set aside decree disposed of by Court not having Small Cause Court powers—Order, legality of—Procedure.*

An application was made to a Subordinate Judge to set aside an *ex parte* decree passed by him in the exercise of the powers of a Small Cause Court Before the Judge could proceed with the hearing of the application, he was transferred and was succeeded by another Judge who possessed no Small Cause Court powers. The latter proceeded to hear the application on the merits, though there was a Munsif possessing Small Cause Court powers in the district who had jurisdiction to hear the application under section 35 of the Provincial Small Cause Courts Act:

Held, (1) that as there was a Court possessing Small Cause Court powers, all pending proceedings which were within the cognizance of that Court should have been transferred to it:

(2) that the Subordinate Judge's order dismissing the application was *ultra vires*, as he had no jurisdiction to hear the application **O** SAHI DIN *v.* ABU SAID, 22 O C. 52 **647**

——— **Sch. II, Art. 31**—*Profits of land, claim for—Profits consisting of rent and being fixed sum—Jurisdiction of Small Cause Court.*

A suit for a specific sum as profits of land without asking for an account of profits is a suit of a Small Cause nature, and is not exempt from the cognizance of a Small Cause Court under Article 31 of Schedule II to the Provincial Small Cause Courts Act **M** HAMMAKKE BENGSU *v* KOCHAPPA RAI, 26 M L T 245 **631**

Punjab Alienation of Land Act (XVII of 1900), s. 16 **356**

Punjab Pre-emption Act (II of 1905), s. 3 (1), (2)—*Tea factory, whether agricultural land or village immoveable property—Forest, whether agricultural land—Tea garden, whether agricultural land—Government notification, whether has retrospective effect Waiver of right, proof of—Omission to include fixtures in claim, effect of—Pre-emption, right of, limitations on—Plaintiff, duty of.*

A tea factory built outside the limits of a village site is not liable to pre-emption either as agricultural land or as village immoveable property.

A stretch of natural forest which does not lie within the village site is also exempt from pre-emption, as it is not agricultural land nor land used for purposes subservient to agriculture

A garden is a plot of land devoted to the production of herbs, fruits, flowers and vegetables, and as tea does not fall under any of these heads, a tea garden is not a garden but is agricultural land and is liable to pre-emption

Where a person, having a right of pre-emption, congratulates a vendee upon his purchase and joins in an entertainment given by the vendee on that occasion, such conduct does not amount to a waiver by that person of his right.

A notification of the Government restricting the right of pre emption in a certain area cannot be regarded as having retrospective effect, so as to deprive a person of the right to pre-empt which he possessed prior to the issue of the notification but which from the date of the notification is taken away.

Where a plaintiff claims to assert a right to pre-empt a building used as a factory, he is not at liberty to omit to sue for the machinery therein as these are fixtures and form an integral part of the factory. A deliberate exclusion of the machinery fixtures would involve a dismissal of the suit.

The right of pre-emption is a very invidious right which constitutes an invasion of the principle of free contract, and the party who comes into Court to enforce that right must be careful to observe all the restrictions within which that right is hedged **P** KAJU MAL *v.* SALIG RAM, 91 P. R. 1919 **563**

Punjab Pre-emption Act (I of 1913), s. 3 (5) (a) **337**

——— **s. 30 (1)**—*Pre-emption—Vendee put in possession—Vendor not in exclusive possession, effect of—Limitation*

The vendors sold certain land owned by them and their nephew, who was a minor, ignoring his right and without joining him in the sale. The land being free of crop, the vendors stated to the Patwari that they had placed the vendee in possession:

Held, that, under the circumstances, it must be held that the vendee took possession of the land on the date of the sale and that limitation began to run from that date under section 30 of the Punjab Pre emption Act. **P** UDMI *v.* RAM GOPAL, 9 P. L. R. 1919 **48**

Railway, *carriage of goods by—Risk Note, Form B—Liability of railway, extent of—Wilful neglect or theft by railway servants, proof of—Burden of proof—Evidence Act (I of 1872), s. 103.*

Where goods are booked for conveyance by a railway under Risk Note, Form B, and, in consideration of a special reduced rate being charged, the consignor agrees to hold the Railway Adminis-

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tration harmless for any loss except for loss of a complete consignment or complete package due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants, it being provided that wilful neglect would not include robbery from a running train, then, in the absence of proof of wilful neglect or theft by the railway servants, the Administration is free from responsibility. If neglect or theft is proved, the Administration will escape liability for loss if proof is given of robbery from a running train, etc.

Where the plaintiff alleges wilful neglect or theft by railway servants, under section 103 of the Evidence Act it lies on him to give proof of the fact. **B** B. B. & C. I. RAILWAY *v.* RANCHHODLAL CHHOTALAL & Co., 21 BOM. L. R. 779; 43 B. 769 **516**

Railways Act (IX of 1890), s. 75—*Liability of Railway Company, extent of—Exemption from liability—Burden of proof.*

In order to avoid liability under section 75 of the Railways Act, a Railway Company must establish, first, that the articles composing the consignment were articles mentioned in the Second Schedule to the Act, and secondly, that the total value of the consignment exceeded Rs 100. There is no justification for reading the section as though it meant "when any articles mentioned in the Second Schedule are articles of intrinsic value and contained in a parcel or package delivered to a railway administration for carriage by railway." **A** SHUDARSHAN *v.* EAST INDIAN RAILWAY COMPANY, 17 A. L. J. 1031 **644**

——— ss. 126 (a), 130—*Minor, offence committed by—Summary trial by Magistrate, legality of—Criminal Procedure Code (Act V of 1898), s. 260, Sch. II—Penal Code (Act XLV of 1860), ss 82, 83.*

When a person is prosecuted under section 130, read with section 26 (*a*), of the Railways Act, the offence is not one triable exclusively by a Court of Session—a Magistrate has jurisdiction to try it, and to try it summarily.

Section 130 of the Railways Act enacts an offence distinct from the offences in sections 126 to 129 of the Act. A minor who is entitled to the benefit of section 82 or section 83 of the Penal Code, does not commit an offence when he is guilty of any of the acts or omissions referred to in sections 126 to 129 of the Railways Act. It is section 130 of the latter Act which, by excluding the operation of these exceptions, creates the offence. **B** EMPEROR *v.* DHONDYA DUDYA, 21 BOM. L. R. 768; 20 CR. L. J. 699 **667**

Recital *as to consideration, value of—Burden of proof.*

The recital in a mortgage-deed of the receipt of consideration is good *prima facie* evidence against an auction-purchaser just as it would be evidence against a purchaser by private treaty. **A** NARAIN DAS *v* DILAWAR, 17 A. L. J. 141; 41 A. 250 **830**

Registration Act (XVI of 1908), s. 17—*Compromise changing rate of rent whether lease—Registration, whether necessary.*

Where a compromise is effected between a landlord and a tenant varying the terms of the contract previously existing between them in respect of property valued at more than Rs 100, section 17 of the Registration Act does not operate if that compromise is embodied in a decree of the Court even though the compromise creates rights and liabilities extraneous to the suit The only exception is where the compromise creates a lease requiring registration under the provisions of the Registration Act.

A decree based upon and embodying a compromise, which does not transfer any interest in land but merely changes the terms of the contract on which a tenant was already holding, does not amount to a lease within the meaning of clause (*d*) of section 17 of the Registration Act. **Pat** RAMPADARATH SINGH *v.* SOHRAI KOERI **20**

——— s. 23—*Property comprised in deed situated in different districts—Registration in district where transferor has ceased to have interest in property, validity of—Fraud or collusion, effect of.*

If any portion of the property to which a document relates is within the district of the Sub-Registrar of the office where it is registered, the registration is a valid registration within section 28 of the Registration Act, even if it turns out that the transferor, though acting in a perfectly *bona fide* manner, has ceased to have an interest in that property, provided the property described exists It is only where there is fraud or collusion between the parties for the purpose of giving jurisdiction to a particular Sub-Registrar to register a document by including property which does not exist, that registration is rendered invalid. **Pat** RAM DAI *v.* RAMCHANDRABALI DEBI, 4 P. L. J. 433 **446**

——— ss. 47, 72, 74, 75, 85—*Denial of execution—Compulsory registration—Enquiry delegated by Registrar to another officer, effect of - Registration, validity of—Priority.*

A executed a sale-deed of certain land in *B*'s favour on 5th December 1916 but the deed was not registered. On 6th December 1916, *A* executed another sale-deed of the same land in *C*'s favour and the deed was followed by registration the same day. *A* refused to have the sale-deed in *B*'s favour registered *B* thereupon applied to the Registrar for compulsory registration under section 73 of the Registration Act, who referred the matter for inquiry to the Sub-Divisional Officer and on receipt of the latter's report directed the deed to be registered in *B*'s favour under section 75 of the Registration Act:

Held, (1 that the registration of *B*'s deed was not rendered invalid by reason of the Registrar delegating the holding of the inquiry to another person;

(2) that the sale-deed in *B*'s favour took effect under section 47 of the Registration Act from the date of its execution and must prevail against the sale-deed in *C*'s favour, notwithstanding the latter's earlier registration. **P** HARDWARI MAL *v* SHAMBHU NATH, 7 P. L. R. 1919 **99**

——— s. 48—*Priority—Gift by registered deed—Previous oral sale with knowledge of donee—Donee, whether can claim priority.*

Plaintiff sued for possession by partition of half of a house, alleging that it had been given to her orally by her father-in-law as part of her dower. The defendants, the widow and daughters of the deceased father-in-law, pleaded a subsequent gift by registered-deed of the entire house by him in favour of his wife, and contended that the oral transfer in favour of the plaintiff, even if proved, could not prevail. It

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appeared that the defendant widow was present at the *nikah* when the half share in dispute was given to the plaintiff:

Held, (1) that inasmuch as the oral transfer made in favour of the plaintiff was in consideration of a portion of her dower, it was a sale rather than a gift;

(2) that as the defendant widow had notice of the oral transfer previously made, it was not open to her to claim the benefit of the rule laid down in section 48 of the Registration Act. **P** YAKUB JAN *v.* RAHMAT NUR, 132 P. R. 1919 **245**

Remand, whether re-opens whole case or only in respect of party appealing. *See* CIVIL PROCEDURE CODE, S 115, SCH. II, PARA. 16 **569**

Rent, *decree against recorded tenants—Execution of decree—Sale of tenure—Subsequent suit for arrears—Transferee of portion of tenure, liability of.*

A tenure was sold in execution of a decree for rent obtained against the recorded tenants only. Afterwards, the landlord brought a suit for arrears of rent for the period between the date of the institution of the previous suit and the confirmation of the sale, as well as for some subsequent years, making the old recorded tenants and an unrecorded transferee of a part of the tenure, parties to the suit:

Held, (1) that the entire, tenure including the share of the purchaser of a portion of it whose name was not registered in the landlord's *sherista*, passed by the execution sale and that it was not open to such a purchaser to sue for a declaration of his right to his share in the tenure;

(2) that the unrecorded purchaser was not liable for the rent of the period subsequent to the confirmation of sale. **C** PROFULLA KUMAR SEN *v.* SALIMULLAH BAHADUR, 23 C. W. N 590 **304**

———, enhancement of—Method of assessing *See* AGRA TENANCY ACT, SS. 43, 44 **403**

———, rate of, presumption as to, where tenant paying at higher rates **351**

Res judicata—*Decree against limited owner, whether binds remainderman—Transferee from remainderman—Possession, suit for Limitation, commencement of.*

In 1866 *FS* made a Will bequeathing his property to his widow with remainder to her daughter. In 1878 *CB* sued the widow alone to recover the property, basing his claim on an earlier Will He was granted a decree and obtained possession of the property In 1879 the widow and her daughter gifted the property to *C* who sold his rights to the present plaintiff. On the death of the widow the plaintiff brought the present suit against the representatives of *CB.* to recover possession of the property, but the suit was dismissed on the ground that the plaintiff was bound by the decision in the suit brought by *CB* against the widow, and that it was barred by limitation. The plaintiff appealed:

Held, (1) that the suit was not barred by the rule of *res judicata*, inasmuch as the widow did not fully represent the estate, and that, therefore, the decision in the suit brought by *CB.* was not binding on her daughter nor on the plaintiff who claimed through the latter;

(2) that the suit was not barred by limitation, inasmuch as the only interest which *C.* obtained in the property by the gift in his favour was the

Res judicata—contd.

vested remainder of the daughter, and as the latter could not have brought a suit until her mother's death, the cause of action for the present suit arose when the mother died. **O** ACHHAIBAR SINGH *v.* HARGOBIND SINGH, 6 O. L. J. 355, 22 O. C. 156 **845**

———, *doctrine of, applicability of—Court which tried former suit not competent to try subsequent suit—Judgment binding on party in representative capacity, effect of.*

In order to apply the rule of *res judicata*, the Court which decided the former suit must be competent to decide the subsequent suit, and the judgment in the previous suit must be binding on the parties. Where the Court which tried the previous suit was, by reason of the pecuniary limits of its jurisdiction, incompetent to try the subsequent suit, and the judgment in the former suit was binding on the defendant only in a representative capacity, there would be no question of *res judicata*. **P** ANAND BAHADUR *v.* HARDIL AZIZ, 87 P. R. 1919 **545**

———, doctrine of, limitations of. *See* CIVIL PROCEDURE CODE, 1908, s. 11 **34**

——— doctrine of, whether applicable to second appeals **625**

——— *Estoppel—Mortgage by way of conditional sale followed by simple mortgage—Suit on simple mortgage—Purchase of equity of redemption in execution of decree—Suit to enforce conditional sale—Claim for full amount due—Denial of purchase of equity of redemption, effect of—Suit, subsequent, for declaration of full ownership, maintainability of*

T. executed three deeds of conditional sale in favour of the Raja of Bansi, and subsequently executed a simple mortgage in the Raja's favour. The Raja instituted a suit on the last mortgage and obtained a simple money-decree, in execution of which he brought to sale the whole of the equity of redemption of some of the properties mentioned in the deeds of conditional sale, and a portion of the equity of redemption of others, and purchased these interests himself, and continued in possession without causing any entries to be made in the revenue records as to the properties of which he was the mortgagee and those of which he was the owner. The Raja then sued for foreclosure in respect of the three deeds of conditional sale, and demanded the full amount due thereon; he made no mention that he had purchased any portion of the equity of redemption, nor did he allow for any reduction in the amount to be paid for redemption in virtue of his purchase of a portion of the equity of redemption and, in the course of the suit, denied that he had made such a purchase. He obtained a decree and the mortgagor paid up the amounts due. The Raja then instituted the present suit for a declaration that he was the full owner of the properties of which he had purchased the equity of redemption The trial Court dismissed the suit on the ground that it was barred both by *res judicata* and by the principle of estoppel On appeal to the High Court

Held, that the suit had been rightly dismissed, and that as the Raja had deliberately agreed to return the property free of all incumbrances on being paid a certain sum and as that sum had been paid the suit was barred by equitable estoppel, and this would be so even if the defendant was in a position

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to know that the plaintiff had a title under which he could have retained full proprietary rights over a portion of the property concerned. **A** RATTAN SEN SINGH *v.* TRIPATHI UGARNATH, 17 A. L. J. 988 **690**

——— Finding in favour of plaintiff—*Res judicata* between co-defendants. *See* CIVIL PROCEDURE CODE, s. 11 **258**

———*Partition—Arbitration proceedings—Ignorance of right, effect of—Admission, gratuitous, value of—Estoppel—Waiver of right, what constitutes.*

Plaintiff instituted the present suit for partition of certain joint property and for possession of certain other property as exclusively his. In 1909 a partition of some joint property of the parties was made by arbitrators appointed by them, and the plaintiff now alleged that there was other joint property, besides that dealt with by the arbitrators, which the defendant did not disclose, and the present suit related to this property. The defendant denied that the suit property was joint, and pleaded that the arbitrators' award, and the decree thereon, estopped the plaintiff from now alleging that any property, other than that included in the award, was joint, that the plaintiff had admitted at the time of the arbitration that the suit property was the exclusive property of the defendant, and that he had abandoned his rights in respect of the other property claimed by him. The trial Court, without recording a finding whether the property alleged to be joint was joint, dismissed this portion of the suit on the ground that the plaintiff not having included the property now alleged to be joint in the claim of 1909, he was debarred from suing for it now, the matter being *res judicata*. The plaintiff appealed:

Held, (1) that as the arbitrators neither gave any adjudication nor made any inquiry about the existence of joint property other than that mentioned in the agreement to refer to arbitration, and were told nothing about the property now in suit, their award did not operate as *res judicata* so as to bar the claim for partition of this property;

(2) that it was for the defendant to prove that the plaintiff had waived his rights, and waiver was not to be inferred from plaintiff's omission to give evidence and explain when and how he came to know that the property was joint;

(3) that in the absence of proof that plaintiff knew at the time of the arbitration that the property was joint, his admission would not amount to waiver; the admission being gratuitous could be withdrawn, and did not create an estoppel as it did not lead to any change in defendant's position. **P** MANOHAR LAL *v.* NANAK CHAND, 68 P. R. 1919 **503**

———, whether *ex parte* decree operates as *See* CIVIL PROCEDURE CODE, 1908, s. 11 **82**

Restitution. *See* CIVIL PROCEDURE CODE, s 145 **410**

——— of conjugal rights, suit for, coupled with prayer for injunction, value of. *See* SUITS VALUATION ACT, s. 9 **101**

Revenue Court, decree passed by, whether suit lies in Civil Court to set aside. *See* JURISDICTION OF CIVIL AND REVENUE COURTS **98**

Review, application for, whether affected by appeal filed while review pending **642**

Revision (Civil). *See* CIVIL PROCEDURE CODE, 1908, s. 115 **263**

——— Court refusing to accept deposit of purchase-money amounts to a refusal to exercise jurisdiction. *See* CIVIL PROCEDURE CODE, s. 115, O. XXI, R. 89 **344**

——— High Court, whether can interfere with order of Revenue Court for restitution. *See* AGRA TENANCY ACT, s 167 **640, 756**

——— *High Court, power of, scope of—Time fixed by lower Court for doing certain act, whether can be extended.*

In exercising the special powers given by section 115 of the Civil Procedure Code it is not for the High Court to enter into the question whether upon the facts a particular order is right or wrong

Quære—Whether the High Court, as a Court of Revision, has the power to extend the time fixed by a lower Court for the doing of an act by one of the parties. **C** JITENDRA NATH CHATTERJEE *v.* ASOKE NATH MITTER, 30 C. L. J. 64 **4**

——— *Jurisdiction of Court—Judge, whether bound to prove his jurisdiction—Party alleging want of jurisdiction, duty of.*

Where the jurisdiction of a Court is attacked at the hearing, it is not the duty of the Judge to prove to the parties the foundation of his jurisdiction. It is the duty of the party alleging want of jurisdiction to prove his allegation by affidavit or otherwise.

It is the duty of a person when applying in revision, particularly when relying upon want of jurisdiction, to provide himself first with the materials which prove the allegation on which he relies, and to lay them before the Court either by affidavit if they consist of statements which do not prove themselves, or by production of the record if they consist of statements which are proved by the record. **A** DARBARI LAL *v.* ROSHAN LAL, 1 U. P. L. R. (H. C.) 18 **32**

———, mistake of law, whether sufficient ground for interference in. *See* AGRA TENANCY ACT, 1901, s. 185 **151**

——— wrong decision on question of law not open to *See* CIVIL PROCEDURE CODE, s. 115, O. XXI, RR. 89, 90 **641**

——— **(Criminal)** *against acquittal—Question of law not free from difficulty—High Court, interference by.*

Where in an application for revision against an order of acquittal the questions of law that arose were not in all respects free from difficulty, the High Court refused to interfere in the exercise of its revisional jurisdiction. **C** MOHAMMAD KAJIM ALI *v.* JARABDI NASHKAR, 29 C. L. J. 522; 20 CR. L. J. 574; 46 C. 986 **62**

——— ———, order of Magistrate acting under s. 161, Bombay District Municipalities Act, open to. *See* BOMBAY DISTRICT MUNICIPALITIES ACT, s 161 **670**

Sale—Execution—Whether application to set aside can be made by private purchaser. *See* CIVIL PROCEDURE CODE, O. XXI, R. 89 **331**

——— Execution—Whether judgment-debtor entitled, after parting with his interest, to make application to set aside sale. *See* CIVIL PROCEDURE CODE, s. 15, O. XXI, R 89 **344**

———, proclamation of—Misstatement of approximate value in, whether irregularity. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R. 90 **23**

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——— in execution—Deposit made but not received by Court within thirty days—Whether sale should be set aside. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R 89 **161**

——— in execution of rent decree—Whether tenant can object to sale of holding **380**

——— in execution, whether application by prior vendee to set aside, maintainable. *See* CIVIL PROCEDURE CODE, s 15, O. XXI, RR 89, 90 **641**

——— in execution of decree—Absence of notice to judgment-debtor, effect of—Whether sale can be set aside. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, RR 56, 66, 90 **167**

Sale Certificate, statement in, as to situation of property, whether purchaser bound by. *See* ESTOPPEL **739**

Sarbarakari tenure, transfer of—Landlord's consent, if necessary. *See* ORISSA TENANCY ACT, 1913, ss. 3 (4), 6, 31 **231**

"Settlement". *See* OUDH RENT ACT, s. 67 (2) **478**

——— **Record,** continuous entry in, whether controvertible. *See* U. P. LAND REVENUE ACT, 1901, s. 44 **230**

Sikhism —*Marriage between different castes, validity of—Transfer of Property Act (IV of 1882), s. 59—Evidence Act (I of 1872, s. 69—Transfer of Property (Validating) Act (XXVI of 1917), s. 2—Mortgage-deed—Attestation, proof of—Hindu Law—Antecedent debt, what is.*

BS., a Sikh, mortgaged his ancestral joint family property to *SS.*, another Sikh, on the 26th July 1904, and subsequently executed four deeds of further charge on the same property in favour of *JS.* who, alleging himself to be the son of *SS.*, brought the present suit for sale of the mortgaged property, on the basis of these deeds, against *BS.* Subsequently, the sons of *BS.* were joined as defendants. *JS.* obtained a decree against *BS.* alone on the deeds of further charge, and against all the defendants on the mortgage-deed of the 26th July 1904. The sons of *BS.* challenged this latter decree in appeal to the Judicial Commissioner. The first point taken in appeal was that *JS* was not the legitimate son of *SS.* as his mother, a *sunar* woman, was the mistress of *SS.* and *JS.* had been born to her before she was taken over by *SS.*:

Held, that the parties being Sikhs, and it being open to a Sikh to marry any woman he pleased provided she adopted the Sikh religion, the facts (*i*) that *JS's* mother was always treated among the brotherhood as the wife of *SS.*, (*ii* that *JS* was always treated as the legitimate son of *SS*, (*iii*) that *SS.* made no disposition of his property by Will or otherwise, and (*iv*) that *JS* was referred to in the deeds of further charge as the son of *SS*, sufficiently proved that he was the legitimate son of *SS.*

It was next objected that the deed of mortgage of the 26th July 1904 was not properly attested as required by section 59 of the Transfer of Property Act, inasmuch as the executant of the deed had not signed the deed in the presence of one of the three attesting witnesses:

Held, that under section 2 of the Transfer of Property (Validating) Act, 1917, it was sufficient if the witness, before signing his name, received from the executant a personal acknowledgment

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of his signature to the same, and that unless this was proved, the witness was not an attesting witness, but that as it had been proved that the signatures of the other two witnesses were in their handwriting, and as the presumption under section 69 of the Evidence Act had not been rebutted, the due execution and attestation of the deed had been proved.

Lastly, it was contended that no portion of the consideration of the mortgage-deed was borrowed either for legal necessity or to pay off an antecedent debt, and that, therefore, the deed was not in any way binding on the sons of *BS*:

Held, that under the Hindu Law the principle of antecedent debt applied only when the sale or charge had been incurred not only antecedently but wholly apart from the ownership of the joint estate, or the security afforded or supposed to be available by such joint estate, and that a debt could not be regarded as antecedent so as to bind the sons as such, unless it had been incurred irrespective of the credit obtainable from the joint family property, and that as it had not been shown that the debts, for the payment of which the money was borrowed by *BS.* were incurred wholly apart from the ownership of the joint estate and irrespective of the credit obtainable from the joint family property, the sons of *BS.* were not liable to pay any portion of the mortgage debt of the 26th July 1904. **O** CHANDIKA BAKHSH SINGH *v.* WIDOW OF JAGAN SINGH, 6 O. L. J 331 **449**

Small Cause Court, jurisdiction of, in suit for damages for trespass **265**

Special Law. *See* CRIMINAL PROCEDURE CODE, ss. 1, 488, 489 **873**

Specific performance—*Agreement, oral, to grant lease—Draft to be prepared and approved by parties—Conditions, some, not settled—Specific performance, whether can be granted.*

It is settled law that there may be a concluded agreement, though a document is to be executed embodying its terms.

Where the parties agree to the execution of a formal lease the draft of which is to be approved by them, specific performance can be enforced of the original agreement, even though the draft has not been prepared and approved.

The defendant contracted orally with the plaintiffs to give them a *putni* lease of his share in certain property, at a certain annual rent and for a certain premium The agreement provided for the preparation of a draft of the lease according to the terms settled, which was to be approved by the lessor's Pleader. In a suit for specific performance of the contract:

Held, (1) that all the material terms of the lease having been settled, in the absence of express agreement to the contrary, matters not expressly settled would be regulated by the provisions of the law in that behalf:

(2) that there was, in the circumstances of the case, a binding agreement to grant a lease, though a document was to be executed embodying its terms, and, therefore, defendant could not resile from the agreement, nor could he or his Pleader refuse assent to a properly drawn instrument

Per *Shamsul Huda, J.*—In all cases of an agreement for a sale or for a lease where a registered document

Specific performance—concld.

is necessary to complete the transfer, the approval and execution of such a document is always in the contemplation of the parties. To hold that in all such cases there is no contract capable of specific performance till the document itself is executed, would lead to results which the law never contemplated. **C** BIJOYA KANTA LAHIRY CHOWDHURY *v.* KAILASH CHANDRA BHOWMIK, 23 C. W. N. 563; 46 C. 771 **575**

———, *suit for—Sale of land—Person in possession of land with knowledge of agreement, whether necessary party—Possession, prayer for, whether can be joined.*

To a suit for specific performance of a contract for the sale of land, a person who has obtained possession of the land with the knowledge that there is a prior agreement for sale in favour of the plaintiff, is a necessary party.

Where parties properly sued for specific performance of a contract for the sale of land are in possession of the land the plaintiff may add a prayer for possession to the prayer for specific performance and so obviate the necessity for filing a fresh suit for possession. **M** VELAYUDA CHETTY *v.* KUMARASWAMI CHETTIAR, 10 L. W. 201; (1919) M. W. N. 572 **700**

Specific Relief Act (I of 1877), s. 31—*Award—Decree based on award—Fraud—Rectification of decree, suit for, maintainability of.*

Where fraud is alleged, a suit will lie to rectify a decree based on an award, and such suit may be brought in a Court of inferior grade to the one which passed the decree, provided such inferior Court has jurisdiction as to the subject-matter of the suit.

Section 31 of the Specific Relief Act, which permits the rectification of an award, must also be taken to permit the rectification of a decree which is based on and gives formal expression to the award. **S** CHAINRAI *v.* DEVIBAI, 13 S. L. R. 144 **916**

——— **s. 42**—*Authority to adopt set up by widow in Will—Suit by reversioner for declaration that Will is not genuine, maintainability of.*

Where a Hindu widow sets up a power to adopt conferred on her under an alleged Will, it is open to a reversioner to sue for a declaration that he is a reversioner of the deceased and that the Will is not genuine. **M** MALLAMPALLI SOMAYYA *v.* ANNAPURNAMMA, 10 L. W. 25; 26 M. L. T. 139; 42 M. 699; (1919) M. W. N. 794 **380**

——— **s. 42**—*Mortgage, payment of part consideration for—Declaration, suit for that mortgage is good only to extent of consideration actually paid, maintainability of.*

A suit by a mortgagor for a declaration that the mortgage is good only to the extent of the part consideration actually paid, is not barred under section 42 of the Specific Relief Act where the term fixed for redemption has not expired at the date of suit. **M** NAVUNNI *v.* RAMASWAMY PATTER, 10 L. W. 169 **738**

Stamp Act (II of 1899), s. 12, Sch. I, Arts. 1, 5—*Cancellation of adhesive stamp, how to be effected—Memorandum of agreement, what*

Stamp Act—concld.

is—Sarkhat *acknowledging debt and stipulating rate of interest payable, nature of—Stamp payable.*

A memorandum of the rate of interest to be payable in future, when appended to an acknowledgment of a debt, over the signature of the debtor, for the express purpose of being used hereafter as evidence of an agreement to pay interest at the particular rate specified, must be regarded as a stipulation to pay interest within the meaning of the proviso to Article 5 of the First Schedule to the Stamp Act, so as to make the document a memorandum of an agreement within the meaning of Article 5 of the same Schedule, and a document, described as a *sarkhat*, which, in addition to acknowledging a debt, contains, over and above the said acknowledgment, a note of the rate of interest to be payable hereafter on the debt thus acknowledged, is a document of the foregoing description.

The question whether a particular adhesive stamp has or has not been cancelled in a sufficiently effectual manner, so that it cannot be used again, is one which must be considered with reference to the facts of each particular case. Where a person writes his name close to a stamp on its left side, and continues the line which forms the upper portion of the writing in the Hindi character across the face of the stamp, and immediately against the right hand edge thereof continues his writing by the insertion of words of formal acknowledgment, this is an effectual cancellation of the stamp within the meaning of section 12 of the Stamp Act. **A** MAHADEO KORI *v.* SHEORAJ RAM TELI, 17 A. L. J. 19; 41 A. 169; 1 U. P. L. R. (H. C.) 29 **974**

——— **s. 19**—*Promissory note, unstamped, executed outside British India, suit on, maintainability of—Admissibility, without affixture of proper British Indian stamp.*

If a promissory note executed outside British India is valid according to the law of the place where it was executed, it can ordinarily be sued upon in India and is admissible in a British Indian Court without affixing any Indian stamp on it. If any stamp is necessary, it is sufficient if, at the time of the decree, an Indian stamp is affixed to it. **M** KUNHI KOYA *v.* PANIKKA VITTIL ASSAN BAVA, 36 M. L. J. 188; 25 M. L. T. 191 **477**

——— **s. 37**—*Certificate by Collector under s. 37, grant of, legality of—Endorsement on pro-note that penalty has been levied, effect of—Pro note, invalid, suit on—Trial without objection by parties—Original cause of action, suit on—Amendment of plaint—Oral application, whether sufficient—Civil Procedure Code (Act V of 1908), s. 153, O. VI, r. 17.*

An endorsement on a pro-note by a Sub-Collector that penalty has been levied, is not a certificate within the meaning of section 37 of the Stamp Act that the pro-note is duly stamped.

Where a suit is based on a pro-note which is invalid under the Stamp Act but which both parties think is valid, the Court should allow the plaintiff to amend his plaint and fall back on his original cause of action.

A written application is not necessary to move the Court for an order allowing an amendment of the pleadings. An oral application is sufficient. **M** KAMAKSHI AMMAL *v.* SUBBARAYA CHETTY, **758**

Statutes, interpretation of—Court, whethe can consider policy underlying enactment. *See* POLICE ACT, s. 34 495

——— interpretation of—Legislative Council, proceedings of, whether can be referred to. *See* ARBITRATION ACT, 1899, ss. 4 (*a*), 19 139

———, *interpretation of—Legislative discussions, whether can be looked at.*

In interpreting the meaning of a word in a legislative enactment, it is the duty of the Court to refrain from examining the discussion and the views of the legislative authority which enacted the Statute. It has to look at the meaning of the word only. **A** SHUDARSHAN *v.* EAST INDIAN RAILWAY COMPANY, 17 A. L. J. 1031 644

Step-in-aid, oral application to enter up partial satisfaction, whether. *See* LIMITATION ACT, SCH. I, ART. 1, 82 (5) 652

——— of execution—Oral application to proceed with sale. *See* LIMITATION ACT, 1908, s. 15, SCH. I, ARTS. 181, 182 116

———, whether time granted for amending application for execution amounts to. *See* CIVIL PROCEDURE CODE, O. XXI, R. 17 705

Striking off. *See* CIVIL PROCEDURE CODE, O. XXI, R. 5 294

Such Magistrate. *See* BOMBAY DISTRICT MUNICIPALITIES ACT, S. 161 670

Suits Valuation Act (VII of 1887), s. 9, *rules framed by Punjab Chief Court under, r. 1 1)—Restitution of conjugal rights, suit for, valuation of Injunction, prayer for, effect of—Value, whether enhanced.*

Where a plaintiff sues for restitution of conjugal rights and for an injunction restraining certain persons from preventing the union of the plaintiff with the lady whom he claims to be his wife, the value of the suit for purposes of jurisdiction is Rs. 1,000. The prayer for an injunction, being merely a relief ancillary and incidental to the main relief claimed, does not affect that value **P** NATHU *v.* CHUHRI, 20 P. L. R. 1919 101

——— **s. 11,** *object of—Over-valuation or under-valuation of suit Decision by Court not having pecuniary jurisdiction—Appellate Court, interference by, limits of Absence of findings on points raised, effect of—Prejudice.*

The object of section 11 of the Suits Valuation Act is to prevent the operation of the general rule that neither consent nor waiver can confer jurisdiction on Courts which have under law only a limited pecuniary jurisdiction, in cases where there has been no prejudice on the merits.

In cases of over-valuation or under-valuation, the Appellate Court should not interfere with the decision given by the lower Court on the merits unless the disposal of the suit has been prejudicially affected.

Where a lower Court fails to determine material questions specifically raised before it, such failure amounts to a disposal prejudicially affecting the party, and the decree will be set aside **M** VEDAJI BASKARA *v.* SUBRAMANIA GURUKKAL 992

Sure. *See* EVIDENCE ACT, S. 34 704

Taxing Officer, decision of, whether can be questioned *see* COURT FEES ACT, S. [illegible] 502

Tea factory, whether agricultual land. *See* PUNJAB PRE-EMPTION ACT, S. 3 503

Tea garden, whether agricultural land *See* PUNJAB PRE-EMPTION ACT, S. 3 563

Tenancy, whether can be presumed from long possession. *See* LANDLORD AND TENANT 469

Tenant. *See* BENGAL TENANCY ACT, SS. 4, 105 412

Tort—*Conversion of goods—Damages, assessment of—Admission by Pleader, whether binding on client.*

In an action for conversion the Court, in assessing the damages, is not limited to the value of the property at the time of conversion, but may find as damages the value at a subsequent time, even up to the date of trial, and in assessing damages it may take into account the conduct of the defendant.

An erroneous admission on a point of law made by the Pleader of a party prior to the filing of a suit is not binding on that party. **S** LOUIS DREYFUS AND CO. *v.* FIRM OF GHANDAMAL & CO., 13 S. L. R. 128 878

Transfer of Property Act (IV of 1882), s. 6 (a)—*Buddhist Law, Burmese—Chance of succession, transfer of, validity of—Civil Procedure Code Act (V of 1908, O I, r. 3, O. II, r. 3—Joinder of parties and causes of action, when permissible.*

Where the succession to an estate is governed by the Burmese Buddhist Law, an heir-apparent is precluded by the provisions of section 6 *a* of the Transfer of Property Act from transferring his chance of succeeding.

Where different portions of an estate are in the possession of different persons, each of whose interests is opposed to that of the others, except where they are joint, a person interested in the estate suing for his share therein cannot join all the persons in possession as defendants in one suit, unless they are in possession in virtue of the same transaction or the same series of transactions within the meaning of rule 3 of Order I of the Civil Procedure Code, nor can he, by virtue of rule 3 of Order II of the Code, join in the same suit several causes of action against the several parties in possession, unless they are all jointly interested in each separate cause of action. **L** DHAR *v.* HTOON MAY, 12 BUR. L. T. 106 927

——— **s. 6 (d)**—*Maintenance allowance, right to, whether can be transferred—Interest Act (XXXII of 1839), s. 1—Sum payable under written instrument—Interest, whether can be allowed.*

An annuity by way of maintenance is alienable, whether by voluntary or involuntary transfer, and unless the annuity creates a charge upon immoveable property, an alienation of such annuity is not barred by the provisions of clause (*d*) of section 6 of the Transfer of Property Act

Where a certain sum of money is payable by virtue of a written instrument at a certain time, the Court has authority under the Interest Act to allow interest, if it thinks fit, at a rate not exceeding the current rate of interest, from the time when the money is payable, and where there is no security a rate of one per cent. per mensem is not unreasonable **N** MURLIDHAR *v.* MULCHAND 953

——— **ss. 8, 9, 54**—*Promissory note secured by deposit of title-deeds—Assignment of pro-note for collection, whether passes security—Registration, whether necessary*

The general provisions of section 54 of the Trans-

Transfer of Property Act—contd.

fer of Property Act as to sales by act of parties cannot be construed as affecting the express provisions of section 8 as to the transfer of securities being attendant on the transfer of the debt.

The transfer of a promissory note secured by deposit of title-deeds passes the equitable mortgage with it and no separate registered document is necessary to evidence the latter.

Per *Napier, J.*—Where the assignment is not for consideration but for collection, section 9 of the Transfer of Property Act applies and the title-deeds having been delivered with an intention to transfer, there is a legal transfer and title passes along with the assignment **M** CUNNIAH *v.* GOPAL CHETTIAR, (1919) M. W. N. 613; 26 M. L. T. 242 **879**

——— **s. 8,** *scope of.*

Section 8 of the Transfer of Property Act is not a canon of construction but a rule relating to the legal effect of a grant. **M** CHOCKALINGA NAYAKAN *v.* ARUNACHALAM CHETTIAR, (1919) M. W. N. 353; 26 M. L. T. 262 **239**

——— **s. 43,** *applicability of Vendor and purchaser—Sale by widow of her own and her co-widow's interest—Purchaser, knowledge of, of co-widow's interest—Vendor's acquisition of co-widow's interest, effect of.*

Section 43 of the Transfer of Property Act does not apply to the case of a purchaser who knew, at the date of the sale, that the sale did not convey to him the whole interest which it purported to convey.

Where a Hindu widow sold properties belonging to her and her co-widow and the purchaser knew of the co-widow's interest in the property:

Held, that the purchase would not operate on the interest which the vendor subsequently acquired in her co-widow's share. **M** VENKATA LAKSHMI NARASAYYA *v.* MEENAKSHI AMMAL, 10 L. W. 224; (1919) M. W. N. 707 **992**

——— **s. 52**—*Scope of.*

Section 52 of the Transfer of Property Act only protects rights which are acquired under a decree or order of Court. **L B** SUBRAMONIAN CHETTY *v.* MAHAIR ALI, 10 L. B. R. 43; 12 BUR. L. T. 117 **624**

——— **s. 53**—*Fraudulent transfer—Intent to defeat or delay creditors—Transaction, how far void.*

Where the inferences deducible from the established facts in relation to a conveyance or transfer show that the transferor and transferee had the intention of defeating or delaying the creditors of the transferor, the transaction must, at the option of the person defeated or delayed, be treated as void *in toto*, and not merely void in so far as there is no consideration. **B** BHIKHABHAI MULJIBHAI *v.* PANACHAND ODHAVJI, 21 BOM. L. R. 770; 43 B. 707 **682**

——— **s. 53**—*Transfer* pendente lite, *validity of—Delaying or defeating creditors—Intention.*

There is nothing in section 53 of the Transfer of Property Act or in any other provision of the law to prevent a defendant in a suit from transferring either for consideration or voluntarily his property to another, unless the effect is shown to be that his creditors are defeated or delayed. Such a transfer made during the pendency of a suit, when obviously the defendant was in possession of ample funds with which to pay off his creditors, is not a fraudulent transaction nor a transaction entered into with the object of defeating his creditors. **Pat** MUHAMMAD KABIR *v.* SHAHDEO **873**

Transfer of Property Act—contd.

——— **ss. 54, 58**—*Mortgage, usufructuary—Sale of portion of equity of redemption in favour of mortgagee, effect of—Registration, whether necessary—Unregistered deed, admissibility of.*

J., the predecessor-in-interest of the plaintiffs, mortgaged two plots of land to the defendant, the arrangement being that the defendant should hold possession of both the plots for a certain period in full satisfaction of the debt and interest. Before the expiry of the term, the parties came to an arrangement whereby *J*, by an unregistered conveyance, sold one of the plots to the defendant-mortgagee and took back the other plot, the mortgage being thus paid off. The plaintiffs then brought this suit for recovery of possession of the plot sold to the defendant:

Held, (1) that the thing sold was merely a right in the immoveable property, the property being in the actual possession of the mortgagee, and that the sale, being thus of an intangible thing, could be made only by a registered instrument as provided in section 54 of the Transfer of Property Act;

(2) that the unregistered conveyance was inadmissible in evidence to prove the sale or the satisfaction of the debt.

Per *Chitty, J.*—Enjoyment of the mortgaged property for a fixed term in lieu of principal and interest satisfies the debt automatically after the expiry of the term. **C** HUSHMAT *v.* JAMIR, 23 C. W. N. 513 **558**

——— **s. 55**—*Limitation Act (IX of 1908), Sch. I, Art. 116—Registered conveyance—Covenant for title, whether implied—Breach of covenant.*

Under section 55, clause (2), of the Transfer of Property Act, there is an implied covenant for title and possession in all registered conveyances, and a breach of that covenant is the breach of a contract in writing registered within the meaning of Article 116 of Schedule I to the Limitation Act. **C** KANOK DASI *v.* SRIHARI GOSWAMI **269**

——— **s. 55 (4) (b)**—*Vendor and purchaser—Consideration, part of, non-payment of, effect of—Title, whether passes—Lien of vendor—Contract to contrary—Burden of proof—Election—Remedies, several—Choice of one, whether bars rest.*

In a sale of immoveable property, title to the property passes to the purchaser on the execution of the deed of sale, although the seller is entitled to a charge on the property for the amount of the purchase-money or any portion thereof remaining unpaid to him with interest thereon, unless there is a contract between the parties that title to the property will not pass to the purchaser until the full consideration has been paid: but such a contract must be alleged and proved by the party setting it up.

If two remedies are equally available to a party, and he pursues one remedy and fails therein equity will step in and prevent him from pursuing the other remedy, because he chooses one remedy at his own peril and cannot turn round and say, when he fails therein, that he will now pursue the other remedy open to him. **Pat** JAGDEEP SAHAY *v.* SONU LAL **363**

Transfer of Property Act—contd.

——— ss. 67, 68, 72—*Mortgage—Covenant to put mortgagee in possession, breach of—Mortgagee, whether entitled to interest—Payment made by mortgagee to save property from being sold, whether charge—Mortgage money, whether includes interest.*

Certain tenure-holders mortgaged their interest in the tenure, and it was stipulated in the mortgage-bond, *inter alia*, that the mortgagee should be put in possession of the mortgaged property in lieu of interest and that the mortgagors should pay off the principal at the end of a specified year and, in default of payment, the mortgagee should be at liberty to foreclose according to law. The mortgagee, however, was wrongfully kept out of possession by the mortgagors and was unable to get possession except for one year. During the currency of the mortgage and while he was out of possession, the mortgagee discharged a decree for arrears of rent obtained against the mortgagors, to prevent the property being sold in execution. He instituted the present suit to recover the principal debt with interest at 12 per cent and futher claimed, under section 72 of the Transfer of Property Act, to add to the amount secured the amount of the decree paid by him with interest thereon at 9 per cent per annum It was contended in appeal to the High Court (1) that the plaintiff was not entitled to interest, but (2 if he was entitled to interest at all, he could only claim interest by way of damages under the Interest Act:

Held; (1) that inasmuch as the plaintiff had been wrongfully kept out of possession, he was entitled to interest on the principal;

(2) that the plaintiff was entitled to interest as a charge on the property and that the amount claimed was not excessive.

The term "mortgage-money" includes interest. **C** SITA NATH GHOSE *v* THAKURDAS CHAKRAVARTY, 16 C. 448 **433**

——— ss. 76 (1), 83—*Malabar mortgage—Improvements effected by mortgagee, value of, whether 'amount due on mortgage' under s 83—Tender of compensation money Malabar Compensation for Tenants' Improvements Act (I Mad. of 190), s. 5, scope of.*

Section 76 (*i*) of the Transfer of Property Act has no application to money due for improvements to a mortgagee in Malabar, because the value of improvements effected by such mortgagee cannot be brought under the expression 'amount due on the mortgage' in section 83 of the Act.

A mortgagee in Malabar has a right to remain in possession till he is actually paid or till he is ejected by decree of Court and hence he is not accountable for mesne profits till either of those events happens.

Per *Napier, J*—Section 5 of the Malabar Compensation for Tenants' Improvements Act applies to all tenants except such as have been paid. If payment has been made and the term is determined or the mortgage has been discharged, the section has no application. If the 'compensation is so due,' *i. e.*, has not been paid, then the section applies.

According to the policy of the Act, the compensation is to be ascertained by the Court. If a tenant accepts payment he waives his right, but if he claims assessment by the Court, there is nothing to deprive him of his statutory right under section 5,

Transfer of Property Act—concld.

even if the amount tendered is found to be sufficient. **M** MOORIATH VARIATH *v.* MELEDATH K. KUNJI NANGAYARAMMA, 37 M. L. J. 206; 10 L. W. 300; 26 M. L. T. 329 **834**

——— ss. 89, 90. *See* MORTGAGE—REDEMPTION **466**

——— s. 95—*Co-mortgagor redeeming mortgage—Charge, nature of—Covenant between mortgagor and mortgagee, whether can be set up as defence to suit for redemption by co-mortgagor*

A deed of mortgage whereof the consideration is promised to be paid afterwards cannot be held to be without consideration, unless the mortgagee expresses his unwillingness to keep his promise or has by his conduct disqualified himself from carrying out his part of the contract.

A co-mortgagor who redeems a joint mortgage is entitled to a charge on the mortgaged property under section 95 of the Transfer of Property Act, but he is not entitled to set up in defence to a suit for redemption a covenant which was only enforceable as between the original parties to the transaction. **O** NAROTAM PRASAD *v.* SHANKAR SINGH, 22 O C 1 2 **91**

——— s. 101. *See* HINDU LAW **842**

——— s. 106—*Landlord and tenant—Tenant of homestead land, holding over—Notice, period of, necessary.*

Where a tenant for a term of years of homestead land situated in a town holds over on the terms of the expired lease, the tenancy may be determined by reasonable notice or by a notice on the terms of the expired lease.

There is no authority for the proposition that a tenant of homestead land holding over is entitled to six months' notice expiring at the end of a year of the tenancy. **C** MONMOTHA NATH *v.* PEARY MOHAN, 23 C W N. 596 **180**

Trust, religious—Permanent lease granted by trustee, validity of. *See* LANDLORD AND TENANT **517**

———, *resulting—Creditor put in possession of estate, position of—Purchase made in creditor's name—Real purchaser, whether can recover possession from creditor—Consideration, payment of, proof of—Oral evidence, admissibility of—Sale for arrears of rent due in respect of period prior to purchase Creditor, position of—Transfer of Property Act (IV of 1882), s. 76 (c).*

R, the father of the plaintiffs, being indebted, his properties were purchased in execution of a decree against him by *P*, who agreed to return the properties to *R* in consideration of a payment to him of Rs 2,150. Defendants Nos. 1 and 2 advanced a certain sum to *R* as a loan, and on *R* himself paying the balance, *P* executed a *kobala* in the names of defendants Nos. 1 and 2 in 1897. A year after, *R*, being unable to pay interest on the sum advanced by the defendants Nos. 1 and 2, put the latter in possession of the properties to enable them to take the profits until re-payment of the debt due. After the execution of the *kobala*, some of the properties in suit, *viz*, plots Nos. 1 to 13, were sold for arrears of rent due for a period prior to the *kobala* and were purchased by the defendants themselves The plaintiffs then brought these suits within 12 years of the execution of the *kobala* for recovery of

Trust—concld.

possession of the properties upon payment of the amount due to the defendants:

Held, (1) that the defendants Nos. 1 and 2 were in the position of creditors in possession, and there was a resulting trust so far as these properties were concerned and that, therefore, the plaintiffs were entitled to get back the properties upon payment of the amount due to the defendants;

(2) that it was competent for the plaintiffs, whose father was the real purchaser, to prove the payment of the purchase-money by parol, even though it was expressed otherwise in the *kobala*;

(3) that under section 76 (*c*) of the Transfer of Property Act the defendants Nos. 1 and 2 were responsible for the sale of plots Nos to 3 in execution of decrees for arrears of rent, even though they were for a period prior to the execution of the *kobala*, and that, therefore, the plaintiffs were entitled to recover those plots also C KSHETRA NATH ADHIKARI *v.* DURGAPADA MANDAL 902

Trusts Act (II of 1882), ss. 89, 96 1003

Unable to maintain itself. *See* CRIMINAL PROCEDURE CODE, ss. 1, 4-8, 489 893

Undue influence, what is. *See* CONTRACT ACT, ss 6, 74 335

U. P. Court of Wards Act (IV of 1912) s. 54 Notice to Court of Wards. *See* U. P. LAND REVENUE ACT, s. 111 643

U. P. Land Revenue Act (III of 1901), s. 44—*Settlement Record, continuous entry in, whether controvertible.*

Continuous entries in a Settlement Record are not incontrovertible and can be shown to be incorrect. **U P B R** ANAPUR ESTATE *v.* DEBI GHULAM, 1 U. P. L. R (B R 14 230

——— **s. 111**—Revenue Court, order by, refusing partition. *See* CO-SHARERS 73

——— **s. 111 (b)**—*U. P. Court of Wards Act, (IV of 1912), s. 54—Order by Revenue Officer directing institution of civil suit—Notice to Court of Wards—Suit brought before expiry of two months, maintainability of.*

The appellant, who filed objections in a partition case instituted by the Court of Wards, was on 4th March 1918 ordered, under section 111 of the Land Revenue Act, to institute within three months a suit in the Civil Court for the determination of the question in dispute On 20th May 1918 he gave notice to the Collector as required by section 54 of the U. P. Court of Wards Act and nine days later instituted the suit in the Civil Court:

Held, that there was no reason for dispensing with the express provisions of section 54 of the U. P. Court of Wards Act, and as it was in no way impossible for the appellant to have complied with that section and yet have brought his suit within the time allowed, the suit was rightly dismissed. **O** RAM DEO SINGH *v.* DEPUTY COMMISSIONER, SULTANPUR, 22 O. C. 147 643

——— **s. 150,** *scope of—Attachment—Release of property in favour of particular person, whether authorised.*

Property attached under section 150 of the U. P. Land Revenue Act cannot be released in any particular person's favour. The section contemplates the removal of an attachment, but provides for no inquiry or decision as to who is entitled to hold the property after release. **U P 3 R** HUSAIN ARA BEGUM *v.* RUQAIYA BEGUM, 1 U. P. L. R. (B. R.) 6 153

——— **s. 233 (k)**—*Partition proceedings affecting minor represented by guardian, whether can be challenged.*

Where in imperfect partition proceedings under the U P Land Revenue Act a minor is represented by a guardian and no question of title is raised on his behalf, it is not open to him to challenge those proceedings subsequently by suit. **O** PATESHWAR *v.* AJODHIA, 1 U P L R (J. C.) 9 123

——— **s. 233 (k)**—*Partition proceeding—Civil suit, maintainability of.*

Section 233 (*k*) of the Land Revenue Act bars a civil suit if the plaintiffs were parties to the partition and were properly represented, but not if they were not parties or were not properly represented. **O** ZAIBUNNISSA *v.* HASARATUNNISSA, 1 U. P. L. R. J. C.) 1; 22 O. C. 124 162

U. P. Municipalities Act (II of 1916), ss. 19 to 26—*Election petition—Petition by unsuccessful candidate to unseat several successful candidates, whether permissible—Cause of action.*

It is competent for an unsuccessful candidate at a Municipal election, petitioning against the election of more than one successful candidate, to join in one petition a claim that all or any of the candidates, being more than one, be unseated. **A** MOHAMMAD ABDUL BAQI KHAN *v.* SIRAJ-UL-HASAN, 17 A. L. J. 844 67

——— **ss. 298 (G), 318, 321**—*Bye-laws relating to dangerous and offensive trades—License, whether can be refused arbitrarily—Remedy of person aggrieved—Injunction, suit for, whether maintainable—Jurisdiction of Civil Courts.*

A Municipal Board would not be justified in refusing to grant a license properly applied for, under the bye-laws relating to dangerous and offensive trades, not on any grounds of public safety, health or public convenience, but merely in order to secure an advantage to itself in a dispute about a question of title with another person.

Under the U. P. Municipalities Act of 1916 the jurisdiction of the Civil Courts is limited by the provisions of sections 318 and 321 of the Act. Under these sections the only remedy of a person who considers himself aggrieved by a bye-law made under section 298 (G) of the Act is by way of appeal to the higher authority referred to in section 318 of the Act, but it is by no means equally clear that a suit would not lie for an injunction to compel a Municipal Board to grant the plaintiff a license for carrying on a particular [illegible] on a particular spot, provided always that the [illegible] prepared to take out the license subject to all the conditions prescribed by the bye-laws and could satisfy the Court that the Municipal Board had refused him the license for reasons wholly unconnected with the public health, safety or convenience. **A** MANNUA *v.* EMPEROR, 20 CR. L. J. 705; 17 A. L. J. 976 785

U. P. Rent Act (XII of 1881), s. 9—*Occupancy right—Hindu widow, rights of, extent of—Revision—Lower Court following wrong authority, effect of—Illegality.*

U. P. Rent Act—concld.

Inasmuch as under section 9 of the U. P. Rent Act of 1881 an occupancy right devolved as if it were land, the interest of a Hindu widow who succeeded to an occupancy holding while that Act was in force was a mere life interest.

Where a Court relies for its decision upon the judgment of a superior Court, which is no authority for the proposition set up by its decision, it acts illegally in the exercise of its jurisdiction, affording a ground for interference in revision. **U P B R** MAHABIR LAL *v.* GIRJA PRASAD, I U. P. L. R. (B. R.) 21 **438**

——— **s. 10**—Sir, *usufructuary mortgage of—Proprietor, whether acquires expproprietary rights—Occupancy rights, acquisition of—Ejectment.*

A *zemindar* who makes a usufructuary mortgage of his *sir* land does not lose or part with his proprietary rights and does not, therefore, acquire any expproprietary rights in the *sir*; the character of the *sir* in the hands of the mortgagee remains unchanged, and, as a sub-tenant of such land cannot acquire occupancy rights therein, he is liable as such to be ejected. **U P B R** RAM SARUP *v.* ZALIM SINGH, 1 U. P. L. R. (B. R.) 17 **456**

Unlawful assembly, common object of—Evidence. *See* PENAL CODE, s. 147 **494**

Vakil embarking on commercial transaction should inform High Court **638**

Vendor and purchaser—*Agreement to sell—Subsequent discovery of defect in vendor's title—Mortgage created by third party before date of agreement—Enquiry, claim for, by purchaser before completing sale—Rescission by vendor, legality of—Specific performance and enquiry into title, right of purchaser to—Contract Act (IX of 1872), ss. 39, 64—Specific Relief Act (I of 1877), ss. 12, 18, 35.*

A purchaser, under a contract of sale, is entitled to a good and marketable title. If the title is found to be doubtful, so as to require investigation, he cannot be compelled either to rescind the contract or to accept without investigation, the doubtful title. He may sue for specific performance of the contract and ask for an enquiry into the title by the result of which he will be bound.

E. entered into an agreement to sell her house to Oosman Sait & Co. for consideration, towards which the latter paid her Rs. 500 as earnest-money. One of the conditions was, that the sale was subject to good title and the advance was to be refunded if the title was found not to be in order. Before the date fixed for completion of the sale, the purchasers discovered that the vendor's grandson, in whose fav[illegible]r had created an estate in remainder, had, prior to the date of the agreement created mortgages on the house. On the vendor's requiring the purchasers to complete the purchase, the latter replied that they deferred performance pending an enquiry into the mortgages. There. upon the vendor rescinded the contract, stating that the mortgagor had no title and offered to indemnify. Both parties brought suits, the purchasers for specific performance and the vendor for rescission of the contract:

Held, (1) that the vendor was not justified in rescinding the contract, or in calling on the purchasers to complete the contract within a stated time without further investigation;

(2) that the purchasers were entitled to sue for specific performance and an enquiry with a view to clearing up the question of title. **M** MADURAI CHETTY *v.* BABU SAHIB **971**

Vizagapatam Agency Rules, rr. 17, 19, 20—*Appellate judgment of Assistant Agent—High Court, power of, to direct review under r. 20—Remedy of aggrieved party.*

Under the Vizagapatam Agency Rules the only course open to a party dissatisfied with an appellate jndgment passed by an Assistant Agent is to appeal to the Agent under rule 17, and not to move the High Court to direct a review under rule 20, as, for the purposes of that rule, the judgment of the Assistant Agent cannot be treated as passed by the Agent. **M** KIRAT CHUND SINGH *v.* MAHARAJA OF JEYORE, 9 L. W. 533 **694**

Void. *See* PROVINCIAL INSOLVENCY ACT, ss. 36, 37 **519**

Waiver of right, proof of. *See* PUNJAB PRE-EMPTION ACT, s. 3 **563**

———, what constitutes *See* IGNORANCE OF RIGHT **503**

Wajib-ul-arz, entry in, as to custom, whether binding on tenants. *See* CUSTOM, EXTINGUISHMENT OF **869**

———, *entry in, construction of—Hindu widow, power of, to make adoption—District Gazetteer, evidentiary value of.*

An entry in a *wajib-ul-arz* empowered a Hindu widow to adopt a son, but was silent on the point of the authority of her husband:

Held, that the proper construction of the entry was that the widow was given the ordinary power to adopt with the authority of her husband.

A passage in a District Gazetteer describing the lineage of one of the leading families of the district cannot supply the want of a pedigree showing the family and the members of it. **O** BALMAKUND *v.* BISHWA NATH SINGH, 6 O. L. J. 337 **851**

Water, flow of, from higher to lower level—Higher and lower owner, rights of. *See* EASEMENT, NATURAL **128**

Will 30 years old—Presumption—Registration, effect of. *See* EVIDENCE ACT, s. 90 **837**

Workman's Breach of Contract Act (XIII of 1859), s. 1, *scope of—Advance to be paid off from wages, effect of.*

The Workman's Breach of Contract Act relates to contracts in which workmen have received advances of money on account of the work which they have contracted to perform, and has no application to a contract of service for a term of years accompanied with an advance of money which may be paid off from the wages the workman is to earn, as such a contract is not one made on account of the work which he has contracted to perform. **B** RAMKRISHNA HARIBHAOO VADKE *v.* EMPRROR, 21 BOM. L. R. 753; 20 CR L. J. 701 **669**

——— **s. 1,** *scope of Act—Contract to be performed outside British India—Jurisdiction of Magistrate to take action.*

A contract to be performed outside British India does not come within the purview of the Workman's

Workman's Breach of Contract Act—contd.

Breach of Contract Act. **L B** Po Thit, S. *v.* Ma Saw Shin, 20 Cr. L. J. 576 **64**

——— **ss. 1, 2**—Complaint against workman, dismissal of. *See* Criminal Procedure Code, s. 250 **58**

——— **s. 2,** *scope of—Contract Act (IX of 1872), ss. 16, 19 A—Contract induced by undue influence, breach of—Jurisdiction of Magistrate.*

It is only where a contract between an employer and a workman is broken by the latter without lawful or reasonable excuse, as provided by section 2 of the Workman's Breach of Contract Act, that the employer has the right to have recourse to the Criminal Courts for the enforcement of the contract. A contract which is liable to be avoided or broken as having been obtained by undue influence under sections 16 and 19A of the Contract Act, cannot be so enforced. **B** Kordia Gopal Katkari *v.* Emperor, 21 Bom. L. R. 1090, 20 Cr. L. J. 673 **593**

——— **s. 5**—*Notification restricting jurisdiction of Magistrates, validity of—Advance made at one place—Complaint preferred at another—Jurisdiction of Magistrate to entertain complaint.*

Where a notification of the Local Government specially appoints all Magistrates of the First Class to exercise the powers vested in a Magistrate of Police under the Workman's Breach of Contract Act

Workman's Breach of Contract Act—concld.

and where by a subsequent notification the exercise of the power so conferred is restricted to those cases only in which an advance of money was made or the work was to be performed within the local limits of the ordinary jurisdiction of such Magistrates, the latter notification does not take away any of the powers of such Magistrates: it merely forbids the exercise of the powers in a class of cases with a view to a distribution of the business, and is consequently not *ultra vires.*

A firm having its head office at Karachi made a complaint to the City Magistrate at Karachi against workmen who had received an advance for work to be done at Hala in the Hyderabad District. The City Magistrate returned the complaint for presentation to the proper Court. In an application for revision to the Judicial Commissioner it was contended that the Magistrate was wrong in returning the complaint:

Held, that the City Magistrate was right in refusing to entertain the complaint, that the complaint should have been presented to the nearest Magistrate empowered, in the local area in which the alleged offence occurred, to entertain the complaint and that that Magistrate was the First Class Magistrate at Hala and not the City Magistrate at Karachi. **S** Ram Ratanchand *v.* Piru Khan Mahomed, 18 S. L. R. 93; 20 Cr. L. J. 731 **891**

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

INDIAN CASES.

1919.

VOLUME LII.

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 912 OF 1917.

March 31, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT.

Sheikh GOHARADDI—DEFENDANT No. 1—APPELLANT

versus

HASAIN KARIKAR AND OTHERS—RESPONDENTS.

Muhammadan Law—Gift—Musha, *doctrine of, applicability of*—*Donees, shares of, ascertainable, effect of*—*Procedure*—*Point not raised in pleadings, whether can be argued.*

The Muhammadan Law doctrine of *Musha* is not applicable to a gift where the share of each of the donees can be ascertained. [p. 2, col. 2.]

A Court ought not to allow a point to be argued before it which is not founded on facts, and in respect of which no definite issue is raised. [p. 2, col. 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Dacca, dated the 29th of January 1917, modifying that of the Munsif, 1st Court at that place, dated the 22nd of May 1916.

FACTS appear from the judgment.

Babu *Gopal Chandra Das*, for the Appellant.—Defendant No. 1 is the appellant. The appeal arises out of a suit for recovery of joint possession. Plaintiff's case is that the lands belonged to Saber and that these were gifted away in his widow's favour as also in favour of a foster-son. Plaintiff purchased them from the latter. Defendant No. 1 is the son of Saber. The question to be decided is whether there can be a valid gift of a property capable of partition and secondly, whether the gift is valid, when there is no delivery of possession, under the Muhammadan Law. If the doctrine of Musha be applicable, then the whole gift fails. There cannot be joint gift in favour of two persons unless the properties were partitioned by the donee. See Wilson's Digest of Muhammadan Law, page 349, section 312. There has not been a subsequent gift either which could have validated the gift. The joint gift is invalid if the property is capable of partition and is not actually partitioned. As regards my second point, it has been found by the lower Court of Appeal that there has been no delivery of possession. Refers to *Ibrahim Goolam Ariff* v. *Saiboo* (1), *Abdul Aziz* v. *Fateh Mahomed* (2). The subject-matter of these gifts is capable of partition, as they are cultivable lands. Even if a suit for partition is brought now, I submit that would not be maintainable.

Babu *Surendra Nath Guha*, for the Respondent.—The points taken by my learned friend are now being for the first time raised in second appeal. There were not sufficient materials on the record for the Court to come to a decision on the points now urged. As regards the scope of the applicability of the doctrine of Musha, I would draw your attention to *Ibrahim Goolam Ariff* v. *Saiboo* (1) where it has been held that the doctrine ought to be restricted in its use in progressive societies.

Babu *Gopal Chandra Das*, in reply.

JUDGMENT.—This suit originally was for the possession of 8 annas share in plots Nos. 1 to 6 and for the whole of plot No. 7. The learned Subordinate Judge held that the plaintiff was not entitled to possession of

(1) 35 C. 1; 4 A. L. J 572; 11 C W. N. 973; 9 Bom. L. R. 872; 17 M. L. J. 408; 6 C. L J. 695; 34 I. A. 167; 2 M. L. T. 479; 4 L. B. R. 154 (P. C.).

(2) 9 Ind. Cas. 635; 38 C. 518; 15 C. W. N. 541; 13 C. L. J. 492.

plot No. 7, and the appeal now relates to 8 annas of plots Nos. 1 to 6.

These plots of land belonged to one Saber, the father of defendant No. 1. He made a *heba* of these plots in favour of his widow Sabani Bibi and a foster-son of the name of Kuran. The defence originally was that the *heba* was executed under the undue influence of Sabani Bibi at a time when the defendant was not present.

The learned Munsif held against that contention and after having dealt with the case made by the defendant upon that question he added that the defence was improved at the trial and in the arguments by introducing certain objections. One of these objections was that the gift was invalid on the principle of Musha. He held that the objection was not a purely legal objection but one in which facts had to be found. He appreciated that such a point required to be rejected, specially as no such issue was raised, but unfortunately he dealt with it. The Subordinate Judge held that the doctrine of Musha was not applicable to such lands, because the shares of each of the donees could be ascertained. The donees, as I have said, were the widow and the foster-child.

There is no question in this case that possession was given to the donees. The foster-child being an infant, the widow acted as the natural guardian. Although there is no distinct finding that there was appropriation of the rent derived from these lands in equal shares by the mother and the foster-child, yet there is no doubt that the shares are easily ascertainable. The Privy Council has laid down that the doctrine relating to the invalidity of gifts of Musha is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules. The Courts have gone far beyond the strict rules. They have not applied the doctrine in the case of undivided Zemindaries where the proprietor of each share was entitled to collect a definite share of the rents. They have not held it to apply to the case of an undivided house in big commercial towns like Rangoon. Why that rule must be applied to the six plots of land held by the mother and the foster-child. I cannot understand. They are practically jointly interested. I, therefore, agree in holding that when the shares of each of the donees can be ascertained, the doctrine ought not to be held applicable. I ought to add that I think it extremely undesirable for the trial Court to deal with points of this character started without any foundation of facts and without any definite issue being framed. They ought to be rejected and not allowed to be argued. To allow them may be prejudicial to the parties concerned.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 123 OF 1918.

March 4, 1919.

Present:—Mr. Daniels, A. J. C.

Babu HAR BAKHSH SINGH—DEFENDANT NO. 2—APPELLANT

versus

Babu NAGINDRA BAHADUR SINGH—PLAINTIFF AND ALOPI DIN SINGH—DEFENDANT NO. 1—RESPONDENTS.

*Oudh Estates Act (I of 1869), ss. 22, 23—Hindu Law—Succession to non-*talukdari *property of* talukdar, *regulation of—Law, applicable—Impartibility—Custom—"Ordinary law," whether includes custom—Burden of proof.*

Succession to the non-*talukdari* self-acquired property of a Hindu *talukdar*, entered in List II of the lists prepared under the Oudh Estates Act, is governed by the ordinary rules of Hindu Law, and not by the special rules laid down in the Act; in other words, in the absence of any custom established to the contrary, such property descends to the nearest collateral relative of that *talukdar* as against a remoter relative representing the senior line. [p. 3, col. 2.]

It does not follow that because there is a custom of impartibility in a family, therefore there is a custom involving an order of descent different from that recognised by Hindu Law, nor can any such detailed custom be presumed from the mere fact of impartibility. Impartibility is a form of property perfectly well known to Hindu Law. [p. 3, col. 2.]

The words "the ordinary law to which members of the intestate's tribe and religion are subject", in section 23 of the Oudh Estates Act, include a custom where one is made out, but it is for the person who

alleges a custom varying the ordinary law to establish it and, unless he does so, the ordinary personal law will prevail. [p. 3, col. 2.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 22nd January 1918, confirming that of the Subordinate Judge, Partabgarh, dated the 4th August 1917.

The Hon'ble *Syed Wazir Hasan*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra*, Babus *Surendro Nath Roy*, *Parmeshwar Dayal*, *Avadh Behari Lal* and Pandit *Gaduadhar Prasad*, for Respondent No. 1.

JUDGMENT.—This appeal relates to a house which was the non-*talukdari* self-acquired property of Bajrang Bahadur Singh, the last male owner of the Baispur Estate in the Partabgarh district. The estate is entered in Lists I and II, *i. e.*, it is one which by family custom prior to the 13th February 1856 ordinarily devolved on a single heir. The first *talukdar* after the passing of the Act was Saltanat Bahadur Singh. He was succeeded by his son Bajrang Bahadur Singh, who died in 1900. Bajrang Bahadur Singh was succeeded by his two widows Harnath Kuar and Sartaj Kuar, the last of whom died in 1916. On the death of the widows there were two collateral relatives of Bajrang Bahadur Singh in existence:

(1) Babu Alopi Din Singh, the nearest collateral who has sold his rights to the plaintiff respondent.

(2) Babu Har Bakhsh Singh the defendant-appellant, who though two degrees further removed from the deceased than Alopi Din Singh represented the senior line.

Babu Har Bakhsh Singh being the nearest agnate succeeded to the *taluka* in accordance with clause (10) of section 22 of Act I of 1869 as amended by the Oudh Estates Amending Act, 1910. He also obtained possession of the house in suit. This house is valued at only Rs. 2,000, but the case has been elaborately argued and it is stated that it is being fought as a test case.

The memorandum of appeal consists of eight paragraphs but it has been argued on a single issue, namely, whether Alopi Din Singh was entitled to succeed to the estate as being the nearest heir of Bajrang Bahadur Singh under Hindu Law. The learned Advocate for the appellant accepts the following sentence in the lower Court's judgment as correctly stating the issue he wished to argue :—

"I have, therefore, to see what law is applicable to the case,—whether Hindu Law or the customary law of succession." His argument is,

(1) that as a List II estate is by definition an estate in which there is an ancient custom of impartibility, the inheritance must necessarily be regulated by custom and not by Hindu Law;

(2) that there is a presumption that the non-*talukdari* and *talukdari* property descend to the same person, and

(3) that both on ground (2) and because the defendant is in possession, it was for the plaintiff to establish affirmatively a custom entitling him to succeed.

The fallacy of this argument is obvious. There is admittedly no evidence to prove any custom regulating the mode of descent in this family. It does not follow that because there is a custom of impartibility, therefore, there is a custom involving an order of descent different from that recognised by Hindu Law, nor can any such detailed custom be presumed from the mere fact of impartibility. Impartibility is a form of property perfectly well known to Hindu Law and the principles of succession to it have been laid down by the Privy Council (*sic*) in *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (1) and in other cases. Under section 23, Act I of 1869, which governs the present case, succession is regulated by "the ordinary law to which members of the intestate's tribe and religion are subject." It is not disputed that the ordinary law includes a custom where one is made out ; *vide Bhai Narindar Bahadur Singh* v. *Achal Ram* (2) and *Parbati Kunwar* v. *Chandarpal Kunwar* (3). But it is for the person who alleges a custom varying the ordinary law to establish it and unless he does so, the ordinary personal law will prevail.

I am not sure how far an argument is drawn by the appellant from the rule of

(1) 17 M. 316 at p. 325; 4 M. L. J. 152; 6 Ind. Dec. (N. S.) 219.

(2) 20 C. 649 (P. C.); 20 I. A. 77; 6 Sar. P. C. J. 310; 17 Ind. Jur. 319; Rafique & Jackson's P. C. No. 128; 10 Ind. Dec. (N. S.) 438 P. C.).

(3) 4 Ind Cas. 25; 31 A. 457; 10 C. L. J. 216; 6 A. L. J. 767; 13 C. W. N. 1073; 11 Bom L R. 890; 12 O. C. 304; 19 M. L. J. 605; 36 I. A. 125 (P. C).

primogeniture adopted in cases falling under clauses (1) to (10) of section 22, but so far as he relies on this, it is only necessary to remark that these provisions have nothing to do with custom but are statutory provisions applying to all List II estates without regard to the nature of the custom previously governing them.

In view of these considerations the question at issue between the parties appears to admit of but one answer, but as the appellant's case has been argued chiefly on authority, it is desirable briefly to consider whether there is any recorded decision which conflicts with this view. The appellant relies chiefly on the case of *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (4) decided by the Privy Council in appeal from a decision of this Court reported as *Yasin Ali Khan* v. *Murtuza Husain Khan* (5). The parties belonged to a Muhammadan family in which a custom of primogeniture applying to the *talukdari* property was definitely proved by the evidence. The question arose whether it could be presumed to extend to the non-*talukdari* property. Their Lordships pointed out that among Hindus there were two kinds of property, ancestral and acquired, which were subject to different modes of devolution where there were no lineal descendants. There was no such distinction among Muhammadans, whose law only recognises one kind of property and one rule of succession. Among Muhammadans, therefore, it was for the person who asserted that the non-*talukdari* property followed a different rule of succession to prove it. This case is clearly no authority for a suit —

(1) which is between Hindus, and

(2) in which no custom of primogeniture is proved at all.

If this case, on which the appellant chiefly relies, fails to assist him, it is hardly necessary to consider any other. *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (6) related to property admitted on both sides to be impartible. As far as this Court is concerned, *Ghisa Singh* v. *Thakur Garaj Singh* (7) is a direct authority in favour of the respondent. The Privy Council case of *Janki Pershad Singh* v. *Dwarka Pershad Singh* (8) (the *Ranimau case*) is also in respondent's favour. It is true that that case was decided on the question whether the non-*talukdari* property had been incorporated with the *taluka*, whereas in this Court the appellant does not plead incorporation, but the decision clearly implies that in the case of property not incorporated the ordinary law of inheritance applies.

The decision of the lower Court is, in my opinion, correct and I accordingly dismiss the appeal with costs.

Appeal dismissed.

(4) 36 Ind. Cas. 299; 19 O. C. 290; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 804; 38 A. 552; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 43 I. A. 269 (P. C.).

(5) 22 Ind. Cas 577; 16 O. C. 290.

(6) 10 C. 792 at pp. 806, 807 (P. C.); 11 I A 135; 8 Ind. Jur. 331; 4 Sar. P.C.J. 628; Rafique & Jackson's P. C. No. 79; 5 Ind. Dec. (N. S.) 531.

(7) 33 Ind. Cas. 371; 18 O. C. 289; 3 O. L. J. 45.

(8) 20 Ind. Cas. 73; 16 O C. 216; 35 A. 391; 25 M. L. J. 34; 14 M. L. T. 210; 17 C. W. N. 1029; 18 C. L J. 200; 11 A. L. J. 818; (1913) M. W. N. 630; 15 Bom. L. R. 853; 40 I. A. 170 (P. C.).

CALCUTTA HIGH COURT.

RULE *Nisi* No. 173 OF 1919.

May 9, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Mr. Justice N. R. Chatterjea and Mr. Justice Walmsley.

JITENDRA NATH CHATTERJEE—DEFENDANT—PETITIONER

versus

ASOKE NATH MITTER—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIX, r. 7 (1) (a)—Suit to redeem pledge—Order on pledgee to produce articles pledged, whether can be made after he has parted with articles—Revision—High Court, power of, scope of—Time fixed by lower Court for doing certain act, whether can be extended.

Certain articles of jewellery were pledged by the plaintiff with the defendant. In a suit to redeem the articles the defendant pleaded that, in consequence of a settlement between the parties, the plaintiff had abandoned his right to redeem and the articles in question belonged to the defendant, and that the latter had been dealing with them as his property having sold some, broken up others and raised money on some of them. On the application of the plaintiff the trial Court made an order requiring the defendant to produce in Court the articles in suit within

JITENDRA NATH CHATTERJEE v. ASOKE NATH MITTER.

one month. The defendant moved the High Court in revision, urging that the trial Judge had no jurisdiction to make the order in question, inasmuch as the articles were not in the custody or possession of the defendant at the time the application was made:

Held, that, although the articles were not in the custody or possession of the defendant, he nevertheless was in a position to redeem them and produce them in Court, and that consequently the trial Court had jurisdiction to make the order for their production under Order XXXIX, rule 7 (*i*) (*a*), of the Civil Procedure Code [p. 6, col. 2.]

In exercising the special powers given by section 115 of the Civil Procedure Code it is not for the High Court to enter into the question whether upon the facts a particular order is right or wrong. [p. 6, col. 2.]

Quære.—Whether the High Court, as a Court of Revision, has the power to extend the time fixed by a lower Court for the doing of an act by one of the parties.

Rule against the order of the Sub Judge, First Court, 24 Perganas.

FACTS appear from the judgment.

Mr. *B. Chukerbutty* (with him Babus *Biraj Mohan Mojumdar* and *Ramendra Mohan Mojumdar*), for the Petitioner, urged that the order made under Order XXXIX, rule 7, of the Civil Procedure Code requiring the petitioner to produce the articles and to place the same in the custody of the Court was without jurisdiction. First of all, according to the defence the articles were the property of the defendant, so without a determination of that point the order under Order XXXIX, rule 7, could not be made.

[SANDERSON, C. J.—The Court may make an order for the inspection of the property which is the subject matter of the suit, or as to which any question may arise therein.]

Yes. But the plaintiff must establish a *prima facie* title to the property.

Then, the defendant dealing with the property as his own was not in possession of all the articles in question. The articles had been pledged to a third person. The Court could not ask the defendant to produce that which was not in his possession. In requiring the defendant to produce that which was not in his possession or control, the Court acted without jurisdiction. The order should not have been made unless it was found that the defendant was liable to produce the ornaments in question. The articles were dealt with by the defendant on an assertion of his right to them. The question was one of title. It was a material irregularity within the meaning of section 115, Civil Procedure Code, to assume that the plaintiff was entitled to have the production of those articles. Further, there was no question of preservation of property involved in this case.

[SANDERSON, C. J.—The question is whether the order can be revised under section 115, Civil Procedure Code.]

In making the order the learned Subordinate Judge acted without jurisdiction. The order, though interlocutory, could be revised under section 115. Referred to *Gobind Mohun Doss* v. *Kunja Behary Doss* (1) and *Bankey Behari* v. *Ram Bahadur* (2).

Mr. *C. C. Ghose* (with him Babu *Surendra Madhab Mullick*), for the Opposite Party, submitted that under Order XXXIX, rule 7, clause (*a*), the plaintiff was entitled to an order for the inspection as well as for the preservation of the property. The Court below rightly made the order, and as no question of jurisdiction was involved in the case, it could not be revised under section 115. The Court below had jurisdiction to make the order and it did exercise that jurisdiction. The order was an interlocutory order, and the trend of decisions showed that such order should not be revised unless it was absolutely necessary to meet the ends of justice: Mulla's Civil Procedure Code, 6th Edition, page 246.

JUDGMENT.

SANDERSON, C. J.—In this case a Rule was issued calling upon the opposite party to show cause why the order complained of should not be set aside or why such other order should not be passed as to this Court might seem fit.

The order in question was an order made by the learned Subordinate Judge of 24-Parganas to this effect: "The defendant appears to have pawned some of the articles in suit (that is 6 *chooris* set with stones). He must make arrangements to produce the same in Court within a month."

The suit was one in which the plaintiff was claiming a right to redeem certain articles which he had pledged with the defendant.

One of the defendant's defence was that the plaintiff had no right to redeem the articles, inasmuch as there had been a

(1) 4 Ind. Cas. 364; 10 C. L. J. 407; 14 C. W. N. 147.
(2) 44 Ind. Cas. 891; 4 P. L. W. 281; (1918) Pat. 223; 4 P. L. J. 191.

settlement between the parties and as a part of that settlement the plaintiff had abandoned his right to redeem and that consequently the articles in question were the property of the defendant.

In that suit the plaintiff made an application asking that the defendant should be ordered to produce in Court the unredeemed portion of the pledged articles, and that the same should be placed in the custody of the Court and, then there was an alternative relief asked, with which I need not deal. In the petition the plaintiff alleged, amongst other things, that he believed that the defendant had been wrongfully dealing with the ornaments and had parted with the possession thereof.

The defendant asserted that since the adjustment of the suit, that is the alleged settlement to which I have already referred, the defendant had been dealing with the jewellery as his own property having sold some of them, broken up some others and sold in part and raised money for his own purposes on a few of them along with other jewelleries

It does not appear from the affidavit what the particular articles which the defendant said he had pledged were, but we are informed by the learned Counsel for the plaintiff that the defendant stated in the lower Court that the articles which he had pledged were six *chooris* and it is obvious that the learned Judge must have had some statement of that kind before him, otherwise he could not have specified the articles in his order. Therefore, it must be taken for the purpose of this case that the articles which the defendant had pledged along with other articles were six *chooris*.

It is urged on behalf of the defendant that the learned Judge had no jurisdiction to make this order. The order was made under Order XXXIX, rule 7 of the Civil Procedure Code, the material part of which is as follows: "1 The Court may, on the application of any party to a suit, and on such terms as it thinks fit,

"(*a*) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein." It is clear that the articles in question are part of the subject-matter of the suit. But Mr. Chakerbutty, learned Counsel for the defendant, urged that the learned Judge had no jurisdiction to make the order inasmuch as the six *chooris* were not in the custody or possession of the defendant at the time the application was made.

In my judgment the first part of rule 7 applies to the case where the articles are in the possession, custody or power of the party against whom the order is sought to be made. It is clear in my judgment that the articles in question were not in the custody or possession of the defendant. Therefore, the question is narrowed down to whether it can be said, upon the facts of this case, that the 6 *chooris* were within the power of the defendant in such a way that the learned Judge had jurisdiction to make an order on him to produce them.

The articles were pledged. One element of a pledge is that the pledgor has in the ordinary course a right to redeem the articles pledged. It was not alleged by the defendant in any part of the affidavits that he was unable to redeem these articles. It was not suggested that the time for redeeming had elapsed or that his pecuniary position was such that he could not redeem them, nor was it alleged in any way that he had no power to redeem them and produce them in Court.

Having regard to these facts and to the terms of the order of the learned Judge, I think that upon the facts of this case it must be taken that the learned Judge satisfied himself that the defendant was in a position to redeem the 6 *chooris* and produce them in Court. That being so, in my judgment the learned Judge had jurisdiction to make the order. If he had jurisdiction, the matter is at an end. It is not for us, when we are exercising the special powers given to us under section 115 of the Code of Civil Procedure, to enter into the question whether upon the facts of this case the order was right or wrong.

For these reasons I think that the Rule should be discharged with costs. Hearing fee five gold *mohurs*.

I should add that on the application of Mr. Chakerbutty we indicated that we

had doubt whether we had power to extend the time for the production of the articles. We have, however, no doubt that upon a proper application, the Court below will extend the time to such period as it may think right.

N. R. CHATTERJEA, J.—I agree.

WALMSLEY, J.—I agree.

Rule discharged.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 245 OF 1918.

April 9, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

HARDEO SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHANDKA BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers, position of—Joint land—Possession, exclusive, for long time, effect of—Partition, suit for.

Where land is in the exclusive possession of one co-sharer from a long time, the other co-sharers of the village have no right to disturb his possession except by means of a suit for partition. [p. 7, col. 2.]

Maha Singh v. *Bhoga*, 7 O. C. 336 and *Bhim Shankar Dat* v. *Ganga Dayal*, 11 O. C. 355, distinguished from.

Appeal from the decree of the District Judge, Sitapur, dated 20th March 1918, reversing that of the Munsif, Biswan (Sitapur), dated 30th November 1917.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *A. P. Sen*, for Respondents Nos. 1 and 2.

JUDGMENT.—The dispute in this case relates to plots Nos. 109, 110 and 111 *khasra abadi*. The allegation of the plaintiffs was that the defendants had made encroachments on the said land by making new constructions thereupon within the last 5 or 6 years. The constructions complained of consist of certain buildings said to have been erected by the defendants and certain cattle-troughs with pegs attached thereto built by them for tying their cattle. The defence was that the buildings in question existed from 30 years and the plaintiffs had no right to have them removed. There was also a claim for the removal of a tree said to have been planted by the defendants on No. 111 *khasra abadi* 5 or 6 years ago.

The Court of first instance decreed the claim, holding that the constructions complained of had been made 8 years ago, on land which was till then in the exclusive possession of the plaintiffs. The lower Appellate Court, however, dismissed the claim on the bare ground that the proper remedy of the plaintiffs was to apply for the partition of their share.

There can be no doubt that where land is in the exclusive possession of one co-sharer from a long time, the other co-sharers of the village have no right to disturb his possession except by means of a suit for partition. The *khasra abadi* shows that land No. 110 was occupied as *nashistgah* or sitting-room of Bisram Singh, who is now represented by the plaintiffs, and that Nos. 109 and 111 were pieces of vacant land lying round about that sitting-room. No. 109 had standing on it at that time 3 *imli* and 2 *nim* trees belonging to Bisram Singh and No. 111 was partly used by Bisram Singh as his *sahan* and was partly lying waste, but beyond this there are no satisfactory indications of the plaintiffs having exercised any exclusive possession over those two plots. The *nashistgah* appears to have fallen some years ago. The Commissioner found the ruins of a house existing there. Over portions of those ruins the defendants appear to have built the room marked ABCD in the map of the Commissioner. As this room was built, according to the Courts below, about 8 years ago, the plaintiffs are entitled to its removal. But so far as the other buildings go, they stand on *uftada* land and do not appear to have been in the exclusive possession of the plaintiffs. No relief can be granted to the plaintiffs in regard to them after the lapse of 8 years from the date when possession was assumed over that land by the defendants. Being land originally joint or in other words not in the exclusive possession of either party, the remedy of the plaintiffs, if any, was to seek partition.

Some cattle troughs appear to have been constructed between the plaintiffs' house and the *nashistgah* close to one of the *imli* trees, which, according to the *khasra abadi*, belonged to the predecessors in-title of the plaintiffs. These cattle-troughs with the pegs appertaining thereto will also have to be removed. The decisions in *Maha Singh* v.

Bhoga (1) and *Bhim Shankar Dat* v. *Ganga Dayal* (2), to which the learned Counsel for the defendants respondents refers, are inapplicable, because they relate to land which was lying vacant before it was built over by one of the co-sharers. The principle laid down in *Sobha Singh* v. *Ganga Bakhsh* (3) is more applicable to the circumstances of the present case. The decision of the Court below, which directly permits a co-sharer to assume possession of any land which had till then been in the exclusive possession of another co-sharer, by building over it would have the effect of interfering with the rights accruing from long existing possession, which nothing but a partition can disturb.

The appeal is, therefore, allowed and the claim of the plaintiffs decreed for possession of the land comprised in No. 110 *khasra abadi*, so far as it has been encroached on by the building marked ABCD in the map prepared by the Commissioner and the removal of the cattle-troughs and pegs constructed and fixed on plot No. 109 *khasra abadi* close to the *imli* trees belonging to the plaintiffs. The defendants will be directed to remove the materials of the said constructions within two months from this date. In case of failure, the plaintiffs will be entitled to have the constructions and pegs removed and charge the defendants with the expenses of removal. The plaintiffs will, in the circumstances, get half of their costs here and hitherto from the defendants, who will get half of their costs from the plaintiffs throughout.

Appeal partly allowed.

(1) 7 O. C. 336.
(2) 11 O C. 355.
(3) 4 O. & A. L. R. 349.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 17 OF 1916.
September 24, 1918.
Present:—Mr. Justice Shah.
JANA APPA SUTAR—DEFENDANT—APPELLANT
versus
RAKHMA NARAYAN BADIGER—PLAINTIFF—RESPONDENT.

Hindu Law—Succession—Full sister, whether should be preferred to half-sister.

Under the Mitakshara as between a full sister and a half-sister the former is the preferential heir to her deceased brother. [p. 9, col. 1.]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 16 of 1915, confirming the decree passed by the Subordinate Judge, Chikodi, in Civil Suit No. 462 of 1913.

Mr. *S. Y. Abhyankar* (for Mr. *S. R. Gokhale*), for the Appellant.

Mr. *Nilkant Atmaram*, for the Respondent.

JUDGMENT.—The question of law arising in this second appeal is whether as between a full sister and a half-sister the former is the preferential heir or both of them are heirs to their deceased brother under the Mitakshara. Both the lower Courts have answered it in favour of the full sister.

In support of the case for the half-sister it is urged that neither in the Mitakshara nor in the Vyavahara Mayukha is any preference shown to the full sister over the half sister, and that the preference of the whole to the half-blood under the Mitakshara is confined to brothers and nephews, as pointed out in *Samat* v. *Amra* (1) and *Vithalrao* v. *Ramrao* (2).

There is apparently no decided case in this Presidency directly bearing on the point. The position of the sister as an heir has been considered in several cases: and it is not disputed before me that under the Mitakshara as under the Mayukha the sisters would be heirs, and that they would come in after the grandmother. The ground upon which the sister has been assigned this place as an heir under the Mitakshara has been a matter of some controversy and difference of opinion, as the judgments in *Sakharamsadashiv Adhikari* v. *Sitabai* (3), *Kesserbai* v. *Valab Raoji* (4), *Mulji Purshotum* v. *Cursandas Natha* (5) and *Bhagwan* v. *Warubai* (6) would show. The question, which I have to consider, relates to the preference of the whole to the half-blood, whatever the position of sisters as heirs may be in competition with other relations.

It is clear that Vijnanesvara does not refer to sisters in his commentary relating to the

(1) 6 B. 394; 6 Ind. Jur. 537; 3 Ind. Dec. (N. S.) 718.
(2) 24 B. 317; 2 Bom. L. R. 139; 12 Ind. Dec. (N. S.) 746.
(3) 3 B. 353; 4 Ind. Jur. 81; 2 Ind. Dec. (N. S.) 236.
(4) 4 B. 188; 2 Ind. Dec (N. S.) 633.
(5) 24 B. 563; 2 Bom. L. R. 721; 12 Ind Dec. (N.S.) 906.
(6) 32 B. 300; 10 Bom. L. R. 389.

order of succession; and the ground upon which her position as an heir is determined may have some bearing upon the present question. I do not think, however, that it is necessary to discuss these grounds. It is clear that if the word "brothers" (*bhratra*) used in Yajnavalkya's text and in the commentary is interpreted as including sisters, the half-sister will have no case. In that case she will come in after the full sister as the half brother comes in after the full brother. I do not think that that interpretation can be pressed against the half sister, since it has been practically rejected in determining the sister's position as an heir under the Mitakshara.

Quite independently of this interpretation, Vijnanesvara gives a clear indication that the question of preference arising in this appeal must be determined by the test of propinquity: and according to that test the sister is the preferential heir. In dealing with the case of parents, Vijnanesvara applies the test of propinquity and it is significant that he treats the mother's propinquity as of a specially high order, and gives her a place before the father in the list of heirs (see Mitakshara, Ch. II, s. 3, paras. 3, 4 and 5; Stokes' Hindu Law-Books, pp. 442-443). In dealing with the case of brothers he gives preference to brothers of the whole blood on the strength of the text, which he cites in discussing the case of the mother, *viz.*, "to the nearest *sapinda* the inheritance belongs." He prefers the brothers of the whole blood, "since those of the half-blood are remote through the difference of the mothers" (see Mitakshara, Ch. II, s. 4, paragraph 5; Stokes' Hindu Law Books, p. 445). There is no reason whatever why the same reasoning should not apply to the case of sisters. It is also clear that according to Vijnanesvara's definition of *sapindaship* given in his commentary on verse No. 52, Acharadhyaya, the full sister would be the nearer heir: and his specific application of it to the case of brothers shows that the same view should prevail in the case of sisters.

In the Vyavahara Mayukha there is no reference in terms to the case of a half-sister, though the case of 'sister' is specifically dealt with. Nilkantha does not accept Vijnanesvara's view as to the preference to be given to the mother over the father. But his preference of the whole to the half-blood is more marked than Vijnanesvara's in the case of brothers, as he assigns a much lower position to half-brothers in the list of heirs. Thus Nilkantha's view, so far as it goes, supports the conclusion in favour of the full sister based on the Mitakshara. No doubt under the Mayukha the anomaly of preferring her as an heir to a half-brother might arise, if her position as an heir is determined by treating her as included in the word 'sister' used by Nilkantha in discussing the sister's place as an heir. That consideration, however, is not relevant to the present point.

It is hardly necessary to go beyond these two books to justify the conclusion in favour of the full sister. As the Nirnaya Sindhu and the Dharma Sindhu are works which may be referred to, I may point out that in determining the order of persons entitled to perform the *shradhs* both Kamalakara Bhatta and Kashinath, the respective authors of the two treatises, mention the full and half-sisters and give preference to the full sister. I have quoted the relevant passages* from these

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*In the absence of a brother's son, *shradhs* will be performed by the following relatives in this order: father, mother, daughter-in-law, sister and sister's son, because these relatives succeed in this very order to the property (if any) left by the deceased. Katyayana has laid down in his work known as 'Madan Ratna' that "the obsequies of a brother can be performed both by his elder sister as well as by the younger sister. In the absence of a full sister, a step-sister is entitled to perform the obsequies, and failing both, the sons of a full sister, and in their absence, the sons of a step-sister will (perform the *shradhs.*)—*Nirnaya Sindhu*—(published by the Nirnaya Sagar Press, 2nd Edn., p. 273, or the edition published by the same press with the Gujarati translation at p. 573).

As between a full-brother and a half-brother, the full (and not the half) brother has the preference. If, however, there is no full brother, the half-brother will perform (the *shradhs*). Failing a brother, the nephew, and as among nephews also, a full brother's son will have the preference. If there is no nephew of full blood, the nephew of half blood shall offer the funeral cake. Failing a nephew, whether of full blood or half blood, the father, and failing him, the sister shall perform them, and among sisters, the same rules as to preference of full blood over half blood will apply.—*Dharma Sindhu*—(published by Janardhan Mahadev Gurjar, in the same press, 2nd Edn., p. 282, or the edition published by the same press with the Gujarati translation at p. 485),

books for easy reference in a foot-note. I do not wish to lay undue emphasis on these opinions. But they are valuable as referring specifically to the relative position of full and half sisters in the matter of performing the *shradhs* I have not been able to find any reference to the full and half sisters elsewhere.

In *Kesserbai* v. *Valab Raoji* (4) at page 207 of the report Sir Michael Westropp, C. J, has observed that "The Nirnaya Sindhu, which specially names the half sister as entitled to rank (in the performance of ceremonies, whence her heirship may be inferred), places her after, not on a level with, the sister."

Looking at the question from the point of view of the recognition of the rights of the sister as an heir, on the ground of positive acceptance and usage after Vijnanesvara wrote his commentary, there is no reason to suppose that there has been any positive acceptance or usage in favour of ignoring the distinction which exists between sisters of the whole and the half-blood. There is nothing in the reported decisions to countenance such a view, and the fact that the distinction is undoubtedly recognised in the case of brothers and nephews and that it is referred to specifically in relation to sisters in such modern works as the Nirnaya Sindhu and the Dharma Sindhu is undoubtedly against the possible suggestion that the distinction between the whole and the half-blood is not recognised in practice by the Hindu community as regards the sisters.

Lastly, it is urged on the strength of the observations in *Samat* v. *Amba* (1) and *Vithalrao* v. *Ramrao* (2) that the preference of the whole over the half-blood is confined to brothers and nephews. In neither of these decisions is the case of sisters referred to; and the decisions relate to male relations who come in as heirs after the sisters. The case of sisters is really indistinguishable from that of brothers so far as the test of propinquity is concerned. Westropp, C. J., in dealing with the point that arose in *Samat's case* (1) observes that in the Mitakshara and the Mayukha there is no distinction made on the basis of the full and half-blood relationship except in the case of brothers and brothers' sons. I cannot believe that in making the above observation in *Samat's case* (1) Sir Michael Westropp had any intention to express a dissent from the opinion which he had expressed in *Kesserbai's case* (4) as to the full and half sisters, and to which I have referred above. Besides in that case the question of preference among *sapindas* of the same degree of descent from the common ancestor did not arise. Even according to the test adopted in *Samat's case* (1) that the nearest Gotraja Spinda succeeds, the full sister would be the nearer heir. It is hardly necessary to refer to the grounds mentioned by Nilkantha in determining the sister's place as an heir next after the grandmother, relating to her having both *sapindaship* and *gotrajatva*, though there may be no community of *gotra* (*sagotrata*). But I prefer to distinguish the case on the ground that the present point is not decided there and the *ratio decidendi* does not involve the result that there is no distinction to be made between the full and half-sisters. As regards *Vithalrao's case* (2), it is not possible to treat it as deciding or expressing any opinion as to the present point. Sir Lawrence Jenkins, C. J., has based his decision on the principle of *stare decisis* and Mr. Justice Ranade's observations have reference to relations, who according to decided cases come in after the sisters. His observations relating to different kinds of propinquity have no application to the case of sisters, which, as I have already stated, is not distinguishable from that of brothers so far as the difference between the whole and the half-blood is concerned.

In the view I take of these two decisions, it is not necessary to consider the argument urged on behalf of the first respondent (*i. e.*, the full sister) that the decisions in *Ganga Sahai* v. *Kesri* (7), *Sham Singh* v. *Kishun Sahai* (8) and *Nachiappa Gounden* v. *Rangasami Gounden* (9) require that the view taken in *Vithalrao* v. *Ramrao*

(7) 30 Ind. Cas. 265; 42 I. A. 177; 17 Bom. L. R. 998; 37 A. 545; 13 A. L J. 999; 29 M. L. J. 329; 18 M. L T. 203; 19 C W. N. 1175; 22 C. L J. 508; (1915) M. W. N. 713. 2 L W. 837 (P.C.).

(8) 6 C L. J. 190

(9) 26 Ind. Cas. 757; 23 M. L. J. 1; 17 M. L. T. 87; 2 L. W. 69; (1915) M. W. N. 53.

(2) should be re considered. The argument is that, as pointed in *Ganga Sahai's case* (7), "the preference of the whole blood...is confined to members of the same class, or, to use the language of the Judges of the High Court in *Suba Singh* v. *Sarafaraz Kunwar* (10), to 'sapindas of the same degrees of descent from the common ancestor.'" If it had been necessary to examine this argument and to re consider the decision in *Vithalrao's case* (2), I should have referred this appeal to a Division Court. As it is, I feel no difficulty in deciding the point in favour of the full sister I need hardly add that if *Ganga Sahai's case* (7) is to be accepted as overruling *Vithalrao* v. *Ramrao* (2), as to which I express no opinion, I should not consider any independent examination of this point necessary at all, as in that event *Ganga Sahai's case* (7) would settle it in favour of the full sisters. I have thought it necessary to examine the point with reference to the sister's position as an heir in this Presidency, in consequence of the decisions in *Samat* v. *Amra* (1) and *Vithalrao* v. *Ramrao* (2) quite apart from *Ganga Sahai's case* (7).

I, therefore, confirm the decree of the lower Appellate Court and dismiss the appeal with costs

Appeal dismissed.

(10) 19 A. 215 (F. B.); A. W. N. (1897) 53; 9 Ind. Dec. (N. S.) 142.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 454 OF 1918.

April 29, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

RAGHUBIR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat JANKI KUAR—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Widow, position of—Partition, widow whether can enforce.

In a joint Hindu family, a widow has no right to claim a partition of the share which belonged to her husband, because by reason of survivorship that share lapses or devolves on the remaining male members of the family and the widow is only entitled to maintenance. In a separate family the widow inherits the share of her husband and can, subject to any equities which may arise, claim a partition in the same way as any other co-sharer, though her interest is in certain respects of a limited nature. [p. 13, col. 1.]

A Hindu widow, however, who inherits a share in any property from her husband and succeeds in getting mutation of names effected in her favour, is for the time being a recorded co-sharer of that property, for she represents the estate as against the other co-sharers, though her interest is limited to one for life and she has no power of alienation except in case of necessity. She has the right to obtain a partition of the share recorded in her name, unless by reason of bad faith or other cause there is a bar on equitable grounds [p. 12, cols. 1 & 2.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 14th August 1918, upholding that of the Subordinate Judge, Partabgarh, dated the 23rd May 1918.

The Hon'ble Pandit *Gokaran Nath Misra* and Pandit *Harkaran Nath Misra*, for the Appellants.

Babu *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—The property in dispute belonged to Ganpat Singh, who died leaving a widow, *Musammat* Janki Kuar. He had a brother, Gayadin Singh, who had died in his lifetime without leaving any issue The plaintiffs are the first cousins of Ganpat Singh. They alleged that Ganpat Singh was living jointly with them and that after his death the name of *Musammat* Janki Kuar was entered in the revenue papers in respect of that property. On the strength of the above entry *Musammat* Janki Kuar applied for a partition of the share recorded in her name but was opposed by the plaintiffs. The Revenue Court before which the application for partition was pending directed the plaintiffs to get their title established by the Civil Court.

The plaintiffs assert that they were in possession of the disputed property, though the name of *Musammat* Janki Kuar was entered in the revenue papers in respect of it; and they sue for a declaration that *Musammat* Janki Kuar was not entitled to claim a partition or in the alternative

for possession of the disputed property, in case *Musammat* Janki Kuar is found to be in possession of it.

The Courts below held that Ganpat Singh was living separately from the plaintiffs at the time of his death and that *Musammat* Janki Kuar was entitled to claim a partition. The contention of the learned Counsel for the plaintiffs-appellants is that as *Musammat* Janki Kuar has been in possession of the property in dispute as a Hindu widow for her life in lieu of maintenance under a compromise, she is not entitled to claim partition. The compromise in question was filed by the parties to the present suit in the mutation proceeding arising on the death of Ganpat Singh. It declared that *Musammat* Janki Kuar shall remain in possession and occupation of the property left by her husband for her life and take its profits and maintain her possession over the same in every way (*har tarah par qubza rakkhen*) that the present plaintiffs shall have no power to interfere therewith during her lifetime but will be entitled to get the property on her death and that *Musammat* Janki Kuar shall not have any power to alienate the property in any form. It further provided that the mutation of names in respect of the said property shall be effected in favour of *Musammat* Janki Kuar, that the present plaintiffs shall pay her the profits of her share after explaining the accounts, that if they did not do so, *Musammat* Janki Kuar would be entitled to recover her share of the profits by suit and that the present plaintiffs shall have, in any case, no objection to *Musammat* Janki Kuar remaining in possession and occupation of the *sir* land, left by her husband, for her lifetime.

Section 107 of the U. P. Land Revenue Act (III of 1901) allows any recorded co-sharer of a *mahal* to make an application for partition. A Hindu widow who inherits a share in any property from her husband and succeeds in getting mutation of names effected in her favour is for the time being a recorded co-sharer of that property, for she represents the estate as against the other co sharers, though her interest is limited to one for life and she has no power of alienation except in case of necessity. In *Mahadeo Singh* v. *Musammat Deo Koer* (1) and *Jhunna Kuar* v. *Ohain Sukh* (2) the right of such a widow to obtain a partition of the share recorded in her name was recognised.

The estate of a Hindu widow is not a mere estate for life and as pointed out in *Mohadeay Kooer* v. *Haruk Narain* (3) and *Durga Nath Pramanik* v. *Chintamoni Dassi* (4), she is entitled like any other share holder to claim a partition of the share which she has inherited from her husband, unless by reason of bad faith or other cause there is a bar on equitable grounds. A *bona fide* partition cannot prejudice the rights of the reversionary heirs of her husband on her death. Where there is any danger of prejudice, it is open to the Court directing the partition to do anything necessary to safeguard their interests.

The learned Counsel for the plaintiffs-appellants contends that by virtue of the compromise she was not given any higher right than a right to claim her share of the profits and to hold possession of the *sir* land. She was not, however, a mere assignee of a share of the profits in lieu of her maintenance. She was given the entire property left by her husband and allowed unrestricted enjoyment thereof in any manner she liked so long as the property was not alienated. She did not hold the same merely in lieu of her maintenance. She had an interest therein which made her a co sharer for the period of her life and if a partition was necessary in order that she might enjoy such rights as were conferred on her by the compromise it should not be refused. The decisions in *Bhupal Singh* v. *Mohan Singh* (5) and *Neman* v. *Jas Kunwar* (6) do not apply because in those cases the widow was granted some land merely to provide her with means for her subsistence to which she was entitled as a member of a joint Hindu family. In *Kailashi Kunwar* v. *Badri Prashad* (7), the widow was similarly put in possession for life of a share in certain property, the profits of which were

(1) 9 O. C. 53.

(2) 3 A. 400; A. W. N. (1881) 8; 2 Ind. Dec (N. S) 221.

(3) 9 C. 244; 11 C. L. R. 540; 7 Ind Jur. 364; 5 Shome L. R. 54; 4 Ind. Dec. (N. S) 813.

(4) 31 C. 214. 8 C. W. N. 11.

(5) 19 A. 324; A. W. N. (1897) 72; 9 Ind. Dec. (N. S) 212.

(6) 21 Ind. Cas 449, 35 A. 527; 11 A. L. J. 833.

(7) 21 Ind. Cas. 49; 11 A. L. J. 849; 35 A. 548.

to be paid to her in lieu of maintenance to which she was entitled as a member of the joint family. In a joint Hindu family a widow has no right to claim a partition of the share which belonged to her husband because by reason of survivorship that share lapses or devolves on the remaining male members of the family and the widow is only entitled to maintenance. In a separate family the widow inherits the share of her husband and can, subject to any equities which may arise, claim a partition in the same way as any other co sharer, though her interest is in certain respects of a limited nature. If it were not so, her position would be precarious and it would be within the power of every co-sharer to prevent her from realizing her share of the profits and to compel her to starve, until she is in a position to sue for her share of the profits and recover the same if she gets a decree. If her enjoyment of her interest cannot be secured without a partition, a restraint on alienation would make no difference.

The plaintiffs are not entitled to the declaration asked for.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 236 OF 1916.

March 11, 1919.

Present:– Justice Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

THE HON'BLE MAHARAJA MANENDRA CHANDRA NANDI—PLAINTIFF—APPELLANT

versus

NARENDRA CHANDRA LAHIRI—DEFENDANT—RESPONDENT.

Landlord and tenant—Lease in favour of one person—Subsequent lease in favour of another—Rent, suspension of.

Where a lessor dispossesses the lessee from a portion of the holding the rent due by the lessee to the lessor is suspended. Similarly, where a landlord having let out a portion of the land to one person lets it out again with other lands to a subsequent lessee the rent is also suspended. The landlord having failed to perform the duty he had undertaken, the suspension of rent is equitable. [p. 14, col. 2]

Appeal against the decree of the Subordinate Judge, Rungpur, dated the 31st August 1916.

Babus *Ram Charan Mitter*, *Jogesh Chandra De*, *Hemendra Nath Sen* and *Sarat Kumar Mitter*, for the Appellant.

Babus *Mohendra Nath Roy*, *Nogendra Nath Ghose* and *Khirode Narain Bhuiyan*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the plaintiff against the decision of the learned Subordinate Judge of Rangpur, dated the 31st August 1916. The plaintiff sued for rent, first of all, for 9 months of the year 1318 and for the whole of the year 1319. That part of the claim has been decreed in full, and no question arises in this appeal with regard to it. The other part of the claim was for the years 1320 and 1321 and the rent in respect thereof was sued for on the basis of a compromise decree. That compromise decree was entered into in a former rent suit which the plaintiff brought for the years 1316, 1317 and the first 3 months of the year 1318. What had been the original state of affairs was this. There had been a demise to the defendant of 1,700 *bighas* of land, the rent being calculated at 12 annas a *bigha*, namely, Rs. 1,175. In the former rent suit, the defendant said that he was entitled to an abatement of rent and the reasons why he said that he was entitled to an abatement were, first, dispossession by title paramount of a portion by another Zemindar and, secondly, diluvion of another portion. The compromise provided that the rent for the 9 months of 1318 and the whole of 1319 should be Rs. 1125 for the five plots *ga*, *gha*, *una*, *cha*, and *ja*, on the map filed with the petition of compromise. That is the rent that has been decreed from 1320, and both parties agree that the document in the vernacular means that from the beginning of the year 1320, the rent of the 1,520 *bighas* of land of plots *ga*, *gha*, *una*, *cha* and *ina*, marked on

the map was to be Rs. 1,140 and it was stated that *khas* possession of the plot *ina*, had been delivered to the defendant. The whole dispute in this case turns on this plot *Ina*. It will be noticed that the demise in the petition of compromise is of these plots *ga*, *gha*, *una* *cha* and *ina*, at an entire rent of Rs. 1,140. It is impossible to say what portion of that rent is attributable to plot *ina*. One may be able to guess; but no one can say that each and every portion of this sum of Rs. 1,140 does not issue out of plot *ina*, just as much as all other plots. It is one entire rent for the demise of all these plots. What has been found as a fact and it is not open to doubt is that the tenant has never been inducted into possession of this plot *ina* by the landlord. The statement that he has been given *khas* possession is wholly inaccurate, and the landlord took no steps in order to carry out that term of the arrangement. The learned Judge held that, in the circumstances, the landlord not having performed his duty by inducting the defendant into possession of plot *ina*, according to the terms of the demise, the rent was suspended. That is the point that has been urged against in this appeal. In England there is no difference between the case where the landlord has ousted the tenant from a portion of the holding and the case where the landlord has let out the property to the lessee having already put an earlier and prior lessee in possession of it, and in such cases the rent is suspended. It is only necessary to refer in support of that statement to the case of *Neale* v. *Mackenzie* (1). That was a decision of the Exchequer Chamber and the case has always been considered as good law. It is said that these decisions should not be applied to the system of law in this country and reliance has been placed on the decisions in *Annada Prosad Mukhopadhya* v. *Mathura Lal Nag Mazumdar* (2). The statement relied on is to be found at page 589 of the report. That decision may be a good decision in the circumstances of that particular case. But the rule that rent is suspended on account of the dispossession of the tenant by the landlord from a portion of the holding has been recognised in a number of cases in this Court and, in my opinion, it is not open to question now. It may be noted that the case of *Stokes* v *Cooper* (3) relied on by one of the learned Judges who decided the case of *Annada Prosad Mukhopadhya* v. *Mathura Lal Nag Mazumdar* (2) has been disapproved, first of all, in the case of *Smith* v. *Raleigh* (4). It is quite true that it is only a ruling of a *Nisi Prius*. But the Judge who made that ruling was Lord Ellenborough, C. J. It has also been disapproved in another case—I have not got the reference at present at hand—and the learned Judge who disapproved it was Baron Parke. It cannot be considered that the ruling of the Judge at *Nisi Prius* in *Stokes* v. *Cooper* (3) is good law. However, the rule has been recognized in India that in a case where the lessor has dispossessed the lessee from a portion of the holding, the rent is suspended and I see no reason why the other portion of the same rule should not be applied, namely, that where the landlord having let out a portion of the land to an earlier lessee lets it out again with other lands to a subsequent lessee the rent is also suspended. The landlord having failed to perform the duty he had undertaken, the rent ought to be suspended. I see nothing inequitable in holding this. I agree with the conclusion arrived at by the learned Judge of the Court below. The present appeal, therefore, fails and must be dismissed with costs. We assess the hearing fee at one hundred and fifty rupees.

CUMING, J.—I agree.

Appeal dismissed.

(1) (1836) 1 M. & W. 747; 2 Gale 174; 6 L. J. Ex. 263; 150 E. R. 635; 46 R. R. 478.
(2) 2 Ind. Cas. 123; 9 C. L. J. 585; 13 C. W. N. 702
(3) (1814) 3 Camp. 514 *n*; 14 R. R. 829 *n*.
(4) (1814) 3 Camp. 513; 14 R. R. 829.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 50, 59, 60, 61 AND 62 OF 1916.

January 18, 1917.

Present:—Mr. Lindsay, J. C.

TIKA DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Lala RADHA KISHAN—PLAINTIFF—RESPONDENT.

Oudh Courts Act (XIV of 1891), s. 8—Appeals, consolidation of, whether permissible—Pecuniary valuation—Bench of two Judges, hearing by.

Where in separate suits between the same parties, separate decrees are prepared and there is a separate appeal against each decree, the appeals cannot, for the purposes of pecuniary jurisdiction, be consolidated, so as to make the appeals triable by a Bench consisting of two Judges. [p. 15, col 2]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 14th February 1916.

Mr. *H. C. Dutt* and Babu *Gaya Prasad*, for the Appellants.

Babus *Ram Chandra* and *Chhail Behari Lal*, for the Respondent.

JUDGMENT.—The appellants in these five cases were defendants in five suits brought by the plaintiff, Radha Kishan, for the purpose of recovering certain sums alleged to be due in respect of five promissory notes executed on various dates by one or other of these defendants. The Subordinate Judge tried all the suits together and has decreed the plaintiff's claim. The total of the principal sums secured by the promissory notes in suit comes to Rs. 9,550. The defendants admitted the execution of these notes, and in reply to the plaintiff's claim set up a plea of part payment to the extent of Rs. 8,000. The case put forward by the defendants in this connection was that, on the 18th March 1914, they wrote a letter which was signed by Khushal Das and sent to the plaintiff Radha Kishan asking him to come and receive the money which was due to him. No particular sum was specified in the letter. It is said that on the 21st of March Radha Kishan came to the defendants' house and received from them a sum of Rs. 8,000 made up of 500 sovereigns and Rs. 500. A receipt (Exhibit B1) was put forward which was alleged to have been executed by the plaintiff Radha Kishan, as an acknowledgment of his having received this money. Radha Kishan's reply to the defence was that he had not received the letter dated the 18th March 1914 (Exhibit B2). He further denied that he had ever executed the receipt (Exhibit B1), relied upon by the defendants. The burden of proof being upon the defendants they led evidence in the case. Certain evidence was put forward by the plaintiff by way of rebuttal. The result has been that the claim has been decreed, the Subordinate Judge having come to a finding that the defendants' story of payment of this sum of Rs. 8,000 was untrue. The defendants appeal against the decrees in each of the five suits which were before the Court below. A preliminary point was raised by Mr. Dutt the learned Counsel for the appellants to the effect that inasmuch as the aggregate sum in dispute between the parties exceeded Rs. 10,000 these cases ought to be tried by a Bench, regard being had to the provisions of section 8 of the Oudh Courts Act (XIV of 1891). Reliance was placed on the wording of this section which, it was said, was identical with the language of section 110 of the Code of Civil Procedure which relates to the value of the subject-matter of cases which are appealable to His Majesty in Council. Regarding appeals to the Privy Council a special rule is laid down in Order XLV, rule 4, of the Code of Civil Procedure, by which suits may be consolidated for the purpose of pecuniary valuation. There is no such provision regarding suits in which appeals lie to this Court and it seems to me that the contention that these cases ought to be heard by a Bench is untenable. There were five separate decrees which were prepared in the Court below and there is a separate appeal against each decree. I hold that the appeals are triable by a single Judge.

Proceeding now to the merits of the case the learned Counsel has criticised at considerable length the observations passed by the Subordinate Judge upon the evidence which was put forward by the defendants-appellants in support of their story that they had paid a sum of Rs. 8,000 to the plaintiff. The oral and documentary evidence put in by the appellants must be considered together. I shall deal first with the letter (Exhibit B2) which purports to bear date of 18th of March 1914 and which, it is said, was sent to the plaintiff by way of inviting him to come to the defendants' house to receive payment.

This document was produced by the defendants and the explanation of their being able to produce it, notwithstanding the fact that it was sent to the plaintiff, is as follows. It is said that the letter was taken by hand to the residence of the plaintiff and that on the back of it he recorded a note written in Hindi to the effect that he would attend at the defendants' house on the following Saturday, which was the 21st of March 1914. A witness named Girja Dial, who is the Patwari of the village in which the defendants are proprietors and in which they reside, deposes that he wrote the letter under the instructions of the defendants. Another witness one Ghulam Ali who admits that he is illiterate and that he is a servant of the defendants says he took the letter to the plaintiff Radha Kishan who wrote something on the back of it and returned it to him. The learned Subordinate Judge in connection with this endorsement recorded on the letter (Exhibit B2) has pointed out that no evidence has been given to prove that the writing is the writing of Radha Kishan. That was one of the reasons which led the Court below to reject this piece of evidence. So far as Ghulam Ali's evidence is concerned it is open to the criticism that it comes from the mouth of one who is under the control of the defendants. We also have the fact that Ghulam Ali not being literate is unable to swear to the handwriting contained in the endorsement and I agree with the learned Subordinate Judge that this document (Exhibit B2) is not a reliable piece of evidence so as to justify a finding in the defendants' favour One point which was made by the Subordinate Judge against the Patwari's evidence was that he had failed to make any record in his official diary of the fact that he had written this letter on behalf of the defendants. I do not think there is much in this argument because I am not aware that it is the duty of the Patwari to make entries relating to matters of this kind in his official register. At the same time I am unable to hold in favour of the appellants that this document, as a matter of fact, actually reached Radha Kishan and that it was for this reason that he came to the defendants' house to receive the money which they say they paid him. We next have to deal with the evidence relating to the actual payment. Here the important document is Exhibit B1, a document written in Hindi language and which purports to bear the signature of Radha Kishan in Urdu. The signature of the plaintiff is admittedly a peculiar one. The wording of the signature reads "Radha Kishan *urf* Radhe Kishan *ba kalam khud*." The first witness who deposes regarding the payment is a man named Param Hans. According to this man's story he saw the defendants actually paying Rs. 8,000 to the plaintiff. The witness is the man who wrote the receipt. He says he wrote it at the plaintiff's request and signed it. He further deposes that two witnesses named Bhawani Shankar and Bakhtawar attested the receipt The witness was asked to explain why Radha Kishan did not write the receipt himself, it being an admitted fact that he can write. As to this the explanation was that Radha Kishan had a pimple on his hand which prevented his writing with ease and that it was for this reason that he requested the witness to prepare the receipt. Bhawani Shankar who is a cultivator and who is one of the attesting witnesses to the so-called receipt supported the evidence of Param Hans. The third witness in this connection was a *chaukidar* named Kundan. Kundan could only say that the money was paid in his presence. He was not present at the time when the receipt was prepared. He deposed that just at the time the receipt was about to be written out he had to leave to attend to some business of his own. It may be noted that the witness Bakhtawar was not put forward. He seems to have evaded service and when at length service was obtained the defendants said he had colluded with the other side. The defendant Khushal himself gave evidence in support of the defence story. The evidence which was put forward in rebuttal tended to show that at or about the time the present suits were filed the defendants were in pecuniary difficulties. It was sought to prove that the defendant Khushal was negotiating with a money-lender named Jagannath to raise a loan of Rs. 21,000 for the purpose of discharging the debt due to Radha Kishan in respect of these promissory notes and of satisfying some other debts which were against him. A draft deed of mortgage was produced by a witness called Ishri the son of Jagannath. This, it is said, was drawn up at the time negotiations were going on between Khushal Das

and Jagannath, and it was put forward with the object of proving an admission made in the document to the effect that the money owing in respect of these promissory notes was still outstanding. The story about how this draft was prepared and how it came to be produced in Court did not satisfy the learned Subordinate Judge. He regarded it as a very dubious piece of evidence, an opinion which I share with him. At the same time it is to be noted that Khushal the defendant, although he denied that any draft deed of mortgage had been prepared, nevertheless admitted that he had been consulting Jagannath with the object of raising a loan to discharge certain debts of considerable amount which he owed. He said, however, that these negotiations between himself and Jagannath took place subsequent to the payment made to the plaintiff. He says that he entered into dealings with Jagannath in the month of Baisakh; the suits in the present case were filed in the Hindi month of Chait. Now as regards the alleged signature of Radha Kishan on this receipt (Exhibit B1) a certain document (Exhibit W3) was put forward. Radha Kishan denied that he ever signed his name in the form in which it appears on this receipt, that is to say, "Radha Kishan *urf* Radhe Kishan." He was confronted with this registered document (Exhibit W3), a power-of-attorney, which had been executed in the year 1903. On that document a signature of Radha Kishan was to be found written in the same way as the signature on this receipt, that is to say, Radha Kishan *alias* Radhe Kishan. The plaintiff has had to admit that this was his signature and he gave a description of the circumstances in which the signature was written. He had prepared a document in which his name was spelt in one way but he signed his name in another way, and the registering officer insisted that he should write his signature with both spellings in order to prevent any doubt being thrown upon the genuineness of the document. We have it, therefore, that on one occasion some 11 years before the date of the receipt which we are now considering Radha Kishan did sign his name in this way. I have not, however, been able to satisfy myself that there is any striking resemblance between the writing of the two signatures. The Subordinate Judge observes that he noticed some similarity between the writings but was of opinion that notwithstanding the similarity it was not proved that the signature on Exhibit B1 was Radha Kishan's own signature. A mysterious point in connection with Exhibit W3 is, how it came into the possession of these defendants. So far as the record goes, it appears that it was produced in Court by one of the defendants himself. An explanation was asked as to where the document came from and it was suggested that a witness named Gauri, who was examined as the first defence witness, had been called upon to produce it and had produced it. There is on the record a summons addressed to this witness in which he was asked to produce any document in his possession bearing the signature of Radha Kishan. No particular document such as Exhibit W3 was specified in the summons. It is further apparent from the record that Gauri did appear in Court and that he deposed that he had not in his possession any document which bore Radha Kishan's signature. It seems to me quite clear, therefore, that Exhibit W3 was not produced by the witness Gauri. I must, therefore, it seems to me, assume that this document somehow or other got into possession of the defendants and it is by no means unlikely, as has been argued by the learned Counsel for the respondent, that the document was got hold of in some underhand way for the purpose of fabricating a signature upon Exhibit B1 in imitation of the signature on Exhibit W3. I agree with the learned Counsel for the appellants that some of the reasons given by the Subordinate Judge for discrediting the defence evidence are unsubstantial, but one thing is clear, namely, that it was for the defendants to explain in particular how they came to be in possession of such a large sum of money as Rs. 8,000 on the 21st of March 1914. It cannot happen often that people in the position of these defendants have in their house a bag containing 500 sovereigns, and this part of the story strikes me as being very peculiar. It is true that there is evidence in the case that the defendants are men in a big way of business in the hide trade. They seem to have got some concession from the Nepal Government for the export of hides and apparently they deal in considerable sums of money. At the same time the evidence

leaves no doubt that when the plaintiff was pressing for his money shortly before the present suits were instituted, the defendants were short of cash. Khushal admits that he owed a large sum of money, Rs. 18,000, to the Nepal Darbar and I am, therefore, disposed to doubt this story which he now tells that he had in his possession a sum of Rs. 8,000 on the date on which he says he paid it to the plaintiff. He was asked in cross-examination how he got together this sum of Rs. 8,000; his only answer was that some of it represented proceeds of hides which he had sold and that the rest he had acquired as income from his share in the village in which he lives. I am not satisfied that this is a convincing story. Again when describing his negotiations with the money-lender Jagannath, Khushal made certain statements which were very far from being definite. He said that the Rs. 18,000 which he owed to the Nepal Darbar was due in respect of the instalment of his lease which was to fall due in the month of September or October. He next qualified this statement, and it is difficult to ascertain from his answers what he really meant to say in this connection. He was probably trying to make out that his negotiations for money with Jagannath took place at a much later period than they really took place, that is to say, some considerable time after he had, according to his own story, paid this sum of Rs. 8,000 to the plaintiff. I have carefully scrutinized all the evidence in the case and the impression which it creates in my mind is the same as it created in the mind of the learned Subordinate Judge. To put the matter shortly, it is not convincing evidence upon which any Court could rely for the purpose of finding definitely that, as a matter of fact, the sum of Rs. 8,000 had been paid to the plaintiff by the defendants on the 21st of March 1914. The result, therefore, is that the defendants failed to discharge the burden of proof which was upon them and the Court had no alternative but to pass the decree which it has already passed. I am unable to hold in favour of the appellants that the judgment of the lower Court is wrong. On the contrary I am satisfied that it is a right decision. I dismiss all these appeals with costs accordingly.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1654 OF 1917.

February 14, 1919.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

MADHO RAM—DEFENDANT—APPELLANT

versus

JAGAT SINGH—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 9, scope of—Pre-emption suit—Sale of endowed property—Idol, whether necessary party—Hindu Law—Sale by one brother—Knowledge of other brother—Consent—Presumption.

In a suit for pre-emption in respect of property endowed to an idol, the idol is a necessary party, and unless it is impleaded as a defendant, the suit must fail on the ground that a decree cannot be recorded against a party who is not actually before the Court. [p. 19, col. 1.]

Order I, rule 9, of the Civil Procedure Code deals with cases where the Court can deal with the matter in controversy with regard to the rights and interests of the parties actually before it. [p. 19, col. 2.]

Where one brother in a Hindu family sells his property and there is no evidence of any quarrel, there is a strong probability that the other brother knows of the sale. [p. 18, col. 2.]

Mr. *Gulzari Lal* (with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the Appellant.

Mr. *N. C. Vaish* (with him Dr. *Surendra Nath Sen*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The property was sold on 21st of February 1916. The vendee, although not actually a co-sharer, was a mortgagee in possession from the vendor and his brothers. On the following July (long before the institution of the present suit) the vendee endowed the property. The present suit was instituted on the very last day of limitation by the vendor's own brother without making the Thakurji a party. The first Court dismissed it on the ground that the Thakurji was a necessary party to the suit. It held that the evidence as to the consent to the sale was not sufficient. We may say in passing that there is a strong probability when one brother in a Hindu family sells his property, and there is no evidence of any quarrel, that the other brother knows of the sale. We need hardly say that it stands to reason that where two Hindu brothers have not quarrelled, a brother desiring to sell his property would be only too pleased to sell his property to his own brother rather than to a stranger, if his brother was in a position

and wished to buy. The lower Appellate Court held that the Thakurji was a necessary party and reversed the decree of the Court of first instance upon the ground that the suit against the Thakurji would not be barred. The Court thought that Article 120 of the Limitation Act would apply. We must bear in mind that the Thakurji was a necessary party to the present suit. If the effect of the deed of endowment was to vest the property in the Thakurji, then possession could only be got by virtue of a decree against the Thakurji. In the course of the argument the learned Counsel on behalf of the respondent was forced to admit that if the vendee had re-sold the property to an outsider, a decree for possession by pre-emption could not possibly be made in the absence of that third party. So far as the original vendee is concerned, he would have a complete answer to a suit for possession when he proved that he had re-sold the property and that it was no longer in his possession. An attempt has been made to distinguish between the Thakurji and a third party who had purchased property, because it is said that the possession is still in the hands of the defendant in his capacity as trustee. But it seems to us that he is in possession in an entirely different capacity. He was not sued as trustee, he was sued in his personal capacity. No doubt the Court has power to add a defendant. The Court, of course, would not add a defendant where it was clear that at the time he would be added as a defendant the claim was barred as against him. The Court below considered, as we have already stated, that Article 120 is the appropriate Article, and that the suit would not be barred as against the Thakurji if he was made a party. We think it unnecessary in the present case to decide what is the appropriate Article, but the fact remains that the Thakurji even upto the present time has not been made a party to the suit. We are asked that even now this Court should amend the pleadings by adding the Thakurji as a defendant. Bearing in mind the circumstances of the present case, namely, the relationship between the vendor and the pre-emptor and the date upon which the suit was instituted, we do not think that this is a case in which we are called upon to add parties at this stage. It is said that under the provisions of Order I, rule 9, the suit ought not to be dismissed by reason of the non-joinder of the Thakurji. A careful perusal of that rule shows that it only deals with cases where the Court can deal with the matter in controversy in the suit with regard to the rights and interests *of the parties actually* before it. The matter involved in the present case is the possession of the property sold. On the finding of the Court below, and, in our opinion also, this property is now in the possession of the Thakurji and it is impossible that we can give a decree against the Thakurji who is not before us. We must allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1341 OF 1917.

April 10, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT.

NISHI KANTA DUTTA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHASHI KANTA KARMAKAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease—Covenant against alienation in permanent agricultural lease, validity of—Breach of covenant—Re-entry, right of Bengal Tenancy Act (VIII B. C. of 1885), s. 11—Agricultural lease, whether transferable.

A lease in respect of agricultural lands covered by section 11 of the Bengal Tenancy Act is transferable. [p 20, col. 2.]

A condition in a permanent lease restraining alienation is not void by itself, but the lessor is not entitled to eject the transferee from the lessee unless the lessor reserves to himself the right of re-entry or the lease provides that it would be void in case of a breach of the covenant against alienation. [p. 20, col. 2.]

Keshab Lal v. *Madhu Sudan Pal*, 6 Ind. Cas. 685; 12 C. L. J. 126, *Nil Madhab Sikdar* v. *Narattam Sikdar*, 17 C. 826; 8 Ind. Dec. (N. S.) 1035, relied on.

Appeal against the decree of the Additional Subordinate Judge, Backergunj, dated the 10th of March 1917, affirming that of the Munsif, Barisal, dated the 16th August 1915.

FACTS appear from the judgment.

Babu *Nanda Lal Sarkar* (with him Babu *Hit Lal Guha*), for the Appellants.—The

plaintiffs are the appellants. The appeal arises out of a suit for ejectment. The tenancy—*nimhowla*—was created by a lease, dated the 20th October 1876. The lease provided that the tenant would not be able to sell the *nimhowla* to any one else except the lessor. Defendant No. 1, son of the original tenant, sold the lands to defendant No. 2 and took a *miras ejara* lease under him. The tenant was empowered to relinquish the holding. See *Ramchurn Singh* v. *Raining Cool Association, Ltd.* (1). In that case the option of relinquishment was given and the contract was held to be good. See also section 171, Bengal Tenancy Act. My submission is that the sale to a stranger is void as it is contrary to the express terms of the contract.

Babu *Birendra Kumar Dey* (with him Babu *Bepin Chandra Bose*), for the Respondent.—The only question is whether this contract is valid and if so, can a suit for ejectment be brought to evict the transferee. If it is heritable and transferable, as it appears to be from the terms of the lease, then the holding is permanent. See sections 3, 11, Bengal Tenancy Act. The condition in the lease is void. It is nobody's case that the land is not *mourasi mokarrari* tenure. The general principle of law is that one cannot put restraints on the power of alienation. Ordinarily a tenant cannot force relinquishment on the landlord.

Babu *Nanda Lal Sarkar* replied in brief.

JUDGMENT.—The plaintiffs sought to eject the defendants under the following circumstances. The father of defendant No. 1 got a *nimhowla* right in the lands in suit by a lease dated the $\frac{\text{14th of Kartick 1283}}{\text{20th October 1876}}$. There is a provision in the lease restraining sale of the *nimhowla* to any other person excepting the lessor. Defendant No. 1 succeeded his father and sold the lands to defendant No. 2 and took a *mirash ejara* lease under him. The plaintiffs relied upon the above provision restraining alienation and further prayed that the defendant No. 1 might reconvey the property to them upon the receipt of Rs. 40 as provided for in the lease. The defendants contend that the provision in the *kabuliyat* against alienation is void and that the plaintiffs are not entitled to any *khas* possession. It is admitted that *nimhowlas* in Backergunj are permanent and heritable tenures. This lease is in respect of agricultural lands and if it was covered by section 11 of the Bengal Tenancy Act, it would be transferable. It is contended on behalf of the plaintiffs that a clause restraining alienation in a document of this character before the date of the Act is operative. It is to be noticed that in this lease no right of re entry is reserved to the lessors. It was held in *Nil Madhab Sikdar* v. *Narattam Sikdar* (2) that the plaintiffs are not entitled to eject the defendants when the lease contains no clause giving the lessor a right of re entry or providing that the lease shall become void in case of a breach of the covenant against alienation. That case is based upon the decision in *Sonet Kooer* v. *Himmut Bahadoor* (3). No doubt a condition in a permanent lease restraining alienation is not void by itself, as has been held in *Keshab Lal* v. *Madhu Sudan Pal* (4) but the plaintiffs not having reserved any right of re-entry, I agree with the Courts below that they are not entitled to eject the defendants. The appeal is dismissed with costs.

Appeal dismissed.

(1) 26 C. 29; 25 I. A. 210; 7 Sar. P. C. J. 599; 2 C. W. N. 697; 13 Ind. Dec. (N. S.) 622 (P. C.).

(2) 17 C. 826; 8 Ind. Dec. (N. S.) 1095.

(3) 1 C. 391; 25 W. R 239; 3 I. A. 92; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257; 1 Ind Dec. (N. S.) 245 (P. C.).

(4) 6 Ind. Cas. 685; 12 C. L. J. 126.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1191 OF 1917.

June 13, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

RAMPADARATH SINGH AND OTHERS—APPELLANTS

versus

SOHRAI KOERI—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Bengal Tenancy Act (VIII B. C. of 1885), ss. 29, 147A—Landlord and tenant—Compromise changing rate of rent whether lease—Registration, whether necessary—

RAMPADARATH SINGH *v.* SOHRAI KOERI.

Enhancement of rent, legality of—Status, change of, effect of—Compromise relating to matters extraneous to suit, whether can be recorded.

Where a compromise is effected between a landlord and a tenant varying the terms of the contract previously existing between them in respect of property valued at more than Rs. 100, section 17 of the Registration Act does not operate if that compromise is embodied in a decree of the Court even though the compromise creates rights and liabilities extraneous to the suit. The only exception is where the compromise creates a lease requiring registration under the provisions of the Registration Act. [p. 21, col 2; p. 23, col. 1.]

A decree based upon and embodying a compromise, which does not transfer any interest in land but merely changes the terms of the contract on which a tenant was already holding, does not amount to a lease within the meaning of clause (*d*) of section 17 of the Registration Act [p. 23, col. 1.]

Section 29 of the Bengal Tenancy Act does not apply where a compromise changes the status of a tenant [p. 22, col. 2.]

There is no substantial difference between rule 3 of Order XXIII of the Civil Procedure Code and section 147A of the Bengal Tenancy Act in regard to the jurisdiction of a Court to record a compromise, and there is no reason why a settlement of disputes forming the subject-matter of a suit should not be regarded as the consideration for the contract relating to matters extraneous to the suit. [p. 22, cols. 1 & 2.]

Appeal from a decision of the District Judge, Gaya.

Messrs. *Kailashpati* and *Nawal Kishore Prashad, II*, for the Appellants.

Mr. *Sivanandan Rai*, for the Respondent.

JUDGMENT.

MULLICK, J.—This second appeal arises out of a compromise decree made by the Munsif of Aurangabad in 1913 in a rent suit.

The plaintiffs and the defendant in that suit were in dispute about the rent and area of a holding. There was also a dispute as to whether the rent was entirely payable in cash or whether it was payable partly in cash and partly in kind. The result of the compromise was that the plaintiffs agreed to take a lump sum of Rs. 64 on account of the rent of the years 1316 to 1319 *F. S*, that in respect of future years the rent was fixed at Rs. 78 per year for ever in cash and that the area of the holding was to be reckoned at 12 *bighas*.

The suit out of which the present appeal arises is in respect of the rent of the years 1321 to 1323 *F. S*.

The plaintiffs seek to enforce the compromise and claim Rs. 78 per annum. The defendant denies that the compromise was legal and admits only Rs. 43-2-0 per annum.

The District Judge has found that the cadastral survey record stating the rent to be entirely cash and to amount to Rs. 43-2-0 per annum, correctly shows the state of affairs existing immediately before the compromise, and he has declined to admit into evidence the compromise decree on the ground that it related to matters outside the scope of the suit and, therefore required registration.

The plaintiffs accordingly appeal.

Now in their behalf the first ground taken is, that the Full Bench decision of this Court in *Charu Chandra Mitra* v. *Sambhu Nath Pandey* (1) clearly shows that the learned District Judge was wrong. It has been held in that case that, where a compromise is effected between a landlord and a tenant varying the terms of the contract previously existing between them in respect of property valued at more than Rs. 100, section 17 of the Indian Registration Act does not operate if that compromise is embodied in a decree of Court, even though the compromise creates rights and liabilities extraneous to the suit. The only exception recognized by their Lordships is where the compromise creates a lease requiring registration under the provisions of the Registration Act.

Therefore, in the present case the view taken by the learned District Judge, which it must be noticed was arrived at before the Full Bench judgment, is incorrect.

The learned Vakil for the appellants next contends that the compromise was in fact not outside the scope of the suit inasmuch as it purported to settle that the proper rate of rent payable upon the holding was Rs. 78. This contention is not tenable in view of the finding of the District Judge that the rent was Rs. 43-2-0. This is a finding of fact which cannot be assailed in second appeal. Moreover, it does not appear from the terms of the compromise decree that there was any adjudication at all as to the rate of rent. The sum of Rs. 64 decreed for the years 1316 to 1319 was a lump sum and there was no adjudication whatever as to the proper rate of rent

(1) 46 Ind. Cas. 358; 3 P. L. J. 255; 4 P. L. W. 393; (1918) Pat. 193.

payable during these or any previous years. The contract to pay a rate of Rs. 78 was clearly foreign to the suit and the argument that the decree relating thereto is *res judicata* must fail.

But the learned Vakil for the appellant succeeds on his first point.

In reply it is contended on behalf of the defendant respondent that the compromise is subject to the provisions of section 147A of the Bengal Tenancy Act. That is perfectly true. It is contended that the Full Bench decision, above referred to, related to a compromise recorded under Order XXIII of the Civil Procedure Code which is not applicable to a rent suit. In my opinion, there is no force in this argument because the terms of the first part of section 147A of the Bengal Tenancy Act are identical with the terms of Order XXIII, rule 3, Civil Procedure Code, and the rule laid down by the Full Bench is of general application.

The learned Vakil for the respondent next contends that, even if this is so, section 29 of the Bengal Tenancy Act renders the compromise illegal and invalid. It is contended that the defendant was both before and after the compromise an occupancy *raiyat* and that inasmuch as the compromise enhances his rent from Rs. 43-2-0 to Rs. 78, the contract is illegal and incapable of enforcement. This objection would be well grounded if it was in fact true that the status of the defendant had not been changed by the compromise. The learned District Judge, however, finds that the compromise has changed the defendant from an occupancy *raiyat* to a *raiyat* at a fixed rate of rent, so that section 29 of the Bengal Tenancy Act would not apply to his case. The learned Vakil, however, relies upon the case of *Narendra Bhusan Roy* v. *Banku Behary Ghosh* (2) and contends that the status of the defendant has not in fact changed. For this contention he relies upon that part of the compromise petition which places certain restrictions upon the right of the tenant to build and to excavate tanks.

The report of the case on which the learned Vakil relies does not put us in complete possession of the facts but if the learned Judge intended to rule that a tenant cannot become a *raiyat* at fixed rates if he places restrictions upon himself in the matter of building and making excavations, I would respectfully venture to differ. Reading the report, it would seem that the only point decided was, that in a *pattah* agreeing to let the holding at a certain rent from son to grandson, a restriction as to alienation and other matters was held to justify the construction that it did not create a tenancy at fixed rates. In the present case the document in express words creates a tenancy at a rate of Rs. 78 in perpetuity. The restrictions with regard to excavations and buildings are, in my opinion, not void under any provisions of the Tenancy Act, and I must hold that the defendant is no longer an occupancy *raiyat*. The compromise, therefore, does not offend against the terms of section 29 of the Bengal Tenancy Act and I hold that the Court in accepting it as a basis for the adjustment of the suit acted with jurisdiction.

In this connection it has been somewhat faintly suggested that the Court did not make any investigation into the legality of the compromise. The District Judge has, however, found that there is nothing to support this suggestion.

It is next contended that, even if the provisions of section 29 were not contravened and the decree was made with jurisdiction, still section 147A of the Bengal Tenancy Act does not empower the Court to record a compromise relating to matters extraneous to the suit. In my opinion there is no substantial difference between rule 3 of Order XXIII, Civil Procedure Code, and section 147A of the Bengal Tenancy Act in regard to the jurisdiction of the Court to record compromises; and the reasons given by the learned District Judge for holding that section 147A requires compromises to be confined to the subject-matter of the suit are, in my opinion, inconclusive. There is no reason why the settlement of the disputes forming the subject matter of the suit should not be regarded as the consideration for the contract relating to matters extraneous to the suit. I see no reason why in a suit for rent for a particular period the parties cannot, by consent, effect a change of status

(2) 8 Ind. Cas. 825.

or rate of rent in regard to future years. The Tenancy Act does not expressly or by implication place any restrictions upon the parties in this respect.

Finally the learned Vakil for the respondent urges that even if his other contentions fail, the compromise decree in this case was a lease which is liable to compulsory registration under clause (*d*) of section 17 of the Indian Registration Act.

Now we have very carefully read the terms of the compromise petition, and we do not find that it contains any of the ingredients necessary for a lease. No transfer of any interest in land is effected by the document. All that it does is to change the terms of the contract under which the tenant was already holding, and it clearly comes within the category of the documents described in clauses (*b*) and (*c*) of section 17 of the Registration Act.

In these circumstances it was open to the plaintiffs to sue upon the compromise and to tender the compromise decree as evidence. The defendant, not having succeeded in rebutting that evidence, must submit to a decree for the full amount of the claim. The suit must, therefore, be decreed in full with damages at 25 per cent. and costs throughout.

JWALA PRASAD, J.— I agree to the order proposed by my learned brother. Although I do not want to commit myself to all the reasons given by him in support of the order made, it is sufficient to decree the appeal on the ground that the learned District Judge was under a misapprehension that the compromise petition, upon the basis of which the plaintiffs sued for a declaration of the rate of rent and for recovery of arrears thereof, was inadmissible without registration and hence could not be given effect to. The said compromise petition was incorporated into the decree of the Court and as such was exempted from registration under sub section 2, clause (*vi*) of section 17 of the Registration Act, inasmuch as the terms in question in the compromise did not amount to a lease under clause (*d*) of sub-section 1 of the said section, but came under clauses (*b*) and (*c*) of sub-section 1. A decree or order of a Court embodying the terms of an instrument coming under clause (*b*) or (*c*) is exempted from registration. Only gifts under clause (*a*) and leases under clause (*d*) of sub-section 1 are not so exempted.

Appeal decreed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 215 OF 1917.

May 8, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

PARESH NATH GHOSE—JUDGMENT-DEBTOR—APPELLANT

versus

HARI CHARAN SHAHA AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale—Misstatement of approximate value in sale proclamation—Irregularity—Sale, whether can be set aside.

A misstatement of the approximate value of the property in a sale proclamation constitutes material irregularity within the meaning of Order XXI, rule 90, of the Civil Procedure Code. [p. 24, col 2.]

Where on enquiry made by the lower Court it was ascertained that the value of the property sought to be sold in execution of a decree was Rs. 11,200 but in the sale proclamation the value was stated to be Rs. 6,000 and the property was sold for Rs 6,300:

Held, that the sale should be set aside, inasmuch as the decree-holder knowingly made a misstatement of the value in the sale proclamation which amounted to material irregularity, and thereby caused substantial injury to the judgment-debtor. [p. 24, col. 2.]

Appeal against the order of the Subordinate Judge, 1st Court, Dacca, dated the 14th of May 1917.

FACTS appear from the judgment.

Babu *Trailokya Nath Ghose*, for the Appellant.—This appeal is on behalf of the judgment-debtor and it is against an order refusing to set aside a sale on the ground of fraud and material irregularity. The decree holder fraudulently and with a dishonest motive to have the mortgaged property sold at a nominal price knowingly made a misstatement of value in the sale proclamation. As a result of that the property, which in the opinion of the lower Court was worth Rs. 11,200, was sold for Rs. 6,300. My submission is that a wilful and gross misstatement of the value of the property in the sale pro-

clamation amounts to material irregularity within the meaning of Order XXI, rule 90 of Act V of 1908, and as such misstatement has caused the mortgaged property to be sold at a price far below its proper price, the sale cannot stand; The sale is vitiated by fraud and irregularity causing substantial injury to the appellant and is, therefore, liable to be set aside: *Sivadurga Debi* v. *Raymohan Poddar* (1), *Mahabir Pershad Singh* v. *Dhanukdhari Singh* (2).

Babu *Jatindra Mohan Ghose* (with Babu *Kunja Lall Das*), for the Respondents.—The sale cannot be set aside unless the appellant can show that there was material irregularity or fraud in publishing or conducting the sale and that the applicant has sustained substantial injury by reason of such irregularity or fraud. See *Jadoo Nath Chatterjee* v. *Aswini Kumar Banerjee* (3). It is evident upon the facts of this case that the applicant cannot complain of substantial injury resulting from any material irregularity or fraud in publishing or conducting the sale. Mere understatement of value in the sale proclamation is not a ground for setting aside a sale; see *Macnaghten* v. *Mahabir Pershad Singh* (4). The applicant must connect the irregularity with the inadequacy of price as cause and effect by means of direct evidence. As this has not been done in this case, the sale is not liable to be set aside.

Babu *Trailokya Nath Ghose* briefly replied.

JUDGMENT.

WALMSLEY, J.—This appeal is preferred by the judgment-debtor. The respondents obtained a decree against him on a mortgage for a sum of about Rs. 12,000 and applied for execution. A notice was then issued to the judgment-debtor under clause (2) of Order XXI, rule 66, Code of Civil Procedure, and the judgment debtor appeared in Court. Shortly after that, he applied to this Court for stay of execution of the decree and this Court ordered an enquiry to be made for the purpose of ascertaining whether the mortgaged property was sufficient security for the amount of the decree. This enquiry was held by the learned Subordinate Judge and the conclusion at which he came was that the property was worth about Rs. 11,200. Shortly after that enquiry was completed, the decree-holders asked to have a sale proclamation issued and a proclamation was issued; and, in that proclamation, the value of the property was stated to be not Rs 11,200 as it was found in the enquiry, but Rs. 6,000. In due course, the property was put up to sale. One item was sold at Rs. 2,100 and the other at Rs. 4 2 0 making a total of Rs. 6,300—only Rs. 300 above the sum mentioned in the sale proclamation. The judgment-debtor filed an application before the lower Court asking to have the sale set aside on the ground of material irregularity resulting in loss to him. The lower Court has rejected that application and he has consequently preferred this appeal. It appears to me quite clear on the recent authorities that the misstatement of the approximate value of the property constituted a material irregularity within the meaning of rule 90 of Order XXI, Code of Civil Procedure. That there was a misstatement there is no doubt. There was an elaborate enquiry in the lower Court as to the value of the property and it was found to be Rs. 11,200. That fact was perfectly known to the decree-holders and, if they were honest, they would have put that sum in the sale proclamation On the same materials, it is obvious that there has been a substantial injury to the judgment-debtor because the property has been sold not for 11,200 but for Rs. 6,300. I do not think it is of any consequence that the judgment debtor did not at once bring it to the notice of the Court that in the sale proclamation the value had been put as Rs. 6,000 instead of Rs. 11,200.

The remaining question is whether there is sufficient material for drawing the inference that the injury to the judgment-debtor resulted from the irregularity mentioned. I think there is, for we have the further fact that the only outsiders who bid at the sale stopped their bids at a few rupees more than the sums

(1) 10 Ind. Cas. 475; 15 C. W. N. 577.
(2) 31 C. 815; 8 C. W. N. 686.
(3) 16 Ind. Cas. 974; 16 C. L. J. 98.
(4) 10 I. A. 25 at p. 30; 9 C. 656; 11 C. L. R. 494; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C.).

mentioned in the sale-proclamation. One man went up to Rs. 2,050 for one item and the decree-holders bought it for Rs. 2,100. Another man bid up to Rs. 4,150 for the second property and the decree-holders bought it for Rs. 4,200. It is probable that these bidders were discouraged from bidding beyond the sums entered in the sale proclamation. I think, therefore, it is safe to infer that the price realised was the direct result of the misstatement contained in the sale-proclamation. The appeal should, in my opinion, be allowed and the sale set aside with costs to the judgment debtor both in this Court and in the Court below. We assess the hearing fee in this Court at three gold *mohurs*.

SHAMSUL HUDA, J.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No 319 OF 1916.

March 10, 1919.

Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

LAKSHMI RAM JANI AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARI RAM DUBE—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 60—Deposit with banker—Suit to recover deposit—Limitation—Hindu Law—Nagar Brahmins of Gujarat, domiciled in Benares, whether governed by Mayukha or Mitakshara Law.

Where a deposit is in the nature of a banking deposit the depositee stands in a fiduciary relation to the depositor, and a suit to recover such deposit is governed by Article 60 of Schedule I of the Limitation Act. [p. 26, col 2; p. 27, col. 1.]

Where a family of Nagar Brahmins of Gujarat was domiciled for over a century in Benares, and it was found that they were ignorant of any rules to be found in the Mayukha commentary and were unable to depose to a single instance of special succession under that commentary:

Held, that the family was governed by the Mitakshara Law which prevailed in Benares. [p. 27, col. 2.]

First appeal from the decree of the Additional Subordinate Judge, Benares, dated the 13th June 1916.

Messrs. *Gokul Prasad*, *Baldeva Ram* and *Radhakant Malaviya*, for the Appellants.

Mr. *Sarat Chander Chaudhuri*, for the Respondent.

JUDGMENT.—The defendants in the suit out of which this appeal has arisen are the sons and grandsons of one Gulab Ram Jani, who died in the year 1958 Sambat corresponding to 1901-1902.

The plaintiff is the daughter's son of Gulab Ram Jani by the latter's daughter Gopi Kuar, who died in the lifetime of her father. Gulab Ram's wife was a lady whose name was Ballabh Kuar. The family to which the parties belonged is a family of Nagar Brahmins, who came originally from Gujarat and settled in Benares some 150 or 200 years ago.

The suit was brought for the purpose of recovering a sum of Rs. 9,567 8 9. This sum is made up of four items which are exhibited in the statement of account attached to the plaint. The first item is one for Rs. 3,791-14-0 said to have been deposited with the firm of the defendants by Ballabh Kuar; the second item is a sum of Rs. 2,207 said to have been similarly deposited by *Musammat* Gopi Kuar; the third item of Rs. 533 is also alleged to have been deposited by Gopi Kuar and the fourth item of Rs. 2,500 is said to have been deposited by the plaintiff himself.

The cause of action stated in the plaint was that the plaintiff in the month of January 1914 had demanded payment of these deposits which had been refused. The claim, therefore, was for the total sum of these items together with interest, the aggregate amount being as above stated Rs. 9,567-8 9.

A number of pleas were raised for the defence. First of all it was stated that the item alleged to have been deposited by Ballabh Kuar had been deposited by Gulab Ram Jani himself in her name by way of a trust fund from which were to be defrayed certain expenses for *shradh*.

With regard to the items Nos. 3 and 4, the case for the defendants was that Gulab Ram Jani before his death had placed these sums to the credit of Gopi Kuar and the plaintiff by way of favour and for their maintenance. It was pleaded

that there was no consideration for these deposits which had been made by way of charity and that the plaintiff was not entitled to recover them.

As to the second item it was admitted that Gopi Kuar had deposited Rs. 2,207 with the defendants' firm, but it was pleaded that on this account there was a debit against the plaintiff of Rs. 2,621-15-0. Further pleas to be noticed are:—

(1) That Gopi Kuar, the mother of the plaintiff, was not the daughter of Ballabh Kuar but of another wife of Gulab Ram Jani;

(2) that the suit was barred by reason of certain arbitration proceedings which had taken place before the claim was brought;

(3) that the claim was barred by limitation; and

(4) that in any case so far as the first item was concerned; the right of the plaintiff was to be determined with reference to the Mayukha and not the Mitakshara Law.

The lower Court found that the first item in dispute was the *stridhan* of *Musammat* Ballabh Kuar. The learned Subordinate Judge held that the defence had failed to prove that this money constituted a trust fund for the purposes of meeting the expenses of *shradh*. He next held that the arbitration proceedings upon which the defendants relied, were no bar to the suit inasmuch as the plaintiff had been no party to the reference to arbitration. The Subordinate Judge held also that Gopi Kuar was the daughter of Ballabh Kuar.

As regards the two deposits of Rs. 533 and Rs. 2,500, items Nos. 3 and 4, the finding of that Court was that Gulab Ram himself had made these deposits but that they had been made for the benefit of Gopi Kuar and her son and, therefore, the plaintiff was entitled to get them.

With reference to the second item, namely, the deposit of Rs. 2,207, the Subordinate Judge found that this money had been put in deposit by Gopi Kuar but that there was owing to the defendants on this account a still larger sum, namely, Rs. 2,621 15 0. On the issue of limitation, the Subordinate Judge found that the suit was not time-barred and lastly he held that the Mitakshara Law governed the relations of the parties. He gave a decree, therefore, to the plaintiff for Rs. 6,409 15-0 with proportionate costs and interest *pendente lite* and future at the rate of five annas four pies per cent. per mensem.

Pausing here it may be observed that on the face of it, the decree of the lower Court is wrong. The Subordinate Judge was of opinion that items Nos. 1, 2 and 4 carried interest and yet in making up the account between the parties he has not allowed interest on these sums up till the date of suit.

The defendants come here in appeal and two pleas have been raised on their behalf. The first plea is contained in the first and second grounds set out in the memorandum of appeal, that is the plea of limitation. The third and fourth grounds relate to the law applicable to the parties, the contention being that the family is governed by Mayukha and not by the Mitakshara Law. The plaintiff's case is that the Court below ought to have decreed his claim in full. He objects to the finding of the Court below that there was against him a debit balance of Rs. 2,621-15-0 and says that this sum ought not to have been deducted from his claim.

To deal first with the appeal, it may be observed that there is no longer any dispute about the various items mentioned in the plaint which were received in deposit by the defendants' firm. The case which was set up in the Court below regarding the first item, that is to say, the deposit made in the name of *Musammat* Ballabh Kuar has not been argued here. It is no longer contended that this item was placed with the defendants in trust for the performance of *shradh* ceremonies. We may take it, therefore, that each of the items in the account represents a separate deposit and this being so, the issue about limitation is disposed of at once. We think the lower Court is right in holding that the suit was not time-barred. The Article which applies is obviously Article 60 of the First Schedule of the Limitation Act and time begins to run from the date on which demand was made, that is to say, in the present case from the 16th of January 1914. The suit was filed a few months later. The deposits were in the nature of banking deposits

and the defendants stand in a fiduciary relation to the plaintiff. For these reasons the case falls within the purview of Article 60, and not of Article 62 as was pointed by the Counsel for the appellant.

As to the question whether the parties are governed by the Mitakshara or the Mayukha Law, we have already mentioned that this point arises only in connection with the first item in dispute. On the finding of the Court below this sum of Rs. 3,791-14-0 was the *stridhan* of Ballabh Kuar. If this is a case which is governed by the Mitakshara Law, the whole of this sum was inherited by her daughter Gopi Kuar and is now claimable by the plaintiff as the heir of his mother. On the other hand if the Mayukha Law is to be applied, the *stridhan* of Ballabh Kuar was divisible between her sons and her daughters.

A number of witnesses were examined in the Court below for the purpose of showing which school of law governs the relations of the parties. We have been referred to the statements of six witnesses who were examined on behalf of the plaintiff. There was also a deposition given in a former suit by Ravi Ram who was one of the sons of Gulab Ram Jani. Read as a whole, the evidence is not of very much value for most of it proceeds from witnesses who admit their ignorance of the differences between the Mayukha and the Mitakshara Law. However, so much is established from the testimony of these witnesses that the family is a family of Gujarati Brahmins who migrated to Benares 150 or 200 years ago. Ravi Ram, when examined in the earlier suit, deposed that the family first migrated from Gujarat to Jaipur and came from Jaipur to Benares about the year 1804 A. D.

The argument for the appellants is that as the parties are Gujaratis, they must be deemed to have brought their own law with them and that law must have been the law as laid down in the Mayukha. On the other hand the contention is that the presumption must be in favour of the application of the Mitakshara Law, because it is said that the commentary which goes by the name of the Vyavahara Mayukha did not make its appearance till after the year 1600 A. D. On the authority of the books there seems to be no doubt that the author of this commentary, Nilkantha, lived about the year 1600 A. D. in Benares and his works are said to have come into vogue about the year 1700 A. D. Support for this argument is derived from the history of the Mayukha as set out in West and Buhler's Hindu Law, Volume I, page 19 (3rd Edition), in which the statement of Borradaile is quoted as authority for the history given. It seems to us that it would be very difficult to say that a family which migrated from Gujarat nearly two centuries ago is governed by the special rules of inheritance which are set out in Nilkantha's commentary. The question whether the Mayukha is the governing authority in Gujarat is one which does not appear to have been definitely settled, although the view taken by the Bombay High Court seems to be that the Mayukha is the principal authority in that province. This view, however, has been challenged in a work which was cited before us at the time of the argument—"Codification in British India" by Bijoy Kishore Acharya (Tagore Law Lectures, 1912) at page 345 and the following pages. The learned author points out that the Court of highest jurisdiction in Baroda holds that the Mayukha is not of superior authority to the Mitakshara in the region of Gujarat.

On the evidence before us, we are of opinion that the Mitakshara ought to be applied here. The family has long been domiciled in Benares where the Mitakshara Law prevails, and such evidence as there is before us shows that these people are ignorant of any rules to be found in the Mayukha commentary. No instance of special succession under the Mayukha has been deposed to by any of the witnesses, and this is a fact of some significance for the family is a big one and instances might have been expected to be forthcoming if the Mayukha Law applied.

On the two points raised in the memorandum of appeal, we find against the appellants and the appeal fails accordingly.

Coming now to the cross-objection which relates to a sum of Rs. 2,621-15-0, which the Subordinate Judge debited against the plaintiff, it appears to us that the lower Court has not dealt correctly with this matter. The Subordinate Judge for some

reason or other which is not apparent treats this sum as a debit, against the deposit account of Rs. 2,207, standing in the name of Gopi Kuar. On the other hand, it is the case of the defendants that all the items which go to make up this debit total were items advanced to or chargeable against the plaintiff and if this be so, the debit account should have been made up against the deposit of Rs. 2,500, which stands in the plaintiff's name.

The sum of Rs. 2,621-15-0 claimed by the defendants is made up of three items:—

(1) Rs. 811-9-0 debited to the plaintiff up till Kartik 1957 Sambat, that is to a date prior to the death of Gulab Ram Jani.

(2) Rs. 984-6-0, representing sums paid to the plaintiff since the death of Gulab Ram Jani.

(3) Rs. 826, debited to the plaintiff on account of interest.

There has been much argument before us regarding the account of the defendants which relates to this debit item. In order to support their claim the defendants produced an account which purports to date from 1941 Sambat at a time when the plaintiff can only have been about 16 years of age. This date (1941 Sambat) was 17 years prior to the death of Gulab Ram Jani. The account so produced is not the account from the very beginning, for it opens with a credit item of Rs. 678 6 0 in favour of Hari Ram carried over from an earlier account. By the end of 1949 Sambat this account had become a debit account and has been shown as such ever since. At the time of Gulab Ram's death the debit against Hari Ram is shown as amounting to Rs. 811-9-0.

It is proved beyond all doubt that when Gulab Ram died, he directed a sum of Rs. 2,000 to be placed to the credit of Hari Ram in addition to a sum of Rs. 500 which had been credited previously, and we think that there is good ground for supposing that it was the intention of Gulab Ram Jani in giving these directions to wipe out the debt which was then standing against the name of Hari Ram. This debit seems to have arisen by reason of Gulab Ram's himself paying sums to Hari Ram from time to time for his support and consequently when we find that Gulab Ram Jani just before his death left Rs. 2,500 for the support of his grandson, we think he intended this to be a fresh fund not subject to deduction in respect of any money which had been previously advanced.

We may mention here that the award of the arbitrators, who were appointed to make partition of the family business which belonged to the defendants, is upon the record. The accounts were examined by persons who were more or less experts and we find that the arbitrators in making up this account of Hari Ram took the same line as we are taking now. We are satisfied, therefore, that this debit item of Rs. 811-9-0, which was standing against the name of the plaintiff when Gulab Ram Jani died, should be excluded from the account.

Next we have to take the account from the time when Gulab Ram Jani died, starting with the fact that there was an opening of a credit balance of Rs. 2,500 in favour of the plaintiff. At the hearing of the appeal an extract was prepared from the account books of the defendants which is supported by an affidavit, and according to this extract there have been paid to the plaintiff since the death of Gulab Ram Jani sums the total amount of which comes to Rs 1,795-4-0. No interest is included in this sum. The learned Counsel for the respondent objected to one item in this account, namely, a charge of Rs. 891-8-0 said to represent money advanced to the plaintiff for certain marriage expenses. It was argued that this sum ought not to be debited in the account but ought to be treated as gift from the family business. In our opinion this contention cannot be maintained, for we are of opinion that any sums which were paid to the plaintiff after Gulab Ram Jani's death must, in view of what we have already said, be a charge against the plaintiff's account. There was no reason whatever why these defendants should have made a present of this sum of money to the plaintiff.

Over and above this sum of Rs. 1,795-4-0 there is another item of Rs. 131 which represents not money actually paid to the plaintiff, but debited to his account in the years 1964 Sambat. The history of this transaction appears to be that the plaintiff's

father had pawned certain ornaments with the firm for Rs. 131. It is said that in 1964 Sambat the plaintiff was given the ornaments upon his agreeing to have the debt transferred to his own account. We think this is a reasonable and proper explanation of this item and we hold that it constitutes a proper debit against the plaintiff. We find, therefore, that the total sum which is properly chargeable against the plaintiff's deposit account of Rs 2,500 is Rs. 1,926 4-0.

As to the item of interest, namely, Rs. 826 to which we have previously referred, we leave that out of consideration altogether. The item includes certain entries which accrued due before the death of Gulab Ram Jani and for the reasons we have already given, no debit of a date prior to 1958 Sambat can be charged against the plaintiff. On the other hand, it is quite clear that since Gulab Ram Jani's death the account of the plaintiff, which began with a credit balance of Rs. 2,500 carrying interest at Rs. 4 per cent. per annum, has always been a credit account and consequently the defendants are not entitled to charge interest as if the account had been overdrawn. The lower Court has, as we have said, debited the plaintiff with Rs. 2,621-15-0. Our finding is that the proper debit is Rs. 1,926-4-0 and so the cross-objection must be allowed to the extent of Rs. 695-11.

We have already mentioned in an earlier part of the judgment that the decree of the Court below on the face of it is incorrect, inasmuch as the Subordinate Judge has not allowed interest in the decree although he finds in his judgment that interest was claimable in respect of items Nos. 1, 2 and 4. The correct amount owing to the plaintiff is Rs. 7,641-4-9 and we vary the decree of the Court below accordingly.

A decree will be prepared for this sum with proportionate costs and interest during the suit and future interest at the rate of Rs. 4 per cent. per annum. The result, therefore, is that the appeal fails and is dismissed with costs, which will include in this Court fees on the higher scale. The cross-objection is allowed with proportionate costs.

Appeal dismissed;
Cross-objection allowed.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 136 AND 137 OF 1917.

March 21, 1919.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

WAHED ALI—DEFENDANT—OPPOSITE PARTY—APPELLANT

versus

CHAND MIA—PLAINTIFF—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIII, r 1 (w), O. XLVII, rr. 1, 4, 7—Appeal from order granting application for review, when lies—"Sufficient cause" within meaning of O. XLVII, r. 1, what is—Review.

Order XLIII, rule 1 *(w)*, of the Civil Procedure Code permits an appeal from an order granting an application for review only on the grounds mentioned in Order XLVII, rule 7, of the Code, and on no other. [p. 30, col. 2.]

The omission of the Court and the Pleaders to notice certain provisions of the Code which might govern a case would be a "sufficient reason" within the meaning of Order XLVII, rule 1, of the Code for granting a review. [p. 30, col. 2, p. 31, col. 1.]

Appeals against the orders of the Subordinate Judge, 2nd Court, Chittagong, dated the 5th of April 1917.

FACTS appear from the judgment.

Babu *Chandra Sekhar Sen*, for the Respondent.—Before the case is opened I beg leave to take a preliminary objection to the hearing of the appeal. The appeal is not competent as no appeal lies under Order XLVII, rules 4, 7 and 8 of the Civil Procedure Code.

Babu *Charu Chandra Sen* (with him Babus *Dhirendranath Bagchi* and *Monomohan Banerjee*), for the Appellant.—These appeals arise out of a suit for recovery of money. The first Court dismissed the suit against defendant No. 1 and decreed against other defendants. There were two separate appeals preferred against the decision by defendants Nos. 2 and 3, which were allowed. In both these appeals defendant No. 1 was a party respondent. The plaintiff applied for a review of judgment. The application was granted by the following order of the learned Subordinate Judge: "I think the review applied for should be granted Rule 33, Order XLI, allows full power to the Court to grant relief against a party although no appeal has been preferred by the party seeking relief against

him. My attention was not drawn to this provision of the law at the time of the argument in the appeals."

"It was contended on behalf of the opposite party that the Court was quite right in passing the order passed in my judgment in the appeals, because no relief was sought for by the present applicant as against him during the pendency of the appeals. As the law gives full power to the Court to do complete justice in the case as between the parties interested in a suit, I think these are proper cases for review. The applications are granted."

My submission is that Order XLVII, rule 4, is in my favour. An appeal lies under Order XLVII, rule 7, but no review can be granted. My point is that the express provisions of Order XLVII, rule 4, have been contravened. All the opposite parties did not get notice. The application for review must come under Order XLVII, rule 1. Here there is no sufficient ground for review as contemplated by that rule. The other defendants ought to have been made parties and notices should have been issued to them. My point is that the ground on which the application has been granted is not sufficient in law. Merely because the Judge failed to consider a point of law is no ground at all. See *Chandi Charan Laha* v. *Manoranjan Chattopadhya* (1), *Ellem* v. *Basheer* (2), *Sabapathi* v. *Subraya* (3). The application ought to have been rejected from a strict point of view of law.

JUDGMENT.—In this case the suit was brought by the plaintiff to recover some money from defendants Nos. 1 to 5. In the Court of first instance a decree was passed against defendants Nos. 2, 3, 4 and 5 and the suit was dismissed against defendant No. 1. Defendants Nos. 2 and 3 preferred two separate appeals to the Subordinate Judge, who allowed those appeals and dismissed the suit as against them. Defendant No. 1 was a party respondent in both those appeals. The plaintiff applied for a review of judgment as against the defendant No. 1 on the ground that the provisions of Order XLI, rule 33, Civil Procedure Code, had been overlooked by the Court and the Pleaders at the time of the hearing, and he asked that the appeals might be re-heard against the defendant No. 1, with a view possibly to applying the provisions of that section and granting a decree against defendant No. 1. The Subordinate Judge granted the application for review and against that order the present appeals are preferred.

A preliminary objection is taken that no appeal lies and we think that objection must be upheld. Order XLIII, rule 1 (*w*), permits an appeal from an order under rule 4 of Order XLVII granting an application for review, but rule 7 limits the grounds on which objection may be made to such an order. It can be objected to only on the ground that the application was (*a*) in contravention of the provisions of rule 4, or (*a*) after expiration of the period of limitation prescribed therefor and without sufficient cause. It is argued for the defendant No. 1, the appellant before us, that it is in contravention of rule 4, because it is said that the application was granted without previous notice to all the parties. Rule 4 (*a*) lays down that no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order. In this case the review was only sought against defendant No. 1. It could not affect the other defendants against whom the plaintiff did not desire to proceed further. He had his decree against defendants Nos. 4 and 5 and he was content with the judgment of the Appellate Court to have the suit dismissed against defendants Nos. 2 and 3. Defendants Nos. 2 and 3 were, as a matter of fact, parties to the application for review, defendants Nos. 4 and 5 were not. We think, therefore, that there was no contravention of rule 4. It was suggested that there was no ground at all for entertaining an application for review in this case, but it cannot be said that the omission of the Court and the Pleader to notice certain provisions of the Code which might govern the case would not be a sufficient reason within the

(1) 18 Ind. Cas. 275; 17 C. L. J. 416.
(2) 1 C. 184; 24 W. R. 382; 1 Ind. Dec. (N. S.) 118.
(3) 2 M. 58; 3 Ind. Jur. 210; 1 Ind. Dec. (N. S.) 312.

provisions of rule 1. We think, therefore, that these appeals must, therefore, be dismissed with costs, hearing fee two gold *mohurs* in each case.

Appeals dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 30 OF 1916.

March 28, 1919.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

KESHAB SINGH—PLAINTIFF—APPELLANT

versus

BANSI SINGH—DEFENDANT—RESPONDENT.

Muhammadan Law—Pre-emption—Partition—Shafi-i-khalit—*Appurtenances, what are.*

When there has been a perfect partition of an estate and separate *mahals* with separate *tauzi* numbers are formed, although certain properties, such as wells, roads, tanks, etc., are left undivided, no right of pre-emption on the ground of common appurtenances exists. [p. 32, cols 1 & 2.]

The term "appurtenances" means facilities or amenities peculiar to the owner of an estate but derived not from the estate itself but by easement from the estate of another. Roads, wells, tanks, rent-free land occupancy holdings, etc, left undivided on the partition of an estate are not appurtenances. [p. 32, col. 1.]

Appeal from a decision of the Subordinate Judge, First Court, Muzaffarpur, dated the 8th December 1915.

Mr. *Sultan Ahmad*, Government Advocate (with him Mr. *Chandar Sekhar Banerjee*), for the Appellant.

Messrs *Lachmi Narain Sinha*, *Nirsu Narain Sinha* and *Aghor Nath Chatterji*, for the Respondent.

JUDGMENT.

ROE, J.—In this case the appellant is dissatisfied with a decree of the Court of the Subordinate Judge of Muzaffarpur dismissing his suit upon a claim to pre-emption. The facts of the case upon investigation appear clearly to be as follows:—

The property sold was a separate *touzi* number formed by partition from a parent estate. The plaintiff was the owner of another *mahal* formed by the same partition from the same parent estate. The majority of the lands had been divided, but joint between the parties were left a well, certain roads, a tank, a number of *brahmottar* and *fakirana* holdings and two holdings stated in the schedule of lands left common to be occupancy holdings. The learned Subordinate Judge found that the mere creation of a separate estate severed completely all connection between the plaintiff and the vendor of the share sold, and upon this ground alone, without entering into the question whether the ceremonies necessary to pre-emption had been performed, dismissed the suit. In appeal to this Court it is urged that the partition in question was not necessarily a complete partition, and that, therefore, before the Subordinate Judge could say that there were no lands of the parent *mahal* left undivided, evidence should have been taken as to whether the plaintiffs were in fact co-sharers in benefits to be derived from lands left undivided between the parties. On the other side it is urged that the point has been settled by concurrent decisions of the Courts of Allahabad and of Calcutta, beginning in the Allahabad Court from the case of *Maya Ram* v. *Lachho* (1) and in the Calcutta Court from *Lala Puriag Dutt* v. *Shaikh Bundah Hossein* (2). The facts of the latter case are somewhat different from the case before us, for in the body of the judgment it is distinctly stated that everything which was worth dividing was divided and the parties only remained jointly interested in what was either utterly worthless or more probably was treated as public property in the same way as roads. The Allahabad case, however, is directly in point. It was taken on appeal to the Judicial Committee [*Lachcho* v. *Maya Ram* (3)]. Their Lordships state the law to be as follows:—"Now whether the *thok* comprised the divided lands, which were recorded as belonging to Ibrahim alone, or included the undivided lands which were appurtenant to those divided lands, the plaintiff was no co owner with Ibrahim. She was not a joint tenant, nor a tenant-in-common with him as to the divided portion of the lands; if she were a tenant-in-common of the undivided lands, that

(1) 2 A. 631; 1 Ind. Dec. (N. S.) 980.

(2) 15 W. R. 225; 7 B. L. R. 42.

(3) 5 A. 158; 10 I. A. 1; 4 Sar. P. C. J. 405; 3 Ind. Dec. (N. S.) 197 (P. C.).

did not make her an owner of Ibrahim's share in those lands. A tenant-in-common is the owner of his own share; but he is not an owner of the other tenant-in-common's share. It appears, therefore, to their Lordships that the plaintiff was not an owner of the *thok* which was sold." This disposes of the plaintiff's contention that he was *sharik* or co owner in the *mahal* sold. It is contended, however, on behalf of the appellant that if his claim as a *sharik* fails, he is still entitled to come in as a pre emptor in the second degree or *khalit*, that is, one who is a sharer in the appurtenances of the estate. But it cannot be said that the roads or the well, or the tank or the rent-free land or the occupancy holdings left undivided were appurtenances to the *mahal*. By the term appurtenances is meant facilities or amenities peculiar to the owner of an estate but derived not from the estate itself but by easement from the estate of another. In the case before us the roads and well, *etc.*, which the plaintiffs ask us to regard as appurtenances to the *mahal* are not part of the estate of another. Common tenancy in these roads and wells is not an appurtenance to the plaintiffs' estate, but actually a part of it.

I would dismiss this appeal with costs.

COUTTS, J.—The principal ground for allowing the plaintiffs the right of pre-emption, which is urged before us, is that the plaintiffs have a right as *shafi-i-khalit* or co sharers in the appurtenances of the estate, and the decisions in *Mahtab Singh* v. *Ram Tahal Misser* (4) and *Jahangeer Bukh* v. *Bhickaree Lall* (5) are principally relied on. Neither of these cases, however, assist the appellants, for in both cases the parties were not owners of separate *mahals* but of separate *pattis*, and there was no perfect partition. In the present case, however, although some portions of the original *mouza* were not partitioned, there was a complete partition and separate *mahals* with separate *tauzi* numbers were formed.

This matter has been fully discussed in *Abdul Rahim Khan* v. *Kharag Singh* (6) and *Munna Lal* v. *Hajira Jan* (7). The first of these cases is exactly in point, and in both these cases it was held that when there has been a perfect partition, although certain properties—a village *chaupal*, wells, tanks, and such other properties—were left undivided, no right of pre-emption on the ground of common appurtenances existed. The test appears to be whether or not there has been a perfect partition. The formation of separate *mahals* with separate *tauzi* numbers is clear indication of such a partition, and I agree that this appeal must be dismissed with costs.

Appeal dismissed.

(4) 10 W. R. 314; 6 B. L. R. 43 *note*.
(5) 11 W. R. 71.
(6) 15 A. 104; A. W. N. (1892) 240; 7 Ind. Dec. (N. S.) 783.
(7) 7 Ind. Cas. 404; 33 A. 28; 7 A. L. J. 879.

ALLAHABAD HIGH COURT.
CIVIL REVISION NO. 112 OF 1918.
March 13, 1919.
Present:—Mr. Justice Piggott and Mr. Justice Walsh.
Lala DARBARI LAL—PLAINTIFF—APPLICANT
versus
ROSHAN LAL—DEFENDANT—OPPOSITE PARTY.

Revision—Jurisdiction of Court—Judge, whether bound to prove his jurisdiction—Party alleging want of jurisdiction, duty of.

Where the jurisdiction of a Court is attacked at the hearing, it is not the duty of the Judge to prove to the parties the foundation of his jurisdiction. It is the duty of the party alleging want of jurisdiction to prove his allegation by affidavit or otherwise. [p. 33, col. 1.]

It is the duty of a person when applying in revision, particularly when relying upon want of jurisdiction, to provide himself first with the materials which prove the allegation on which he relies, and to lay them before the Court either by affidavit if they consist of statements which do not prove themselves, or by production of the record if they consist of statements which are proved by the record. [p. 33, col. 1.]

Civil revision against the order of the Sub Judge, Aligarh, dated the 18th May 1918.

Mr. *Girdhari Lal Agarwalla*, for the Applicant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—The question raised by this application is one of jurisdiction. The Court

below was asked to consider this point and remarked that the town of Hathras, where the parties reside and where the property in suit is situated, is now, and was on the date of the order under consideration, within the jurisdiction of that Court as Subordinate Judge of Aligarh. If this statement is correct, it is conclusive of the question raised by the application for revision. There is nothing to show that the statement is not correct, and so far as one can gather from such orders as have been issued by this Court, the intention of the Court always was that the work of the Aligarh district should go to the Subordinate Judge and the work of the two districts in the judgeship, namely, Etah and Bulandshahar, to the Additional Subordinate Judge. We do not think any case is made out for interference. We dismiss this application.

WALSH, J.—I agree. I only want to add a word or two in consequence of the argument addressed to us. It seems to me that it is the duty of anybody when applying in revision, particularly when relying upon want of jurisdiction, to provide himself first with the materials which prove the allegation on which he relies, and to lay them before the Court either by affidavit if they consist of statements which do not prove themselves, or by production of the record if they consist of statements which are proved by the record.

In this particular case the Judge whose jurisdiction was attacked at the hearing went out of his way to answer the question and to give his reasons, and I cannot believe that in the town of Aligarh, if it be the fact that there is no order justifying this particular Subordinate Judge exercising jurisdiction over parties living in Hathras, there is no one who could not ascertain that fact by a very simple enquiry between May 1918 and March 1919. In fact I should think there is hardly a member of the legal profession who could not discover this, if he pleased, in the course of an afternoon. If we were to agree with the suggestion that the Judge is called upon to prove to the parties the foundation of his own jurisdiction, and because this particular Judge had not placed anything on the record to justify his opinion, that, therefore, this order was bad, it is obvious that every defeated party who has lost his case before this particular Judge would come up in revision to have his order quashed.

Application dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 186 OF 1919.

April 9, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

MAHAMED RASEK AND OTHERS—DEFENDANTS—PETITIONERS

versus

TAHIDUNNESSA AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 7—Inventory, order directing preparation of, when can be made.

An order made under Order XXXIX, rule 7, of the Civil Procedure Code directing upon an application the preparation of an inventory of the property which is the subject-matter of a suit, should be made only where such inventory is essential for a proper decision of the case, and not otherwise. [p. 34, col. 2.]

Rule against the order passed by the Subordinate Judge, 1st Court, 24-Pergannas, in Title Suit No. 27 of 1919.

FACTS appear from the judgment.

Sir *Rash Behary Ghose*, (with him Babu *Krishna Kumar Mukerjee* for *M. A. K. Fuzlul Huq*), for the Petitioners.—We complain against the order of the lower Court calling upon the Nazir to make an inventory of the moveables claimed by the plaintiff; as there was no question of detention, preservation or inspection of the properties, no order could have been made under Order XXXIX, Civil Procedure Code. Refers to Woodroffe's Civil Procedure Code, page 1161. There must be a fair *prima facie* case and serious inconvenience. Refers to Annual Practice, 1919, page 845. The learned Subordinate Judge was wrong in passing order under Order XXXIX, rule 7. Inspection should be made for the proper decision of a case. Mr. Justice Mookerjee's judg.

ment in *Amjad Ali* v. *Ali Hussain Johar* (1) is clearly distinguishable from the present case.

The Advocate-General (with him Mr. *J. N. Singha* and Babu *Mohini Nath Bose*), for the Opposite Parties.—This Rule ought to be discharged. This is an eminently fit case where the order passed by the lower Court was absolutely necessary for the decision of the case, and the Sub-Judge was right in passing orders upon the Nazir for making an inventory. The preparation of such an inventory is essential for a proper decision of the case. Refers to *Amjad Ali* v. *Ali Hussain Johar* (1), which lays down the principle in express words and which covers the facts of a case like this. There can be no distinction between inspection and the making of an inventory.

Sir *Rash Behary Ghose* replied.

JUDGMENT.—This is a Rule calling on the opposite party to show cause why the order complained of should not be set aside on such terms as to this Court may seem proper, or such other order passed as to this Court may seem fit.

The order made by the Court below was that an inventory of the moveable properties claimed by the plaintiff be prepared by the Nazir after notice to the Pleaders of all parties. This order was passed upon an application purporting to have been made under Order XXXIX, rule 7 (1) (*a*), which provides that the Court may, on the application of any party to a suit and on such terms as it thinks fit, make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein.

The order made by the Court below was not for preservation or inspection of any property but for making an inventory of certain moveable properties which are described in the schedule to the plaint. So far as they are concerned, no inventory is required; and it was not alleged in the application made to the Court below that there were moveable properties other than those described in the plaint.

We are referred to the case of *Amjad Ali* v. *Ali Hussain Johar* (1). It was observed in that case: "We must consequently hold that the right to grant an inspection implies the right to make an inventory, if the Court be satisfied that the preparation of the inventory is essential, for a proper decision of the case."

So far it has not been shown that it was essential in the present case to have an inventory of the moveable properties for a proper decision of the case.

The petitioner in her plaint prayed for discovery and for the appointment of a Receiver. It is open to her to apply for discovery or for the appointment of a Receiver, and we are informed that an application for the appointment of a Receiver is actually pending before the lower Court.

In all these circumstances the Rule must be made absolute and the order of the Court below set aside.

We make no order as to costs.

Rule made absolute.

(1) 6 Ind. Cas. 574; 12 C. L. J. 519; 15 C. W. N. 353.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 750 OF 1916.

September 25, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

T. R. RAMA KRISHNA NAIDU AND OTHERS—DEFENDANTS NOS. 1 TO 3—APPELLANTS

versus

S. V. KRISHNASAMI NAIDU (DEAD) AND OTHERS—PLAINTIFF NO. 1, DEFENDANT NO. 4 AND LEGAL REPRESENTATIVES OF PLAINTIFFS NOS. 1 & 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 11—Res judicata, *doctrine of, limitations of—Dismissal of suit in spite of findings against defendant—Findings against defendant, whether* res judicata—*Costs, disallowance of, owing to adverse finding, effect of—Merger of finding in decree, whether necessary to operate as* res judicata.

It cannot be laid down as a uniform rule of law that where a plaintiff's suit is dismissed in spite of findings against the defendant, such findings are not *res judicata*. They will be *res judicata* where they are clear and where the intention of the Court was to give a definite decision on matters in issue not inconsistent with the decree or with any other finding. [p 40, col 1.]

Run Bahadur Singh v. *Lucho Koer*, 11 C. 301; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 (P. C.), explained.

RAMA KRISHNA NAIDU v. KRISHNASAMI NAIDU.

Krishna Behari Roy v. *Bunwari Lall Roy*, 1 C. 144 (P. C.); 25 W. R. 1; 2 I. A. 283; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213; 1 Ind. Dec. (N. S.) 93 and *Varathayyangar* v. *Krishnasami*, 10 M. 102; 11 Ind. Jur. 102; 3 Ind. Dec. (N. S.) 821, followed.

Nundo Lall Bhuttacharjee v. *Bidhoo Mookhy Debee*, 13 C. 17; 6 Ind. Dec. (N. S.) 503; *Thakur Magundeo* v. *Thakur Mahadeo Singh*, 18 C. 647; 9 Ind. Dec. (N. S.) 432 and *Parbati Debi* v. *Mathura Nath Banerjee*, 15 Ind. Cas. 453; 40 C. 29; 16 C. W. N. 877; 16 C. L. J. 9, dissented from.

Under section 11, Civil Procedure Code, it is not necessary that in order to operate as *res judicata* a finding or decision should be engrafted in the decree. [p. 43, col. 1.]

Where costs are disallowed to a successful defendant owing to adverse findings against him and notwithstanding the dismissal of the plaintiff's suit, such findings are *res judicata*. [p. 37, col. 2.]

Per *Sadasiva Aiyar, J.*—The decision of the Privy Council reported as *Run Bahadur Singh* v. *Lucho Koer*, 11 C. 301; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 only means that, where in spite of a useless finding on the evidence, an exactly opposite finding is arrived at by the same Court as the basis of its decree, the former useless finding can never be *res judicata* in subsequent proceedings. But it will be going far beyond their Lordships' intentions to say that no finding against a defendant can ever be *res judicata* under any circumstances if the plaintiff's suit is ultimately dismissed notwithstanding that finding. [p. 39, col. 1.]

In cases where a plaintiff is non-suited on the ground of limitation, *res judicata*, misjoinder, insufficient Court-fee on the plaint, jurisdiction or a like technical and preliminary ground and yet the Court proceeds to give a finding on the merits against the defendant to save a remand by the Appellate Court, such finding will not be *res judicata* if, on appeal, the Appellate Court does not itself think it necessary to give its decision on the merits or if, in case there is no appeal, it is evident that the first Court did not intend its findings to be final. [p. 39, col. 2.]

The doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the Court intended to give and has given a final decision on that question. [p. 42, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Mayavaram, in Appeal Suit No. 43 of 1915 (Appeal Suit No. 796 of 1914 on the file of District Court), preferred against the decree of the Court of the District Munsif, Tanjore, in Original Suit No. 308 of 1911.

FACTS appear from the judgment.

Mr. *S. Rangachariar* for Mr. *G. S. Venkatrama Aiyar*, for the Appellant.—The plaintiff's suit was dismissed notwithstanding the findings against defendants as to the ownership of the site and right of access to lane. Those findings were not the basis of the ultimate decree. Defendants are not precluded from re-agitating these matters. See observations of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (1) and also *Achanta Venkatasuryanarayana* v. *Yellapragadu Shiva Sankara Narayana* (2). Those findings were not necessary for the final decision in the previous case in the view which the High Court took. See *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3), *Parbati Debi* v. *Mathura Nath Banerjee* (4), *Thakur Magundeo* v. *Thakur Mahadeo Singh* (5).

The finding has not been merged in the decree and is not the foundation of the legal rights or liabilities of the parties.

The doctrine of *res judicata* should be guardedly applied as the effect of its application is to prevent Courts from going into the merits of the case.

Mr. *B. Sitarama Row*, for the Respondents, relied on the Privy Council case in *Krishna Behari Roy* v. *Bunwari Lall Roy* (6) and on *Varathayyangar* v. *Krishnasami* (7). The findings against defendants were substantial decisions. They were arrived at on a consideration of the evidence and were intended to be final. They could not be re-agitated in the present suit.

It is immaterial that they were not embodied in the decree. Section 11, Civil Procedure Code, does not require that it should be.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants Nos. 1 to 3 are the appellants. The facts are a little complicated. Though the decision of this second appeal ultimately depends upon our opinion on a pure question of law, it is necessary to state the material facts for clearly defining the legal question.

The plaintiff and the defendants are neighbours, the plan Exhibit III showing

(1) 11 C. 301; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 (P. C.).
(2) 27 Ind. Cas. 881; 17 M. L. T. 85; 2 L. W. 101.
(3) 13 C. 17; 6 Ind. Dec. (N. S.) 503.
(4) 15 Ind. Cas. 453; 40 C. 29; 16 C. W. N. 877; 16 C. L. J. 9.
(5) 18 C. 647; 9 Ind. Dec. (N. S.) 432.
(6) 1 C. 144 (P. C.); 25 W. R. 1; 2 I. A. 283; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213; 1 Ind. Dec. (N. S.) 93.
(7) 10 M. 102; 11 Ind. Jur. 102; 3 Ind. Dec. (N. S.) 821.

their respective houses and house sites. Roughly we might say that the plaintiff's house and his vacant site are west and north of the defendants' house and backyard site.

In the plaintiff's vacant site (north of defendants' house and west of the defendants' backyard) there is situated a well marked A, which well is common to both the plaintiff and the defendants. In 1905 the plaintiff tried to enclose the well by walls so as to give the defendants access only to the south eastern half of the circumference of the well (and not to the remaining north-western half) from the defendants' back door (in the northern wall of the defendants' house) situated to the south-east of the well The defendants then obstructed the plaintiff and the plaintiff brought the suit, Original Suit No. 425 of 1905, for an injunction against the defendants' attempted obstruction to the construction of the walls. The plaintiff's allegations in the plaint in that suit were (*a*) that the whole vacant site (within and near the south eastern corner of which the well was situated and including the said well site) belonged to the plaintiff, (*b*) that the defendants had only the right of easement of taking the water from the well, and (*c*) that as the owner of the servient tenement, the plaintiff was entitled to put up walls in his own site leaving a convenient way to the defendants to approach the well from their backyard door (south-east of the well) to the south-eastern half portion of the circumference of the well.

The defendants contended in that suit that the whole vacant site itself, including the site of the well, belonged to themselves as part of their house. The District Munsif found in that suit that the site did not belong to the plaintiff but to the defendants, and so dismissed the suit. On appeal, the District Judge was inclined to differ from the District Munsif on the question of title to the vacant site in which the well stood, but he held that the well itself belonged to both parties and hence that "convenience and mutual relations between neighbours" dictated that the plaintiff's suit for an injunction should be dismissed and he, therefore, confirmed the District Munsif's decree. On second appeal, this Court made the following observations in its judgment:

"The District Munsif found that the site did not belong to the plaintiff, and so dismissed the suit. The District Judge has not stated any finding on the question of ownership and though he states his opinion that the defendants' access to the site cannot be obstructed, he does not state any finding as to the legal character of the defendants' right." Then, directions were issued to the District Judge to send up findings on the following issues:—

(1) Does the site in question belong to the plaintiffs or to the defendants and have the plaintiffs a right to build a wall as alleged in the plaint?

(2) Whether the defendants have any right in the site in question, so as to entitle them to prevent the plaintiffs from building the wall?

The District Judge's findings (in substance) were as follows:—(*a*) that the vacant site except the site of the well itself belonged to the plaintiff; (*b*) that the well and its site belonged in common to both parties; (*c*) that the defendants' contention that even if they had no ownership right in the surrounding vacant site, they had an easement of right of way, not only from their house (to the south-east) to the whole circumference of the well but also another easement of way along a lane running south to north along the western boundary of the vacant site had not been established, they not having used any such way *as of right*, though they might have been passing across all portions of the vacant site and along the western boundary line into the public lane north of the vacant site, without objection through plaintiff's permissive indulgence. The District Judge finally said that the defendants had as owners of half the well such rights over plaintiffs' vacant site as were necessary for the ordinary use and enjoyment of the well and that such rights would be infringed by the construction of the walls "*as set out in the plaint and schedules*" and that the defendants were, therefore, entitled to prevent the "*building of walls in the manner proposed.*"

This Court then pronounced the following final judgment: "We accept the finding: though the site round the well is found to be the property of the plaintiffs, they are not entitled to build on it so as to obstruct the defendants' access *to the well and to every part of the surrounding wall which is common to the plaintiffs and themselves*. The suit was rightly dismissed and we dismiss the second

appeal. *As the defendants claimed ownership of the site and the finding is against them on that question*, we dismiss the appeal without costs."

This final judgment of the High Court in the former suit is dated 15th August 1910. Four months afterwards, in December 1910, the plaintiff attempted to raise another wall so as not to infringe the defendants' rights of convenient access from their house to any portion of the circumference of the wall of the well. Then also the defendants obstructed. So he brought the present suit in July 1911 for an injunction and other proper reliefs.

The defendants contended (among all sorts of other defences) (*a*) that the vacant site belonged to them and they were not bound by the finding contra in the former suit; (*b*) that, in any event, the defendants had a right of access to the lane running to the west of the site: and that the plaintiff was not entitled to obstruct by his wall access to that lane; and (*c*) that even if the defendants had the right of access only to the entire circumference of the well, the wall proposed to be built by the plaintiffs would not give them as convenient and full an access to the well as they were entitled to.

This last contention need not be further considered as, before the District Munsif, the parties put in a joint statement that the construction of a wall as mentioned in that joint statement would give the defendants full and reasonable access all round the well. The District Munsif who ultimately decided the suit (there was at first a judgment against the plaintiff by a previous Munsif, which was upset and the suit was remanded for fresh disposal) held that the contentions (*a*) and (*b*) were *res judicata* against the defendants by the final decision of the High Court in the former suit. He, therefore, passed a decree restraining the defendants from interfering with the plaintiff's construction of the wall in the manner proposed in the joint statement. The defendants appealed to the District Court, which transferred the appeal to the Subordinate Judge of Mayavaram for disposal. The learned Subordinate Judge dismissed the appeal, holding (with the District Munsif) that the defendants were bound by the findings in the former suit, namely, (*a*) that the plaintiffs were and the defendants were not the owners of the vacant site around the well; (*b*) that the defendants had no right of easement of way through that site and along the lane running in the western portion of the site to the public northern street called Kothan lane.

Before us in second appeal, the legal contentions argued were as follows: (Ground No. 5 in the S. A. Memo.) "The Courts below erred in holding that the determination of an unnecessary issue in the judgment in the Second Appeal No. 1225 of 1907 operated as *res judicata* when that decision was not the basis of the decree passed by the High Court." (6) "As the High Court dismissed the plaintiffs' suit on a different point and in spite of the finding as to the ownership, the law of *res judicata* would not apply." (7) "The Subordinate Judge erred in supposing that the determination of any issue in the previous suit would operate as *res judicata*."

The two findings in the former suit which are in controversy now are: (1) the plaintiffs are the full owners of the vacant site including the western lane site; (2) the defendants have no right of way to and along the lane and they cannot, therefore, object to the wall as proposed in the joint statement on the ground that though it gave them full access to all portions of the well, it did not give them access to the lane.

So far as ownership in the vacant site is concerned, even accepting as correct the very limited rule of *res judicata* contended for by the defendants, the High Court in their final judgment in the former litigation refused the defendants their costs on the express ground that the defendants claimed ownership of the site and the finding was against them on that question. The High Court decision, therefore, at least as to costs, was expressly based on that finding as to the ownership of the site and hence that finding is clearly *res judicata* in this suit.

Then comes the more difficult question whether the finding that the defendants have no right of easement to pass along the vacant site to the lane is also *res judicata*. It was first sought to be argued by the appellants that the District Judge himself

in the former suit did not give any such findings because he mentioned it only in the 3rd paragraph of his finding and not in the fifth and final paragraph of his finding. I do not think that this argument needs further notice.

Then it was contended that though the District Judge might have given that finding in the former suit, the High Court did not confirm that finding. As we read the judgment of the High Court, however, we entertain no doubt that this Court accepted all the conclusions of the District Court, which included not only the finding that the defendants had a right of access to all parts of the wall of the well but also that they had no right of easement of way to and along the western lane.

Having thus cleared the ground, we are left the comparatively simple question for decision, namely, whether when the plaintiffs' former suit was dismissed notwithstanding the finding against the defendants that they had no right of easement to pass through the vacant site to go to the lane, this latter finding is *res judicata* against the defendants in the present litigation.

Numerous cases and elaborate arguments were placed before us by Mr. S. Rangachariar and by Mr. B. Seetharam Rao on either side. I shall deal only with the more important cases.

Mr. Rangachariar relied principally upon an observation in the Privy Council decision reported as *Run Bahadur Singh* v. *Lucho Koer* (1) and on observations in *Achanta Venkatasuryanarayana* v. *Yellapragadu Shiva Sankara Narayana* (2). Mr. Seetharam Rao relied, on the other hand, principally on the Privy Council case in *Krishna Behari Roy* v. *Bunwari Lall Roy* (6) and upon this Court's decision reported as *Varathayyangar* v. *Krishnasami* (7). In *Run Bahadwr Singh* v. *Lucho Koer* (1) the facts were as follows:—The plaintiff sued his brother's widow for possession of property on the ground that he and his brother were undivided in interest at the brother's death and that the widow was in unlawful possession as the plaintiff, being the survivor, was solely entitled to the property. Before the suit was brought, there was a succession certificate proceeding, in which it was held that the two brothers were divided. The widow defended the suit on the plea that her husband and the plaintiff were divided in interest and she claimed a finding in her favour on this question, both on the evidence let in by her as to the division and on the legal ground that the finding in her favour as to division in the succession certificate proceedings was *res judicata* against the plaintiff. She also relied upon a finding in another suit brought for rent against a tenant, which suit was within the cognizance of a District Munsif (who had no authority to try the later suit which was filed in the Subordinate Judge's Court). The Subordinate Judge on the evidence held that the brothers were separate in estate, though he decided against her contention that the decisions in the certificate proceedings and in the suit in the District Munsif's Court were also *res judicata* in her favour. The High Court on appeal upheld her contentions as to *res judicata* in her favour and instead of stopping with that, they went into the evidence and gave a finding on the evidence that the brothers were joint in estate. They, however, held that as that question was *res judicata* and had to be, therefore, decided by themselves against their finding on the evidence, they dismissed the appeal.

Then on the final appeal to the Privy Council, their Lordships agreed with the Subordinate Judge and differed from the High Court on the question of *res judicata*. Hence, their Lordships had to go into the merits and on the merits also, they agreed with the Subordinate Judge and differed from the High Court. During the course of their Lordships' judgment, there are two sentences at page 306 as follows: "The widow has not appealed against the decree nor could she because it is in her favour, but she has appealed against the finding of the High Court on the evidence that the brothers were joint in estate." "It may be supposed that her advisers were apprehensive lest that finding should hereafter be held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it but was made in spite of it." I feel bound to state with due respect that taking advantage of these two sentences, several decisions in all the High Courts have tried to whittle down the beneficial doctrine of *res judicata* so as to

promote vexatious litigation. It will be seen that in the case before their Lordships though the High Court gave a finding *on the evidence* that the brothers were joint in estate, they *also* gave the exactly opposite finding that the brothers were divided in interest because they thought themselves bound by the doctrine of *res judicata* to give that exactly opposite finding, and their decree was rightly based upon this latter finding as to division and ignoring the former finding as to joint interest. Their Lordships' observations, when read in the light of this state of facts, can only mean that where in spite of an useless finding on the evidence, an exactly opposite finding is arrived at by the same Court *as the basis* of its decree, then the former useless finding can never be *res judicata* in subsequent proceedings. The rule enunciated in some of the decisions of the High Courts that no finding against defendants can ever be *res judicata* under any circumstances if the plaintiff's suit was ultimately dismissed (notwithstanding that finding) goes in my opinion far beyond their Lordships' intentions.

I shall now consider the decision in *Achanta Venkatasuryanarayana* v. *Yellapragadu Shiva Sankara Narayaana* (2) decided by the Chief Justice and Seshagiri Aiyer, J. In this case, the plaintiff (evidently as reversionary heir) sued for a declaration that the adoption of the defendant by the widow of the last male owner was invalid. The District Court dismissed the suit as barred by limitation as being brought more than 6 years after the plaintiff had knowledge of the adoption, but gave also a finding against the defendant that his adoption was invalid through want of authority in the widow. The defendant appealed against the finding that his adoption was invalid. This Court, while dismissing the appeal because it was an appeal against a finding, remarked that "it was suggested on appellant's behalf that the finding may operate as *res judicata* against him" but that "there was no foundation for this contention." Then they refer among other decisions to the Privy Council case of *Run Bahadur Singh* v. *Lucho Koer* (1) as authority for their view. In the first place, the observation is *obiter* because the real basis of the decision was that no appeal was allowed by the Civil Procedure Code against a mere finding where the decree itself was entirely in the defendant's favour. In the next place, the exact scope of the short observation of their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (1) (which I have already quoted) has not been discussed in detail and it is, no doubt, true that in some classes of cases at least, a finding against the defendants by a Court which finally dismissed the plaintiff's suit on some other ground cannot be relied on as *res judicata* against the defendant in a subsequent suit. The case of *Run Bahadur Singh* v. *Lucho Koer* (1) belongs to one of those classes of cases. In that case the finding relied on (as to the joint interest of two brothers) was completely nullified by an opposite finding (as to the division of status between the brothers, based on *res judicata*). That case well illustrates one of the classes of cases in which the finding in the first suit will not constitute the decision *res judicata* in the subsequent suit. *Achanta Venkatasuryanarayana* v. *Yellapragada Shiva Sankara Narayana* (2) belongs to another such class, namely, where the plaintiff is non-suited on the ground of limitation, *res judicata*, misjoinder, insufficient Court-fees on the plaint, jurisdiction or a like technical and preliminary ground and yet the Court proceeds to give a finding on the merits against defendant to save a remand by the Appellate Court. In these classes of cases also, such findings in the first suit will not be *res judicata if, on appeal, the Appellate Court does not itself think it necessary to give its decision on them*, or if in case there is no appeal, it is evident that the first Court did not intend its findings to be final.

At this stage, I might turn to the consideration of the section itself in the Civil Procedure Code on this point. Section 11 says (omitting the immaterial portions): "No Court shall try any issue in which the matter directly and substantially in issue in a former suit between the same parties has been heard and finally decided in a Court competent to try such subsequent suit and has been heard and finally decided by such Court." The only condition (besides conditions not in dispute and irrelevant to our present subject) imposed by the section to

restrict the rule prohibiting a re trial of an issue (besides the admitted other conditions) is that the issue should have been heard and finally decided in the first suit. There is no further condition that the decision of the issue should have been the basis of the decree. It may be that it should not be wholly *inconsistent with* the decree (this is not the same thing as the decree being in spite of the finding) or with any other finding which is the basis of the decree and which nullifies its effect [as in the Privy Council case of *Run Bahadur Singh* v. *Lucho Koer* (1)]. It may also be that an issue should not be held to have been *finally* decided against the defendant when it is clear from the judgment that the Court did not intend it as a final decision on that particular point, such intention being ordinarily presumed where the suit is decided against the plaintiff on a preliminary point as to limitation, etc.

In the present case, I have no reasonable doubt that the High Court decided and intended to decide finally in the former litigation that the defendants had no right of access to the lane through the plaintiffs' vacant site and such a decision is *res judicata*, and the fact that the plaintiffs' suit was dismissed does not prevent the operation of the rule deducible from the plain language of the section in the Civil Procedure Code.

I am aware that there are several Calcutta cases in which it has been broadly laid down that no finding against the defendant is *res judicata* against him where the suit is finally dismissed unless that finding is incorporated in the decree as a declaration of rights and liabilities. I do not intend to consider them all nor the Bombay and Allahabad cases holding similar views, and I only wish to state that I respectfully dissent from the decisions in these following particular cases, namely, in *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3), in *Thakur Magundeo* v. *Thakur Mahadeo Singh* (5) in *Parbati Debi* v. *Mathura Nath Banerjee* (4). I might add that these Calcutta decisions cannot in my opinion be reconciled with the decisions of the same Court in *Niamut Khan* v. *Khadu Buldia* (8) [which was, a Full Bench decision of five Judges and which was in my opinion, wrongly held in *Nando Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3) to have been overruled by the observations of their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (1)], in *Khater Mistri* v. *Sadruddi Khan* (9), and *Ekabar Sheikh* v. *Hara Bewah* (10) (Sir Lawrence Jenkins, C. J., was a party to the decision of this last case).

I shall now turn to the more important decisions which were relied on by Mr. Seetharam Rao and which, I think, support the view I have taken. In *Krishna Behari Roy* v. *Bunwari Lall Roy* (6), the facts were as follows:—*B*, as adopted son and heir of *G*, instituted a suit to set aside certain Putni leases on the ground that they were not binding upon him. The Putni lessee defendants raised two pleas, namely, (1) that *B* the plaintiff was not the adopted son and heir of *G*, and (2) that the Putni leases were binding upon him even if he was the adopted son and heir as they were given for a proper and necessary purpose. Then *K*, the reversionary heir of *G*, was made a supplemental defendant and he also denied the plaintiff's status as adopted son. The first Court found (*a*) that the adoption was true and valid, (*b*) that, however, the Putni lease was granted for a proper and necessary purpose, and so that Court dismissed the suit. The Putnidars did not appeal, but *K*, the reversionary heir, appealed against the finding as to adoption. According to the present prevailing course of decisions, he had no right of appeal but, anyhow, he appealed and his appeal was unsuccessful and a second appeal to the High Court was also unsuccessful. Then he brought a second suit to set aside the adoption, and it was contended by the adopted son that the finding in the former suit in favour of his adoption was *res judicata* against *K*. That view prevailed in the lower Courts and also in the Privy Council. Their Lordships of the Privy Council say: It is unnecessary to go at length into the reasons for the decision, because those reasons appear in a recent judgment of this Board in the case of *Scorjomonee Dayee* v. *Suddanand Mohapatter* (11). In that judgment it is said: "Their Lordships are of opinion that the term 'cause of action' is to be

(8) 6 C. 319 (F. B.); 7 C. L. R. 227; 3 Ind. Dec. (N. s.) 209.

(9) 34 C. 922.

(10) 8 Ind. Cas. 660; 13 C. L. J. 1; 15 C. W. N. 335.

(11) 12 B. L. R. 304 (P. C.); 20 W. R. 377; I. A. Sup. Vol. 212; 3 Sar. P. C. J. 285.

construed with reference rather to the substance than to the form of action.... But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the *general law relating to res judicata*, founded on the principle '*nemo debet bis vexari, pro eadem causa.*' This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case, which was referred, of *Gregory* v. *Molesworth* (12) in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between the parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingston* (13)."

It will be noticed that in the above case, the finding on a question of fact arrived at in a former suit against the defendant was held to be *res judicata*, even though that suit itself had been dismissed on another ground, namely that the Putni sought to be set aside was binding on the plaintiff.

The next case I shall refer to is the case in *Varadhayyangar* v. *Krishnasami* (7) decided by Muthusawmy Aiyar and Parker, JJ. The facts were as follows: *V* sought in the first suit to eject *K* from a certain land, alleging that *K* was a trespasser. *K* pleaded that he held as mortgagee under two documents one for Rs. 1,000 and the other for Rs 50. On second appeal, it was held that *K* was entitled to defend his possession only by virtue of the mortgage for Rs. 50 and that his other mortgage for Rs. 1,000 was invalid for want of registration. The suit was, however, dismissed as the plaintiff's claim was to eject the defendant as if he was a trespasser, which defendant was not. Then *V* brought the second suit to redeem the mortgage for Rs. 50. The defendant again set up that he had a further mortgage for Rs. 1,000. The District Judge held that notwithstanding the finding in the former suit that the mortgage for Rs. 1,000 was not binding upon the plaintiff, the defendant held a mortgage for a total sum of Rs. 1,050 (Rs. 1,000 *plus* Rs. 50). He, however, dismissed the second suit principally on the ground that it was barred by sections 13 and 43 of the old Procedure Code. On second appeal, the learned Judges say: "The decision of the question, however, whether respondent could defend his possession under the mortgage for Rs. 1,000 and if not under document 2 '(which was for Rs. 50)' was conclusive and binding upon the *parties to that suit* and the respondent" (that is the defendant) "is, therefore, estopped from now alleging the contrary." Thus, they clearly held that the defendant in that case was bound by the decision against him in the former suit that the bond for Rs. 1,000 was not binding on the plaintiff, even though the decree in the former suit was a decree dismissing that suit wholly. My opinion that the observations of their Lordships of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (1) should not be extended beyond its legitimate application to the facts of that case (and its application to the decision of the High Court which gave two contradictory findings and which their Lordships of the Privy Council were criticising) finds strong support from the decision in *Krishna Behari Roy* v. *Bunwari Lall Roy* (6) which their Lordships did not refer to, much less overrule in *Run Bahadur Singh* v. *Lucho Koer* (1). As I said already, in *Krishna Behari Roy* v. *Bunwari Lall Roy* (5) the first suit was dismissed notwithstanding or in spite of the decision against the defendant *K* as to the validity of the plaintiff's adoption, and yet, the finding against the defendant in the former suit was held to be *res judicata* against that party in the second suit. Here I might be permitted a few general observations. It has been argued that as the doctrine of *res judicata* prevents a Court from going into the merits, it should be very strictly and guardedly applied. If this means that where a former decision is relied on as *res judicata*, it and its contents should be strictly proved and mere ambiguous passages

(12) (1747) 3 Atk. 626; 26 E R. 1160.
(13) (1776) 2 Sm. L. C. 6th Ed. 796; (12th Ed. p. 754.)

in the judgment should not be pressed in favour of the party claiming *res judicata* in his favour, I agree. But if it is intended to be argued that even where the finding is clear and where the intention of the Court to give a definite decision which is not inconsistent with the decree or with any other finding is also patent, still the Court should try its best to evade the very beneficial doctrine that a man should not be twice vexed in respect of the same contest as to his rights and the time of the Courts should not be wasted by trying the same matter several times, I entirely dissent. Just as Mr. Justice Mahmood said in a well-known Allahabad case that the doctrine that Statutes of limitation as restricting the trial of questions on the merits should be strictly construed is a dangerous doctrine because Statutes of limitation are also Statutes of repose, based on public policy, so I would hold that the doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the Court has intended to give and has given a final decision on that question. Here I might quote certain passages from the decision of their Lordships of the Privy Council in *Sheoparsan Singh* v. *Ramnandan Prashad Narayan Singh* (14): "There has been much discussion at the Bar as to the application of the plea of *res judicata* as a bar to this suit....But in view of the arguments addressed to them, their Lordships desire to emphasize that the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time. 'It hath been well said', declared Lord Coke, '*interest reipublicæ ut sit finis litium*' otherwise great oppression might be done under colour and pretence of law, [*Ferrer's case* (15)]. Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnaneswara and Nilakanta include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana". "And so the application of the rule" (that is the rule of *res judicata*) "by the Courts in India *should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.*"

In this case, to repeat, this Court finally decided as a matter of substance in the former suit that the defendants had no right of ownership to and no right of easement in the vacant site other than an easement of access to the well and its whole circumference. The lower Courts were, therefore, right in treating the decisions on these two matters as *res judicata* and I would dismiss the second appeal with costs.

NAPIER, J.—The suit out of which this appeal arises was brought by the plaintiff to enforce his right to build a wall round a well on his land, which right he claimed to have been established in an earlier suit against the defendants. The defendants set up in this suit all the defences which they pleaded previously in the former suit and contended that the matter was not *res judicata*. This latter is the sole question before us.

My learned brother has set out the facts at length in his judgment. In the first suit the plaintiff claimed the ownership of the property and that the sole right of the defendants was access to a part of the well. He had built a wall in such a manner as to give such access and claimed an injunction against the defendants to prevent them from interfering. The defendants claimed ownership of the whole plot of land claimed by the plaintiff and alternatively easement rights across it. When the case came before the High Court in second appeal it was remitted for findings to the District Court, and I agree with my learned brother that the result of those findings was that the site belonged to the plaintiff and that the sole right of the defendants was a right of property in the structure of the well and a right of access to the whole of the well. These findings were accepted by the High Court, but as the plaintiff had claimed to be entitled to limit the defendants and was building a wall so as to give access to a part only of the well the plaintiff's suit was dismissed. The plaintiff subse-

(14) 33 Ind. Cas. 914; 43 C. 694; 14 A. L. J. 466; 20 C. W. N. 738; 18 Bom. L. R. 397; 23 C. L. J. 621; (1916) 1 M. W. N. 419; 20 M. L. T. 1; 3 L. W. 544; 31 M. L. J. 77; 43 I. A. 91 (P. C.).

(15) 6 Co. Rep. 7*a* at p. 9*a*; 77 E. R. 263.

quently built a wall giving full effect to the rights found to exist in the defendants by that judgment, and the defendants again interfered with the result that the plaintiff was compelled to file the present suit.

In this suit the defendants have set up exactly the same claims as were negatived in the former suit and contend that the findings in that suit are not *res judicata* because in spite of those findings the suit was dismissed. We have to decide whether this contention is well founded. The proposition is stated as follows:—that where in spite of the actual findings the suit of the party in whose favour the findings were arrived at is dismissed for any reason those findings are not *res judicata*. The question is to be decided on the language of section 11 of the Civil Procedure Code and the decisions based on it. The words of section 11 are: "No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties,.....and has been heard and finally decided by such Court."

We have found that the matter directly and substantially in issue in this suit was directly and substantially in issue in the former suit and has been heard in that suit. It is contended, however, that it has not been finally decided and even if finally decided, there has been engrafted on this section by decisions of the Privy Council the limitation above referred to. As there is authority for this contention in decisions of other Courts, I think it necessary to examine the question somewhat at length.

The first thing to be noted is that the section does not say that the decision must be engrafted in a decree. That this is unnecessary will of course be apparent from the fact that it would depend entirely on the question as to who was the plaintiff and who was the defendant in any suit, whether the rights were so incorporated. If the person in whose favour the right was established was the plaintiff, those rights would appear in the decree. If on the form of the litigation he was the defendant, the suit against him would simply be dismissed and the decree would be silent on the subject. We have here a case, however, where the rights have been found in favour of the plaintiff but the suit has been dismissed because he put his claim too high.

The basis of the law of *res judicata* is stated by their Lordships of the Privy Council in *Sheoparsan Singh* v. *Ram Nandan Prashad Naryan Singh* (14). In England the proposition is that it is for the well being of the State that there should be an end of the litigation. That is the doctrine declared by Lord Coke. In ancient India it is founded on the text of Katyayana that if a person defeated at law sues again he should be answered "you were defeated formerly". These are the foundations of the doctrine as stated by their Lordships on page 706 of that case. Their Lordships further point out what is most important that the application of the rule by the Court should be influenced by no technical considerations of form but by matter of substance. Applying this doctrine to the language of section 11, it seems difficult to argue that where the matter has been directly and substantially decided it is not finally decided because the form of the litigation or the extent of the plaintiff's claim prevented a decree in accordance with the decision.

The law of *res judicata* as applicable to India was considered by their Lordships of the Privy Council on the construction of the first Civil Procedure Code, Act VIII of 1859. Section 2 of that Code provided that "Civil Courts shall not take cognizance of any suit brought on any cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit." This language was considered by their Lordships in *Soorjomonee Dayee* v. *Suddanund Mohapatter* (11). At page 315 the report states that if the term 'cause of action' will not directly cover the matter which is claimed to be *res judicata*, they are of opinion that this clause "would by no means prevent the operation of the general law relating to *res judicata* founded on the principle '*nemo debet bis vexari, pro eadem causa*' "; and their Lordships adopt the language of Lord Hardwicke in *Gregory* v. *Molesworth* (12) that "where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form." These propositions were reiterated by the Board in a case on the

same Code 3 years later, *Krishna Behari Roy* v. *Bunwari Lall Roy* (6). That case is of importance because, as pointed out by my learned brother, the position was very like the position in this case. In the former suit in that case *A*, claiming to be the adopted son and heir of *B*, instituted a suit to set aside certain Putni leases. One of the defences was that *A* was not the adopted son of *B*, and a certain person *C*, who claimed to be the reversionary heir of *B*, was made a co-defendant. This issue was tried and decided in favour of *A*, but the suit was dismissed as it was found in favour of the Putnidar that the Putni could not be set aside. This judgment was upheld by the High Court. Subsequently *C* brought a suit against *A* to set aside the adoption alleged by him. The High Court held that the matter was *res judicata* and this view was upheld by the Privy Council on the authority of their previous decision in *Soorjoomonee Dayee* v. *Suddanund Mohapatter* (11). I agree with my learned brother that this authority covers the present case; and it is not argued before us, and could not be successfully argued, that the more definite language of the present Code has in any way limited the scope of the doctrine *Vide Run Bahadur Singh* v. *Lucho Koer* (1). This principle was applied by this Court in a case, *Varathayyangar* v. *Krishnasami* (7). The question was also considered by a Full Bench of five Judges of the Calcutta High Court in *Niamut Khan* v. *Phadu Buldia* (8), where their Lordships stated that they are bound to follow in its integrity the rule laid down by the Privy Council in the above cases. In that case *A* brought a suit against *B* for enhancement of rent. *B*'s defence was, first, no notice, secondly, that the rent was not enhanceable. The Munsif found that the rent was enhanceable but dismissed the suit for want of notice. The decision of the Full Bench was that as the opinion of the Court has been given on a question which had been raised by the pleadings and argued, that opinion must be considered as *res judicata* even though it may not have been embodied in the decree. In a subsequent case in the same Court, *Thakur Mogundeo* v. *Thakur Mahadeo Singh* (5), a Bench of that Court declined to follow the judgment of the Full Bench on two grounds, (1) that the decision had not been followed in that Court, and (2) that the Privy Council in a more recent case had expressed an opinion which was in opposition to the judgment of the Full Bench. It is to be noted that the Bench did not consider the judgment of the Privy Council on which the decision of the Full Bench was founded, nor did they note that the subsequent decision of the Privy Council, namely, *Run Bahadur Singh* v. *Lucho Koer* (1), did not purport in any way to overrule the previous decision quoted at length by their Lordships. In my opinion the learned Judges misunderstood the decision in *Run Bahadur Singh* v. *Lucho Koer* (1). The facts of this case were as follows:—One Run Bahadur Singh sued the widow of his deceased brother, Murlidhar Singh, to recover possession of Murlidhar's property on the ground that he and his brother were joint in estate. The widow maintained that the brothers were separate and claimed a widow's estate. She further maintained that the question had been conclusively determined in her favour in a former suit. The High Court determined the plea of *res judicata* in her favour. At the same time the High Court considered the evidence adduced in the trial on the point and found that the brothers had been joint. But having decided that the matter was *res judicata* in her favour they dismissed the suit. The widow appealed against the finding of facts on the evidence, and with regard to that their Lordships of the Privy Council say, "it may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her, but this could not be so inasmuch as the decree was not based upon it but was made in spite of it." It is this language which has given rise to what I conceive to be the misapprehension in the subsequent cases. For it has been treated as a dictum that wherever there is a finding which is not given effect to by a decree that finding is not *res judicata*. I am clear that their Lordships of the Privy Council never intended to lay down any such proposition. They simply said that where a Court gives

a finding because it is bound to do so by reason of the application of the doctrine of *res judicata* and embodies that finding in a decree, any other finding on the evidence which negatives the finding that is the basis of the decree cannot be *res judicata*. This proposition seems to me to be obvious, for the finding based on the finding of *res judicata* must continue to be *res judicata* for all time and necessarily a finding of fact on the evidence cannot have the slightest effect. It is certainly unusual for the High Court to give findings on the evidence where they have found the opposite on a plea of *res judicata*, but it is done every day in the original Courts of this country. Munsifs return findings on all issues and it would be an extraordinary contention that a finding of fact on one issue by a Munsif on the evidence should have any validity as against his own finding based on *res judicata* which has been upheld in the Appellate Court. The learned Vakil for the appellant has pointed out that this decision in *Thakur Magundeo* v. *Thakur Mahadeo Singh* (5) has been followed in subsequent cases. I do not think it necessary to examine them, because I am satisfied that this decision is based on a complete misunderstanding of the decision in *Run Bahadur Singh* v. *Lucho Koer* (1) and that the true principles were stated in the decision of the Full Bench of that Court in *Niamut Khan* v. *Phadu Buldia* (8).

My learned brother has dealt with some cases of this Court which seem to adopt the view laid down in *Thakur Magundeo* v. *Thakur Mahadeo Singh* (5) as good law. If those decisions do go to the length of the propositions stated in *Thakur Magundeo* v. *Thakur Mahadeo Singh* (5), I must respectfully dissent from them. This case is, in my opinion, clearly covered by the decision of the Privy Council in *Krishna Behari Roy* v. *Bunwari Lall Roy* (6) and I am bound to follow it.

I agree with my learned brother that the appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No 63 OF 1919.

April 28, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

GAURI NATH AND OTHERS—PLAINTIFFS—APPLICANTS

versus

RAM NARAIN AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Oudh Civil Courts Act (XIII of 1879), s. 7—Civil Procedure Code (Act V of 1908), ss. 24, 92—Suit under s. 92, whether can be transferred by District Judge to Additional District Judge.

Section 7 of the Oudh Civil Courts Act permits a District Judge to assign, with the sanction of the Judicial Commissioner, to an Additional District Judge any of the duties connected with the trial of civil suits cognizable by a Civil Court. [p. 47, col. 1.]

Therefore, a District Judge has power to transfer a suit under section 92 of the Civil Procedure Code to an Additional District Judge, provided the assignment of such suits has been sanctioned in the manner required by law. [p. 47, col. 1.]

Appeal against the order of the District Judge, Lucknow, dated the 22nd April 1919.

Mr. *Mahesh Prasad*, for the Applicants.

Mr. *B. B. Chandra*, for the Opposite Party.

JUDGMENT.—This is an application for the revision of an order passed by the District Judge of Lucknow, transferring a suit pending in his Court for trial to the Court of the Third Additional District Judge.

The suit in question was instituted under section 92 of the Code of Civil Procedure, and the argument of the learned Counsel who appears for the plaintiffs is that such a suit is not covered by section 7 of the Oudh Civil Courts Act (XIII of 1879) and cannot be transferred by the District Judge to any other Court for trial.

Section 7 lays down that when the business before any District Judge requires the aid of Additional Judges for its speedy disposal, the Local Government may, upon the recommendation of the Judicial Commissioner, appoint such Additional Judges as may be requisite. It further declares that such Additional Judges shall perform any of the duties of a Judge under Chapter III of tha Act which the District Judge may, with the sanction of the Judicial Commissioner, assign to them and in the performance of such duties they shall exercise the same powers as the District Judge. Chapter III

deals with the general jurisdiction of the Civil Courts in Oudh. Section 17, which forms a part of Chapter III, lays down that subject to the provisions of the Code of Civil Procedure, section 15, and of any other enactment for the time being in force, the jurisdiction of a District Judge extends to all original suits cognizable by the Civil Courts. A suit under section 92 of the Code of Civil Procedure is unquestionably an original suit cognizable by certain classes of Civil Courts, and the question for consideration is whether there is anything in that section to prevent an Additional Judge from taking cognizance of it, if it is transferred to his Court by the District Judge.

It is desirable in this connection to refer for comparison to the provisions of the old Code of Civil Procedure, section 539 of which required that such a suit could only be instituted in the High Court or in the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust was situated. No power was there reserved to the Local Government to empower any other Court to try the same. Section 25 of the old Code of Civil Procedure did not empower the District Judge to transfer a suit pending in his Court to a subordinate Court. Section 92 of the present Code permits such a suit to be instituted in the principal Civil Court of original jurisdiction or in any Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situated. Section 10 of the Oudh Civil Courts Act (XIII of 1879) declares that the Court of the District Judge shall be deemed to be the principal Civil Court of original jurisdiction in the district over which his jurisdiction extends, and that the control over all the Courts in such district shall be vested in the District Judge, subject to the general control of the Judicial Commissioner.

The powers conferred by section 24 of the present Code of Civil Procedure are wide enough to empower a District Court to transfer any suit pending before it for trial or disposal to any other Court subordinate to it, provided it is competent to try or dispose of the same. An Additional District Judge is competent to try and dispose of a suit filed under section 92 of the Code of Civil Procedure, if it is transferred to him for disposal by the District Court, because under section 7 of Act XIII of 1879 he can exercise, in respect of the duties assigned to him, the same powers as the District Judge. His jurisdiction is co-ordinate with that of the District Court, though for the purposes of section 24, he is deemed to be subordinate to the District Court. Section 7 of Act XIII of 1879 merely requires that the sanction of the Judicial Commissioner should be obtained before any functions are assigned to the Additional Judge.

The learned Counsel for the plaintiffs relies on the decisions in *Abdul Karim Abu Ahmed Khan* v. *Abdus Sobhan Choudhry* (1) and *Muhammad Musa* v. *Abul Hassan Khan* (2). In the former case a suit was filed under section 92 of the Code of Civil Procedure in the Court of the District Judge and was subsequently transferred by him to the Court of the Subordinate Judge, after the latter had been invested by name with the power to try that suit by the Local Government. An objection was taken before the Subordinate Judge to the trial of that suit by him, which was upheld on appeal on the ground that the notification empowering him by name was not of the kind contemplated by section 92 of the Code of Civil Procedure. It was said that it was a notification directed to a particular Judge and purported to deal with a particular litigation pending on the date of the notification in another Court, and that the District Judge had no power to transfer the suit to a Court which was not competent to dispose of it. In the latter case the transfer of a suit brought under section 92 of the Code of Civil Procedure by the District Judge to an Additional Judge who was not invested with the power to try such suits by the Local Government was held to be bad. But it is difficult to understand the reasoning on which that judgment proceeds. It was conceded that had the District Judge assigned, under section 8 of Act XII of 1887, to the Additional Judge the function of a District Judge in respect of suits under section 92 of the Code of Civil Procedure, all might have been well. The argument

(1) 13 Ind. Cas. 243; 39 C. 146; 6 C. W. N. 44.
(2) 22 Ind. Cas. 951; 41 C. 866; 18 C. W. N. 612.

was that the functions so assigned must be general and that an order of transfer under section 24 was insufficient to make the Additional Judge competent to try such a suit. But section 7 of the Oudh Civil Courts Act (XIII of 1879) permits the District Judge to assign, with the sanction of the Judicial Commissioner, to an Additional Judge any of the duties connected with the trial of original suits cognizable by a Civil Court. Reading this section with section 24 of the Code of Civil Procedure the transfer cannot be regarded as illegal, if the assignment of such duties has been sanctioned in the manner required by law.

Let the transfer of the case as a part of the assignment of the duties to be performed by the Third Additional District Judge be sanctioned and the trial of the case be proceeded with in his Court.

This application is rejected. No order is made as to the costs of this proceeding.

Application rejected.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2507 OF 1917.

April 10, 1919.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Cuming.

GOVINDA RAM DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

AGENT, EAST INDIAN RAILWAY COMPANY, LTD—DEFENDANT—RESPONDENT.

Pleadings Case not put forward in pleadings sought to be proved by evidence—Procedure - Court, duty of.

One *T.* consigned 51 tins of *ghee* to the plaintiffs and signed a risk-note in form H in respect of them. When the plaintiffs went to take delivery, it was found that out of the 51 tins of *ghee*, 25 were empty, 25 were full, and one was leaking. The plaintiffs thereupon refused to take delivery and brought a suit against the Railway Company for damages. *T.* was examined on commission on behalf of the plaintiffs, but during his examination no suggestion was made by the plaintiffs that the 25 empty tins were substituted for the 25 full tins, and no such case was made in the plaint. More than a month after the examination of *T.*, one of the plaintiffs wanted to examine himself for the purpose of proving that the 25 empty tins had been substituted for the 25 full tins, but the Court did not allow him to do so:

Held, that the Court was quite justified in declining to allow the plaintiffs to embark on a new case at such a late stage of the proceeding. [p. 48, col. 1.]

Appeal against the decree of the District Judge, Burdwan, dated the 27th August 1917, affirming that of the Munsif, 1st Court at that place, dated the 15th July 1916.

FACTS appear from the judgment.

Babu *Satish Chandra Mookerjee*, for the Appellants.—My client does not deny that he signed the risk-note in form H in respect of the consignment. My grievance is that the learned Munsif wrongly disallowed the second plaintiff to give evidence which he should have done. So I have been greatly prejudiced in the prosecution of my suit. It was no new case that was set up, because the plaint stated thus: 'Instead of 25 tins, 25 empty tins have been put in;' and the plaint was filed on July 23rd, 1915. So how could the learned Munsif shut out evidence on the point? It is not sufficient and does not meet the requirements of the plaintiffs' case that the Kutni man was examined on commission on 11th June 1916. Regard being had to the statement in the plaint, it cannot be said that we were going to make out a new case. No amendment of the plaint was necessary. The suit could have proceeded on evidence being given by the second plaintiff. So the case should be re-heard.

Babu *Provash Chunder Mitter* (with him Babu *Ambicapada Chowdhry*), for the Respondent, was not called upon.

JUDGMENT.—This is an appeal by the plaintiffs whose suit for damages against the East Indian Railway Company has been dismissed by both the Courts below. It appears that on 5th October 1914 Tilak Chand Piramal at Kutni consigned to the plaintiffs at Asansole 51 tins of *ghee* and signed a risk note in form H in respect of them. The plaintiffs' case was that on arrival of the tins at Asansole on 13th October 1914 when they went to take delivery it was found that out of the 51 tins of *ghee* 25 were empty, 25 were full, and 1 was leaking. The plaintiffs wanted to take the 26 tins and give a qualified receipt, but this the Railway Company very properly refused to allow. The consequence was that the *ghee* remained for sometime before

delivery was taken and eventually the full tins and the empty tins were sold. The plaintiffs, on 23rd July 1915, filed the present suit for damages, Rs. 1,099. The only point made by the plaintiffs in this Court is that on 14th July 1916 the second plaintiff was not allowed to give evidence of a case which was then suggested for the first time that the 25 empty tins had been substituted, it is not clear by whom or when, for the 25 full tins. It appears that on 11th June—a little more than a month before—a member of the firm of Tilak Chand Piramal had been examined at Kutni on commission. No such suggestion was made in his evidence, and it is obvious that he was the proper person to prove the identity of the tins consigned by him if there was any question as to their identity. No such case was made in the plaint, and we think that the Munsif was quite justified in declining to allow the plaintiffs to embark on a new case at such a late stage of the proceedings. They certainly could not have been allowed to do so without getting leave to amend their plaint and allow the defendant to put in an additional written statement. Under the risk-note it is clear that no liability fell upon the Railway Company. The appeal is accordingly dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1491 OF 1918.

November 26, 1918.

Present :—Mr. Justice LeRossignol.

UDMI—DEFENDANT—APPELLANT

versus

RAM GOPAL—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS

Punjab Pre-emption Act (I of 913), s. 30 (1)—Pre-emption—Vendee put in possession—Vendor not in exclusive possession, effect of—Limitation.

The vendors sold certain land owned by them and their nephew, who was a minor, ignoring his right and without joining him in the sale. The land being free of crop, the vendors stated to the Patwari that they had placed the vendee in possession:

Held, that, under the circumstances, it must be held that the vendee took possession of the land on the date of the sale and that limitation began to run from that date under section 30 of the Punjab Pre-emption Act.

Second appeal from the decree of the District Judge, Karnal, dated the 28th February 1918, affirming that of the Munsif, 1st Class, Rohtak, dated the 26th November 1917, decreeing possession by pre-emption of the land in suit on payment of Rs. 500.

Mr. *Nand Lal*, for the Appellant.

Mr *Manohar Lal*, for the Respondents.

JUDGMENT —The only question here is whether this suit to pre empt was within time. At the time of the sale, which was oral, the unmortgaged portion of the land sold was free of crop and the vendors, reporting the sale to the Patwari, stated that they had placed vendee in possession. That statement was sufficient to transfer the possession.

But the District Judge holds that the vendors were not in exclusive possession inasmuch as one Bhartu was in possession with them and he did not join in the sale.

Now Bhartu is a minor nephew of the vendors and his interest has been ignored. Had the vendors sold or purported to sell their shares in the field, their possession could not be said to be exclusive, but they treated the field as their sole property and they were certainly in actual physical possession of it.

In my opinion the vendee took physical possession of this portion of the land sold on 23rd February 1916 and the suit was accordingly time-barred.

The appeal is accepted and the suit dismissed with costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 422 OF 1919.

June 25, 1919.

Present:—Mr. Justice Walsh and Mr. Justice Piggott.

ALLA-UD-DIN AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 59, 395—Dacoity—Punishment—Transportation, term of, length of—Approver, statement of, value of—Corroboration, absence of, effect of.

When an offence is punishable with transportation for life or imprisonment for a term of ten years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment, namely, ten years. [p. 49, cols. 1 & 2.]

Where, therefore, an accused, on conviction for an offence under section 395, Penal Code, was sentenced to transportation for 15 years, the High Court reduced the sentence to transportation for a term of ten years, that being the period of imprisonment provided for the offence. [p. 49, col. 2.]

Though the absence of any corroboration of the statement of an approver is not fatal to the conviction of a person named by him as one of the participators in an offence, it is nevertheless sufficient to cast doubt upon its justice and the accused is entitled to the benefit of the doubt. [p. 49, col. 2; p. 50, col. 1.]

Criminal appeal from an order of the Sessions Judge, Kumaun, dated the 25th March 1919.

Mr. *A. S. Osborne*, for the Appellants.

Mr. *L. M. Banerji* (Government Pleader), for the Crown.

JUDGMENT.—This is an appeal by nine appellants against a conviction for dacoity by the Sessions Judge of Kumaun. Three of the appellants Allauddin, Tondi and Bhikhari have been sentenced to 15 years' transportation. During the hearing of the case it was pointed out to me, before whom originally the case came, that the legality of this sentence was open to question. At my request the learned Chief Justice appointed two Judges to hear and determine the appeal in order to dispose of the question of the legality of the sentence by an authoritative decision. Since then, however, our attention has been drawn to the case of the *Queen* v. *Naiada* (1), in which a Full Bench decided that "when an offence is punishable either with transportation for life or imprisonment for a term of 10 years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment, namely, ten years." That authority which dates from 1875 is binding upon us. And the section which we have to administer, namely, section 395 of the Indian Penal Code is in precisely identical terms. We have, therefore, no alternative but to reduce the sentence in the case of Allauddin, Tondi and Bhikhari to a term of transportation for ten years. There is no substance in their appeals, their guilt is perfectly plain and speaking for myself I should have convicted Bhikhari on his own statement for rape. There is no doubt that a horrible rape was committed upon the wife of the complainant and it is a feature of the case that the woman has come forward and described what happened to her. I do not understand why the learned Judge acquitted this scoundrel, and he deserves a whipping as well as a severe term of transportation. However, we cannot deal with the matter which has been disposed of by his acquittal.

With regard to the other appellants Mr. Osborne, who has argued the case of all of them with his usual clearness, has drawn our attention to everything which can be said on their behalf and which comes to very little, and their appeals must be dismissed so far as their conviction is concerned with the exception of one, namely, appellant No. 9, Mahbub Shah He is last on the record amongst the appellants, and was the last person to be arrested and possibly on that account but also possibly, as Mr. Osborne suggests, because he was only brought into the case on account of the statement against him by Karim Bakhsh, he was not in fact put up for identification and was not identified by anybody in the case. In fact upon any analysis of the evidence it appears that the statement of Karim Bakhsh, the approver, against him is totally uncorroborated in law. That is not a fatal objection to the conviction, but in our view it is sufficient to cast doubt upon its justice and, moreover, the learned Judge was not satisfied to act upon Karim Bakhsh's statement alone. He evidently thought that some corroboration was required to satisfy his own mind. Turning to the portion of the judgment which deals with this man's case

(1) 1 A. 43 (F. B.); 1 Ind. Dec (N. S.) 29.

we find that the learned Judge explained his reason for convicting him by the fact that in addition to the statement of the informer his name had been mentioned to the Mukhia by one of the co-accused when the first detailed information of the participants in the dacoity was given to any one. The learned Judge, dealing with the mass of matter which he has done with great thoroughness, overlooks the fact that this really is not evidence of the fact at all and, therefore, cannot be used as corroboration of Karim Bakhsh. We, therefore, give Mahbub Shah the benefit of the doubt and reverse his conviction and direct that he be released. The appeal of all the others will be dismissed so far as the conviction is concerned. As we have already said, the sentences of Alla-ud-din, Tondi and Bhikhari must be reduced to ten years' transportation. The remaining appellants, whose convictions are upheld and who do not really seem to have been dealt with undue severity, have the good fortune, as Mr. Osborne has pointed out, to profit by the compulsory reduction of the sentences of the undoubted ring-leaders Inasmuch as Allauddin and Bhikhari certainly deserve severer sentences than the rest, it is only right that the sentences of the remaining five should be reduced. We, therefore, reduce the sentence of ten years' rigorous imprisonment passed on each of the five appellants, Nabbu Khan, Ghasita, Mohammad Husain *alias* Manna, Nanhe Khan and Abdul Ghani, to one of seven (7) years' rigorous imprisonment each, including three months' solitary confinement.

Sentences reduced.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 121 OF 1919.

July 9, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

SHEO PRASAD KOERI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Confession, uncorroborated, value of—Conviction based on uncorroborated confession, legality of.

A conviction based upon an uncorroborated confession is not bad, if the surrounding circumstances point to the confession having been the outcome of a voluntary act on the part of the confessor, and in the absence of any evidence of coercion either by the Police or any other person. The fact that the confession was retracted before the Committing Magistrate would not deprive it of its voluntary character. [p. 51, cols. 1 & 2.]

Criminal appeal against the order of the Sessions Judge, Sahabad, dated the 26th May 1919, sentencing the accused to transportation for life.

Messrs. *S. Sinha* and *Gour Chandra Pal*, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

MULLICK, J.—The appellant Sheo Prasad Koeri has been sentenced under section 302 of the Indian Penal Code to transportation for life for having committed murder by causing the death of Ram Sarup Koeri on the night of the 3rd April last.

The motive for the crime is alleged to have been that the deceased was suspected of carrying on an intrigue with the wife of the accused, and also with a girl named Asturni who was married to the grandson of Pran Koeri, who was the master and benefactor of Ram Sarup and brother of the accused's grandfather.

The body of the deceased was discovered in the sugarcane field of one Rigan Koeri on the 8th April.

The *post mortem* examination shows that death was due to strangulation probably caused by pressure of two sticks to the throat.

On the 10th April the accused met one Ram Autar in a neighbouring village, and on being informed by Ram Autar that the Police were searching for him, the appellant agreed to make a full confession on condition that Ram Autar would take steps to save him from punishment. Ram Autar thereupon took the appellant to Pararia, the place where the body was found and where the Sub-Inspector was conducting an investigation.

To the Sub-Inspector the appellant is alleged to have made a full confession at about 7 P. M. In consequence of that confession various persons were arrested on the 11th April, and in the house of one Jagannath the appellant is said to have pointed out a *lathi* as one of the *lathis* with which the murder was committed; and also a *kudali* as being the instrument with which the grave, in which the deceased

was buried, was dug. The appellant was detained in Police custody till 5 P. M. on the 12th, when it appears he was produced before the Deputy Magistrate of Sasaram for the purpose of having his confession recorded.

The Deputy Magistrate states that being apprehensive that the accused might still be under Police influence and thereby coerced into making a confession, he remanded the accused to jail for that night. On the following day after repeated warnings he recorded the statement of the accused, from which it appeared that the accused together with five others had caused the deceased to come to the house of Jagannath and had there murdered him.

Both the assessors believe that story. They have accepted the confession as voluntary and have found the accused guilty.

On his behalf it is urged by Mr. Sinha that the confession having been retracted before the Committing Magistrate, it would be extremely unsafe to convict the accused without material corroboration. He contends that there is no material corroboration on the record.

Now the wife of the deceased deposes that the deceased and Jagannath came to the house of the deceased from Paran Koeri's house where they had been attending a feast, and that after a short stay Jagannath took the deceased away to his own house, saying that they were going to listen to some singing. This is some corroboration of that part of the accused's confession which states that Ram Sarup came to the house of Jagannath on the night of the alleged offence.

Next, if the evidence as to the finding of the *lathi* is believed, that also supplies some corroboration of the accused's story.

There is also the circumstance that when the wife of the deceased first went to the sugarcane field where the body was eventually found there was only a hand protruding out of the ground, and that as soon as the accused who was with the wife of the deceased saw it, he cried out that she had better not accuse any one and that the deceased would never return.

It may be contended that all these pieces of corroborating evidence are weak and would not justify a conviction, if we were not satisfied that the confession made by the accused was a substantially true account of what actually took place. But having considered the circumstances leading to the arrest of the appellant, the period of detention in Police custody, the proceedings of the Deputy Magistrate and the precautions taken by him with regard to the confession, it is impossible to believe that the confession was not voluntary, and that it was not prompted by panic or a hope of mercy.

There is no evidence whatsoever of any coercion either by the Police or any other person, and although a suggestion was made during the commitment enquiry and in the Sessions Court that the accused had been subjected to violence by the Police, there was no evidence whatever brought in support of that suggestion.

It seems that on the morning of the 13th April, after putting the three preliminary questions to the accused, the Deputy Magistrate gave the accused twenty minutes' time to think over what he was about to say; and that thereupon the accused proceeded to relate the part which he had taken in the murder. In these circumstances we are satisfied that the confession, though uncorroborated, was sufficient to justify a conviction.

Mr. Sinha has finally contended that the facts do not establish the offence of murder, and that having regard to the dissolute character of the deceased and the provocation given by him, there cannot be a conviction for any offence graver than culpable homicide not amounting to murder. The provocation was certainly grave but it was not sudden, and there are no circumstances which would justify us in holding that death was not caused after full preparation and with a full knowledge that the injuries inflicted would be likely to cause death.

The appellant himself according to his confession only held the legs of the deceased, while the others strangled him to death; but a conspiracy is clearly established, and, therefore, the appellant must be held guilty of the act which caused death.

ATKINSON, J.—I concur.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION NO. 220 OF 1919.
May 29, 1919.
Present:—Mr. Justice Piggott.
MUQADDAS HUSSAIN—APPLICANT
versus
ZAHUR UDDIN - OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 435—Sanction to prosecute granted by Magistrate and upheld by Sessions Judge—Revision—High Court, power of interference of.

Where a Court exercising jurisdiction under the Criminal Procedure Code sanctions, under section 195 of the Code, the prosecution of a witness for giving false evidence, and the sanction so given is upheld by the Sessions Judge, acting under clause (6) of section 195, the High Court has jurisdiction under section 435 (1) of the Code to call for and examine the record of the proceeding before the Sessions Judge and to set aside the order if it is not satisfied as to its propriety. [p. 53, col. 1.]

The existing state of the law permitting a revision to the High Court from the order of a Sessions Judge under section 195 (6) of the Criminal Procedure Code animadverted upon. [p. 53, col. 2.]

Criminal revision from an order of the Sessions Judge, Budaun, dated the 8th March 1919.

Mr. *J. M. Banerji*, for the Applicant.

Mr. *S. A. Haidar*, for the Opposite Party.

JUDGMENT.—This application in revision comes before this Court under the following circumstances :—

One Shamshul Hasan brought a complaint before a Magistrate accusing Zahur Uddin and seven other persons of offences under sections 147 and 323 of the Indian Penal Code. At the trial the present applicant in revision, named Muqaddas Husain, appeared as a witness for the complainant Shamshul Hasan. The evidence then given by him has been read to me and I find that, if the Court had felt itself able to act upon that evidence, it would have convicted Zahur Uddin and other persons of the offences alleged against them. As a matter of fact, the trial ended on the 1st of October 1918 in the acquittal of the accused persons. About a month later Zahur Uddin, passing over the complainant Shamshul Hasan and selecting Muqaddas Husain out of the various persons who had given evidence in support of Shamshul Hasan's complaint, applied for sanction under section 195 of the Code of Criminal Procedure for the prosecution of Muqaddas Husain for the offence of giving false evidence, punishable under section 193 of the Indian Penal Code, alleged to have been committed by him when giving evidence in the criminal case above referred to. Sanction was not sought in respect of any of the statements of fact which formed the material substance of Muqaddas Husain's evidence. Three detached statements were abstracted from amongst the answers which Muqaddas Husain had given in cross-examination and sanction was sought for his prosecution in respect of the same. The Magistrate directed Muqaddas Husain to show cause why the sanction applied for should not be granted, but eventually passed an order as desired in Zahur Uddin's application. That order was dated the 24th January 1919. Muqaddas Husain thereupon applied to the Sessions Judge to revoke the sanction so granted in virtue of his authority under section 195, clause 6, of the Code of Criminal Procedure. The Sessions Judge revoked the sanction granted in respect of two of the statements referred to in the order of sanction but has upheld the same in respect of the one remaining statement. Against this order, dated March the 8th, 1919, Muqaddas Husain comes to this Court in revision. It took him more than a month to present his application in revision before this Court and it has taken about a month and a half more for the said application to come up for hearing. The result is that more than $\frac{2}{3}$rds of the entire period of six months, which the Legislature contemplates as being the period for which an order of sanction shall remain in force, have gone by, and all proceedings based upon the said order have remained pending, having been stayed by the order of this Court passed at the time when this application was admitted. The rights and remedies open to Muqaddas Husain under section 195 of the Code of Criminal Procedure were exhausted by his application to the Sessions Judge. If the order of sanction had been one passed by a Civil or Revenue Court of competent jurisdiction. in respect of any statements made by Muqaddas Husain as a witness in a civil or revenue proceeding, it is fully settled law that no further remedy would have been open to Muqaddas Husain ; he would have had to stand his trial upon any complaint which Zahur Uddin might see fit to file, within the statutory period

of six months, on the strength of the sanction granted to him. It so happens in the present case that the original order of sanction was passed by a Magistrate exercising jurisdiction under the Code of Criminal Procedure and the subsequent order under section 195, clause (6), of the same Code was passed by a Sessions Judge, that is to say, by a Court of criminal jurisdiction inferior to this Court within the meaning of section 4 5, clause 1, of the same Code. It cannot, therefore, be denied that, as the law stands at present, this Court has jurisdiction to call for and examine the record of a proceeding like the present, that is to say of a proceeding under section 195, clause (6), held in the Court of a Sessions Judge. A further opportunity is, therefore, afforded to any person against whom sanction has been granted by one authority, and confirmed by an authority no less competent than that of a Sessions Judge, of further obstructing the process of justice by carrying the matter before this Court in the way of an application for revision. I have been referred to more than one reported case in which this Court has not merely entertained an application for revision similar to the one now under consideration, but has actually interfered with the order granting or refusing sanction. I have never myself denied the authority of this Court to interfere under sections 435 and 439 of the Code of Criminal Procedure as it stands at present. In the case of *Ahsanullah Khan* v. *Mansukh Ram* (1) I made an express reservation in favour of the revisional jurisdiction of this Court as an ultimate resource to be employed, if necessary, in order to avoid a failure of justice. The question, as it presents itself to my mind, is wholly one of discretion. The result of an order of sanction is at worst that the person against whom that order is passed may have to stand his trial before a competent Court. The law allows a person against whom the allegation is made that he has committed the grave offence of giving false evidence an opportunity of contesting the propriety of any order of sanction which may be passed against him before one Court of superior jurisdiction to that which passed the said order. My own feeling in the matter is that it would be better in the interests of justice that Courts, at any rate, of so high a standing as the Court of Session, should be trusted to make a fair and equitable use of the powers given them by section 195, clause 6, of the Criminal Procedure Code, and that persons against whom an order of sanction has been passed and has been affirmed by an authority like that of a Sessions Judge should, generally speaking, be discouraged from delaying and obstructing the cause of justice further by invoking the revisional jurisdiction of this Court, unless and until they can show wholly exceptional reasons for so invoking that jurisdiction. This is an easy enough principle to lay down, but the difficulty of applying it lies in the fact that a person coming up to this Court in revision is necessarily heard in the first instance *ex parte*, and upon inadequate materials. Once he has obtained an order admitting his application, the main purpose of that application is more often than not fully served.

In the present case at any rate, the application of Muqaddas Husain was admitted, and proceedings were stayed, by order of a learned Judge of this Court. Under section 435 of the Criminal Procedure Code the duty has been laid upon me of examining the records of the proceedings in the Sessions Court in this matter of sanction for the purpose of satisfying myself as to the propriety of the order passed. I have been driven to the conclusion that it is wholly impossible for me to profess to be satisfied with the propriety of the order in question. It is an order which I should certainly have refused to pass had the application come before me as a Court of first instance; and had it been my duty to deal under section 195, clause 6, of the Criminal Procedure Code with the order of sanction passed by the Magistrate in this case, I should have unhesitatingly revoked the same. The statement in respect of which sanction has been granted for the prosecution of Muqaddas Hussain is in the following words:—

"I am acquainted with Yakub Ali son of Unas Ali. He bears no sort of relationship to me."

(1) 25 Ind. Cas. 350; 12 A. L. J. 511; 36 A. 403; 15 Cr. L. J. 598.

MAHAMMAD MIAN *v.* EMPEROR.

I understand from an examination of the record of the original criminal trial that it was contended on behalf of Zahur Uddin that there was a feud between himself and the man Yakub Ali son of Unas Ali, referred to in the above statement Presumably the intention was to suggest that that feud was so bitter that any one connected with the said Yakub Ali by any sort of relationship must necessarily be regarded as a prejudiced witness in a case brought against Zahur Uddin. It appears that Zahur Uddin is in possession of information showing that Unas Ali, father of Yakub Ali, was married to a lady whose maternal grandfather was also the paternal grandfather of Muqaddas Husain. I find it difficult to conceive that, if the Court had not before it any stronger reasons for distrusting the evidence of Muqaddas Husain, its opinion as to the veracity of this witness would have been seriously affected one way or the other by the existence of this relationship. Moreover, the matter was not pressed in cross examination, as, in my opinion, it should undoubtedly have been if there was latent intention of making the witness's answer the basis for a charge of perjury. The form of the question put to the witness simply directed his attention to Yakub Ali son of Unas Ali. I do not know now whether Zahur Uddin claims to be in a position to prove that the lady Imtiazunnissa above referred to is actually the mother of Yakub Ali, or is merely one of the wives of Yakub Ali's father. The Magistrate's order of sanction suggests the former, but his review of the documentary evidence laid before him on behalf of Zahur Uddin suggests the latter. In any case the attention of the witness was not drawn to the question of the names of any lady or ladies to whom Unas Ali was married. The answer returned by Muqaddas Husain may have been a rash one. It may have been merely hasty. If it was intended to make that answer the basis of prosecution for perjury, the question should have been pressed home. His attention should have been definitely drawn to the fact that his cross examiner was in possession of instructions according to which a relationship between himself and Yakub Ali was traceable, not through Unas Ali himself, but through a lady whom Unas Ali had married. It seems to me that those conducting the defence of Zahur Uddin at the criminal trial never seriously intended to make anything of this question. They were well content with a hasty answer, which it was possible to represent as false in fact and to use as such hereafter for the annoyance of the witness. Had the question of the relationship between the witness and Yakub Ali been regarded by those responsible for the defence as one of any serious importance, the matter could not have been left where it was. For these reasons I am unable to hold that the order under revision satisfies me as to its propriety and, once the revisional jurisdiction of this Court has been invoked in a matter of this sort, it has to be exercised. My order, therefore, is that I set aside the sanction in question.

Sanction set aside.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS No. 18 OF 1919.

May 7, 1919.

Present:—Mr. Justice Das.

MAHAMMAD MIAN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case, principles governing—Bias, apprehension of—Case pre-judged by Magistrate—Criminal trial—Procedure—Defence of accused, consideration of—Court, duty of—Intimidation of accused or Counsel, whether permissible—Evidence Act (I of 1872), s. 151—Indecent or scandalous questions, when can be asked.

A long series of cases has established the guiding principles upon which Courts should invariably act in dealing with applications for transfer, These are—

(1) that it is expedient for the ends of justice to transfer a case from the file of one Magistrate to that of an another competent to try it, if, by reason of the words or conduct of the Magistrate before whom the case is pending, any party reasonably apprehends that there is bias against him in the mind of the Magistrate, though there may not be in fact actual bias;

(2) the transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him. [p. 56, cols. 1 & 2.]

An accused is entitled to ask the Court to consider his defence, whether true or false, and the

Court acts illegally in shutting out questions which tend to establish this defence. [p. 56, col. 2.]

Indecent and scandalous questions may be put either to shake the credit of a witness or as relating to facts in issue, or to determine whether or not a fact in issue existed. If they are put merely to shake the credit of a witness, the Court has complete dominion over them and may forbid such questions, even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no discretion to forbid such questions, though they may be indecent or scandalous. [p. 57, col. 1.]

Where questions are put in cross-examination to some of the witnesses for the prosecution which have not been put to earlier witnesses, it is the weight to be attached to the case that is affected and not the admissibility of the questions, and it is no ground for disallowing them even though they are scandalous or indecent. [p. 57, col. 1.]

Advocates have ample discretion in the conduct of the case of which they are in charge, and the Court cannot fetter their discretion by insisting that their case should be put to this witness or that. [p. 57, col. 1.]

It is highly improper for persons in charge of a prosecution to threaten or intimidate either the accused persons or the Pleaders appearing for them. The position of accused persons is at all times of grave anxiety and persons in charge of a prosecution should remember that nothing should be done by them which may have the effect of intimidating the defence or adding to its anxiety. [p. 58, col. 1.]

Criminal revision against the order, dated the 9th April 1919, of the District Magistrate, Purnea, refusing to transfer the case on the petition of the accused from the file of the Deputy Magistrate, Purnea.

FACTS briefly stated are that the accused, Mahammad Mian, was the Manager of "Professor" Ram Murti, a Circus Proprietor. He resigned his appointment on the 10th January 1919. R. K. Mitra, an employee of the said Ram Murti, lodged a complaint against the accused that he had embezzled Rs. 1, 50. The defence of the accused was that one of the main motives for instituting the case against him was that the said Ram Murti had been baffled in his attempt to get hold of a woman with whom he, the accused, was living as "husband and wife." Questions on this point were not put to the earlier prosecution witnesses and the Vakil of the prosecution objected that the questions put were scandalous and should be based upon proper instructions adding that Ram Murti might further proceed. The Court thereupon asked the defence Pleader to record in writing his source of information for the satisfaction of the Court as well as for his own protection. The Pleader refused to do this and insisted on putting the questions, adding that the accused had instructed him. The trying Court, being of opinion that the questions were scandalous and not necessary for the decision of the case, disallowed them and made the following note in the order sheet: "Here the defence Pleader put certain questions about Professor Ram Murti's dealing with a woman with whom the accused is living as husband and wife. This is a case of a misappropriation and I do not think I should allow slanderous questions to be asked, particularly when I find from the questions of the defence Pleader that the woman in question is of a doubtful character connected with the accused, who also accordingly has no character. I do not much value instructions on these matters from a man of the moral character of the accused."

Mr. *M. Huque* (with him Mr. *Gour Chandra Pal*), for the Accused. The Deputy Magistrate has adopted a non-judicial attitude, interfered with my cross-examination on vital points and prevented my entering into defence This attitude of his has been hostile to me, and there is apprehension in my mind that he has been favouring one party. The Deputy Magistrate has given me no character and I could not give instructions to my Pleader. The questions which were essential to establish my defence have been wrongly disallowed by the Court. It is clear, therefore, that my defence has been prejudged and I do not expect fair and impartial trial in that Court. The Vakil for the prosecution actually threatened my Vakil and, through him, myself, and after this those questions were disallowed and then the Magistrate recorded in the order-sheet that I had no character at all. Quotes *Lolit Mohan Moitra* v. *Surja Kanta Acharjee* (1). It is now a well established principle of criminal jurisprudence that when the accused reasonably apprehends from the incidents, though capable of explanation, that the Court is biassed against him even though in fact the Court is not actually so biassed, it is expedient for

(1) 28 C. 709; 5 C. W. N. 749.

the ends of justice that the case should be transferred from that Court.

Mr. *Sultan Ahmad*, Government Advocate, for the Crown.—There is nothing to show that the trying Court is in any way prejudiced against him. Only two incidents are alleged against him. I submit that a trying Court is authorised by law to disallow scandalous and indecent questions which in his discretion are irrelevant to this case. The trying Court has also to satisfy itself that there are reasonable grounds for thinking that the imputation conveyed by such questions is well founded before he can allow those questions to be put. Here the Magistrate says that the questions were undoubtedly scandalous, regarding one Professor Ram Murti who was not a witness in the case. And the Magistrate says that they were put in a needlessly offensive form. Under the law there is a grave responsibility imposed upon Courts in these matters. The suggestions in the question were made at a late stage of the case. The Magistrate at the very worst may have erred in law in disallowing the questions as irrelevant, but that is no ground for transfer of the case. The Magistrate has detailed the circumstances under which he came to record the order in the order sheet about the character of the accused, and they do not show that he was biassed against the accused. The remark that the accused has no character, has reference to the accused's relation with the other sex which admittedly were not very honourable. There is no justification for the remark that the Magistrate has deliberately adopted an hostile attitude to the accused.

JUDGMENT.—This is an application for transfer of a criminal case from the Court of the Deputy Magistrate of Purnea to some other Criminal Court. The petitioner complains that the Court has taken up an attitude with regard to him which leads him to believe that he would not get a fair and impartial trial at the hands of the learned Deputy Magistrate and he accordingly invites this Court to transfer the case to the file of some other Magistrate.

A long series of cases have established that (1) it is expedient for the ends of justice to transfer a case from the file of one Magistrate to that of another competent to try it, if, by reason of the words or conduct of the Magistrate before whom the case is pending, any party reasonably apprehends that there is a bias against him in the mind of the Magistrate, though there may not be in fact any actual bias, and (2) the transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him and will in consequence be prejudiced against him. As Lush, J., said in the celebrated case of *Serjeant* v. *Dale* (2): "The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

These being the guiding principles upon which the Court invariably acts in dealing with applications of this nature, I have to consider whether, in the circumstances of this case, I should direct the transfer of this case from the file of the Deputy Magistrate of Purnea to that of some other Magistrate. The petitioner contends before me that the learned Deputy Magistrate has not only shut out his defence but has prejudged it with this result that so far as that Court is concerned, there is little chance of his being able to establish his defence. He says that one of the main motives for the institution of this case is that Rama Murti, the Circus Proprietor, who is the real complainant, "was baffled in his attempt to get hold of a woman with whom he, the petitioner, is living as husband and wife." Now this case may be true or false, but it seems to me that he was entitled to ask the Court to consider his case. It appears, however, that the learned Magistrate shut out all questions in cross-examination which tended to establish this defence. The learned Deputy Magistrate, in his explanation to this Court, justified the ruling which he gave on this point, on two grounds, first, the questions were scandalous and not necessary for the decision of the case, and

(2 (1877)) 2 Q. B. D. 558 at p. 567; 46 L. J. Q. B. 781; 37 L. T. 153.

secondly, the suggestions were made at a late stage and were not put to the earlier witnesses examined on behalf of the prosecution.

So far as the first ground is concerned, the learned Magistrate was clearly in error; indecent or scandalous questions may be put either to shake the credit of a witness or as relating to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. If they are put merely to shake the credit of a witness, the Court has complete dominion over them and may forbid such questions, even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no discretion to forbid such questions, though they may be indecent or scandalous. The learned Magistrate thought that in a case of allegad misappropriation, scandalous questions should not be allowed to be asked. But the case of the defence is that no one would have heard of this alleged misappropriation if scandalous circumstances did not exist. It seems to me that the questions related to matters necessary to be known in order to determine whether or not the facts in issue existed and, therefore, should have been allowed to be put.

The second ground put forward by the learned Deputy Magistrate is equally without merit. It is true that the case as suggested by the questions which were disallowed was not put to some of the earlier witnesses examined on behalf of the prosecution. That, in my opinion, affects the weight to be attached to the case, not the admissibility of the questions. Advocates have ample discretion in the conduct of the case of which they are in charge, and the Courts cannot fetter their discretion by insisting that their case should be put to this witness or that. There may be perfectly good explanations why this particular case was not put to some of the earlier witnesses. If a satisfactory explanation is not ultimately given as to why the case of the defence was not put to some of the earlier witnesses, the Court would be entitled to approach that case with suspicion, but the stage for explanation had not arrived, and the Court was not entitled to disallow the questions on that ground. The learned Counsel for the petitioner says that the Court has already made up its mind that the defence must be false because it was not put to some of the earlier witnesses. Another fact prominently brought to my notice is the note of the learned Magistrate to the effect that he "did not much value instructions on these matters from a man of the moral character of the accused." In my opinion, the petitioner may reasonably be apprehensive after this expression of opinion that the Court has prejudged his defence. Instructions on these matters could only be given by the petitioner and if the learned Magistrate does not value these instructions, the petitioner may reasonably think that it would be worse than useless for him to put forward his defence before the Magistrate trying the case.

I think, therefore, that a transfer is expedient in this case. I ought to state, however, that, in my opinion, the Magistrate has no real bias against the petitioner. But he has unfortunately used words which are calculated to create in the mind of the petitioner a reasonable apprehension that justice may not be done to him. I cannot too strongly press upon the Magistrate that "next to the importance of deciding a case fairly and impartially is the importance of conducting oneself in such a manner as to inspire in the minds of the parties a confidence that nothing but absolute justice would be done to them:" [See *Lolit Mohan Mcitra* v. *Surja Kanta Acharjee* (1)]. I have no doubt whatever that the learned Deputy Magistrate would have tried the case fairly and impartially, but I have also no doubt that, without intending it, he has unfortunately conducted himself in such a way as has created in the mind of the petitioner a reasonable apprehension that he will not secure absolute justice from him. In this view and without casting the slightest reflection on the Magistrate, I deem it expedient that the case should be transferred from his file.

There is one matter which I cannot pass by in silence. The petitioner alleges that when the questions which were subsequently disallowed by the Magistrate were put on his behalf to Krishnarao, Babu Jyotish Chunder Bhattacharjee, who

was appearing for the complainant in this case, "said something indicating a threat that Rama Murti would take legal steps against the defence Pleader." The learned Magistrate, in his explanation, denies that Mr. Bhattacharjee held out a threat that Rama Murti would take legal steps against the defence Pleader, but he admits that he said that Rama Murti might further proceed. In my opinion, the distinction sought to be made by the learned Deputy Magistrate is without a difference Babu Jyotish Chunder Bhattacharjee is a Vakil of standing and eminence and I am unwilling to believe that he could have used expressions which have been imputed to him by the learned Deputy Magistrates; but I deem it my duty to say that it is highly improper for persons in charge of prosecution to threaten or intimidate either the accused persons or the Pleaders appearing for them. The position of accused persons is at all times one of grave anxiety, and persons in charge of prosecution should remember that nothing should be done by them which may have the effect of intimidating the defence or adding to its anxiety.

I direct that the case be transferred to the file of the District Magistrate of Bhagalpore, who will either try it himself or make it over to some officer competent to try it.

Case transferred.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 6 OF 1919.

January 8, 1919.

Present :—Mr Justice Lindsay.

JAMIL AHMAD—APPLICANT

versus

MUHAMMAD ISHAQ—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 250—Workman's Breach of Contract Act (XIII of 1859), ss. 1, 2—Complaint against workman, dismissal of—Compensation, whether can be awarded.

A Magistrate has no jurisdiction, when dismissing a complaint under section 1 of the Workman's Breach of Contract Act, to direct the complainant to pay compensation to the accused. [p. 59, col. 1.]

Criminal reference by the Sessions Judge, Cawnpore.

FACTS appear from the following

REFERRING ORDER.—This is an application for revision against an order of Mr. R. M. White, Joint Magistrate, Cawnpore, ordering the applicant to pay Rs. 5 compensation at the time of dismissing a complaint by the applicant under section 1 of Act XIII of 1859 (Workman's Breach of Contract Act). The order of the Magistrate purports to be under section 250 of the Code of Criminal Procedure. That section begins: "If in any case instituted by complaint as defined in this Code.....a person is accused before a Magistrate of any offence triable by a Magistrate..." An offence is defined as an act or omission made punishable by any law for the time being in force. I am of the opinion (having regard to the list of punishments given in section 53 of the Indian Penal Code and also on the ground of usage) that an order by a Magistrate under section 2 of the Workman's Breach of Contract Act requiring a workman to perform his service contract (or to re-pay the money) is not an order inflicting a punishment. The punishment only supervenes when such an order is disobeyed. This view has been taken by the Calcutta High Court: *Ram Sarup Bhakat, In the matter of* (1). Reference may also be made to *Averam Das Mochi* v. *Abdul Rahim* (2). There are rulings of the Bombay and Madras High Courts which would suggest that those Courts also hold the same view: *Emperor* v. *Dhondu Krishna Kamblya* (3) and *King-Emperor* v. *Takasi Nakayya* (4). No case of the Allahabad High Court to this effect has been cited. As the defect in the order of the Magistrate arises from what is, in my opinion, a defect of jurisdiction, I feel bound to report the case to the Hon'ble High Court although on its merits I do not think that the applicant has much to complain of. The Magistrate came to the opinion that the allegation by the applicant that he had advanced the accused Rs. 28 to be re-paid by Rs. 4 a month was probably false and merely a counterblast to the accused having sued him for wages. The Magistrate also found that even if this were not the case, there was no contract

(1) 4 C. W. N. 253.

(2) 27 C. 131; 4 C. W. N. 201; 14 Ind. Dec. (N. S.) 86.

(3) 6 Bom. L. R. 255; 1 Cr. L. J. 261.

(4) 24 M. 630; 1 Weir 373.

of service based on an advance and the case was merely one of a loan. For the reasons stated above, I direct that after obtaining the explanation of the Magistrate the case be reported to the Hon'ble High Court for its orders.

EXPLANATION OF THE MAGISTRATE.—I have nothing to say. I thought that a complaint could not be made in a Criminal Court except in respect of an offence; but I do not dispute the reasoning which leads to the contrary opinion.

JUDGMENT.—For the reasons set out in the referring order of the learned Sessions Judge I direct that the order of the Magistrate by which the accused Mohammad Ishaq was directed to pay Rs. 5 compensation to the complainant be set aside. The money, if paid, will be refunded.

Order set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No 119 OF 1919.

June 4, 1919.

Present:—Mr. Justice Duckworth.

BATWA KHAN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 447, 457, 511—Attempt and preparation, distinction between—Scaling roof in order to commit theft—Offence—House-breaking—Criminal trespass.

Accused was detected on the roof of a bazaar with an open clasp knife in his hands and two gunny bags. It was found that he had come there with the intention of committing theft:

Held, that the matter not having proceeded beyond the stage of preparation, the accused could not be convicted of an offence under sections 457 and 511 of the Penal Code, but that he was guilty of an offence under section 447 of the Code.

Criminal appeal from an order of the Eastern Sub Divisional Magistrate, Rangoon.

Mr. *Shaw*, for the Crown.

JUDGMENT.—The appellant, a sepoy in the 91st Punjabis, was convicted by the Eastern Sub Divisional Magistrate, Rangoon, under sections 457 and 511, Indian Penal Code, for attempted house breaking by night, with intent to commit theft, in the Sooratee Barra Bazaar at about 1 A. M. on the 3rd February last.

He was sentenced to rigorous imprisonment for 6 months. He appealed to this Court from the Jail.

I have heard Mr. Shaw who appeared to support the conviction and sentence, and have read the record of the case.

The facts are quite clear. The appeal was only admitted because there was some doubt as to whether the offence committed by the appellant was actually one under sections 457 and 511, Indian Penal Code.

It is proved that the appellant was detected on the roof of the bazaar, with an open clasp knife in his hands, and 2 gunny bags. There is, therefore, no reasonable doubt that he had come there with the intention of committing theft in the bazaar premises, some of which were open to him from where he was situated, if he had descended into the open bazaar.

The evidence of Ahmed Moosaji, Walli Mahomed Sikandar and others proves the case, as stated very clearly, and the defence of the appellant was manifestly false.

On consideration, I do not think that the matter had proceeded beyond the stage of preparation, *i.e.*, that it had not yet arrived at the stage of an attempt, for which some overt act is required. In house-breaking, for instance, it would be necessary to show that the accused had actually done something towards the offence, *i.e.*, such an act as breaking open a wall. In this case it is clear that he was not in the premises, but on the roof thereof. House-trespass required that there should be some entry into the house, or building.

The appellant was, therefore, wrongly convicted under sections 457 and 511, Indian Penal Code. The section applicable appears to me to be section 447, Indian Penal Code. This view is supported by the case of *Walidad v. King Emperor** (1).

It is possible that there is some lacuna in the Penal Code, if indeed, as I think, this is correct law, but, as matters stand, I consider that it is the only possible course to take. The conviction of the appellant is altered to one under section 447, Indian Penal Code, and the sentence is reduced to 3 months' rigorous imprisonment, the maximum under that section.

Conviction altered; Sentence reduced.

(1) 15 P. R. 1907 Cr.; 44 P. W. R. 1907 Cr.; 6 Cr. L. J. 444; 56 P. L. R 1907.

*The substance of the report is reproduced on page 1119 Ratan Lal's Law of Crimes, Edition 8, under section 511, Indian Penal Code, where the case is quoted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 177 OF 1919.

July 7, 1919.

Present:—Mr. Justice Piggott.

LALTU—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 109—Security for good behaviour—Arrest under suspicion—Accused residing within jurisdiction—Order directing furnishing of security, legality of.

Accused was arrested under suspicious circumstances and was placed before a Magistrate, within whose jurisdiction he resided, who disbelieved his explanation of his presence at the place where he was arrested, and, under section 109 of the Criminal Procedure Code, bound him over to be of good behaviour:

Held, that the Magistrate's action was bad in law, as it could not be said that the accused was unable to give a satisfactory account of himself within the meaning of clause (*b*) of section 109 of the Code of Criminal Procedure.

Criminal revision from an order of the District Magistrate, Cawnpore.

Mr. *S. N. Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The point raised by this application in revision may be stated thus:—One Laltu was arrested by certain Police Officers along with a number of other persons in a lane in the City of Cawnpore under what were undoubtedly suspicious circumstances. The matter came before the Joint Magistrate of Cawnpore, and he was of opinion that Laltu had not given a true explanation of his presence on the night in question at the spot where the Police arrested him. Upon this finding Laltu has been bound over to be of good behaviour under section 109 of the Code of Criminal Procedure. I have ascertained that Laltu resides within the jurisdiction of the Joint Magistrate before whom proceedings were taken. I do not think it is possible to apply the provisions of section 109 of the Code of Criminal Procedure to the state of facts above set forth. There are two cases of this Court more or less in point, that of *Sharif Ahmad* v. *Emperor* (1) and that of *Ghulam Jilani* v. *Emperor* (2). The latter was obviously a much stronger case against the applicants in revision than is the one now before me. On the principles laid down in these two rulings I am quite satisfied that it cannot be said of Laltu that he could not give a satisfactory account of himself within the meaning of section 109, clause (*a*), of the Code of Criminal Procedure. I set aside the order against Laltu and direct his sureties to be discharged and his security bond to be cancelled. If he is in custody for failure to furnish security, he must be released.

Order set aside.

(1) 12 Ind. Cas. 304; 8 A. L. J. 1097; 12 Cr. L. J. 536.

(2) 51 Ind. Cas. 161; 17 A. L. J. 432; 20 Cr. L. J. 401.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 924 OF 1918.

November 1, 1918.

Present:—Mr. Justice Fletcher and Mr. Justice Walmsley.

M. N. MUKHERJEE—CLAIMANT—PETITIONER

versus

MATANGI CHARAN PALIT—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403—Plea of previous acquittal—Procedure—Court, duty of.

On a charge of cheating and criminal breach of trust where the plea taken by the accused was that he had already been tried and acquitted in another Court on a charge involving the same set of facts:

Held, (1) that this was a matter to be ascertained after hearing the evidence and ascertaining what the facts in both the cases were; [p. 6, col. 1.]

(2) that if it was found necessary to frame a charge, the accused would be able to set up his previous acquittal as a plea in defence. [p. 61, col. 1.]

Babus *Dasarathi Sanyal* and *Bir Bhusan Datt*, for the Petitioner.

Mr. *K. N. Chowdhuri* and Babu *Horendra Krishna Mookerjee*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule calling upon the Chief Presidency Magistrate and also on the opposite party to show cause why the order complained of should not be set aside. The complainant complained before the Chief Presidency Magistrate charging the accused-opposite party with cheating and criminal breach of trust. The case set up by the accused was that he had already

been tried and acquitted in Burdwan on a charge which involved the same set of facts and that, therefore, this case ought not to be permitted to go on. The matter, however, had already been once before this Court and the Rule that had been obtained by the accused was discharged on the ground that the accused ought to have taken the plea of his previous acquittal before the trial Court as a defence. It is quite impossible to give effect to that judgment without hearing the case and ascertaining what the facts in this case are; and if it becomes necessary to frame a charge, then the accused would be able to set up the previous acquittal as stated by the learned Judges in the former judgment as a plea in his defence. I am not satisfied one way or the other as to whether the facts are or are not the same. It is exceedingly difficult, without having any evidence, to ascertain whether these facts are the same facts that were gone into in the Burdwan Court. That is a matter which has got to be ascertained after hearing the evidence and ascertaining what the facts are in this case and what were the facts found in the Burdwan Court. I think we ought to make the Rule absolute and send the case back to the Presidency Magistrate to have the complaint of the petitioner duly enquired into and determined.

WALMSLEY, J.—I agree.

Rule made absolute; Case sent back.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 553 OF 1919.

July 3, 1919.

Present:—Mr. Justice Stuart.

KALIDIN—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 464, 471—Using false document—Alteration of date—Dishonesty or fraud, absence of, effect of—Offence.

The accused altered the date of a document for the purpose of having the document received in evidence, but the alteration did not in any way help him as by altering the date he ruined his case. He was, nevertheless, convicted of an offence under section 471 of the Penal Code. In appeal to the High Court:

Held, that inasmuch as the element of "dishonesty" or "fraud" required under section 464 of the Penal Code was wanting, the conviction under section 471 could not be maintained.

Criminal appeal from an order of the Additional Sessions Judge, Gorakhpur, dated the 10th May 1919.

Mr. *G. W. Dillon*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—The learned Additional Sessions Judge has tried this case with great care. His reasoning is for the most part excellent and his conclusions of fact are, in my opinion, absolutely made out.

I am satisfied that the appellant deliberately altered the figure 1282 into the figure 1262, under the impression that if he did not make the alteration the document would not be received in evidence. But the question remains whether on the facts as found by the learned Additional Sessions Judge an offence is made out under the law. In my opinion an offence is not made out because the element of "dishonesty" or "fraud" required under the provisions of section 464 is wanting. "Dishonesty" is defined in sections 23 and 24 of the Indian Penal Code. Now what did the appellant do here? He made an alteration for a very silly reason. As a matter of fact he mismanaged his case from beginning to end. It was perfectly true that the Zemindar's predecessors-in-interest had granted the appellant's predecessors in-interest land on favourable terms in recognition of their service. Now this circumstance was one which the Settlement Officer would no doubt have taken into consideration under the proviso to section 87, Local Act III of 1901, in an application for enhancement of rent. He would not be bound by the fact one way or another, but he would take it into consideration. The applicant could in no way be helped by making this alteration. The lease had been executed in 1282 Fasli, that is to say, in 1875 A. D. He could not be satisfied with the truth, but with that stupid low cunning that distinguishes so many persons of his class not only in the Basti district, he wanted to throw the document back to the year 1857 and in consequence ruined his own case. He behaved badly and improperly, but he did not behave "dishonestly" within the meaning of the law, and as he did not behave

dishonestly or fraudulently within the meaning of the law, he cannot be convicted under section 471. The result is that I accept the appeal and set aside the conviction and sentence.

Appeal accepted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 183 OF 1919.

April 1, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

MOHAMMED KAJIM ALI—PETITIONER

versus

JARABDI NASHKAR AND OTHERS—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss 193, 423—Kabuliyat, whether document, within meaning of s. 423—Revision against acquittal—Question of law not free from difficulty—High Court, interference by.

It is doubtful whether the language of section 423 of the Penal Code could be so interpreted as to include a *kabuliyat* within its scope [p. 62, col. 2.]

The accused executed a registered document purporting to be a *kabuliyat* in favour of the complainant which contained recitals designedly false. According to the accused this *kabuliyat* was accepted by the complainant:

Held, that as the recitals in the *kabuliyat* would be evidence against the complainant, the accused was guilty of an offence under section 193 of the Penal Code [p 63, col 1.]

Where in an application for revision against an order of acquittal the questions of law that arose were not in all respects free from difficulty, the High Court refused to interfere in the exercise of its revisional jurisdiction. [p. 63, col. 1.]

Appeal against the order of the Sessions Judge, 24 Pergannahs, dated the 5th December 1918, reversing that of the Deputy Magistrate, Diamond Harbour, dated the 31st May 1918.

Mr. *Sasmul*, Babus *Gagan Chand Bural* and *Santosh Kumar Pal*, for the Petitioner.

Moulvi *A. K. S. Akram*, for the Opposite Party.

JUDGMENT.—The opposite parties in this case were convicted by the Magistrate of offences under sections 423 and 193 of the Penal Code and sentenced to terms of imprisonment. On appeal they were acquitted by the Sessions Judge. The petitioner, the complainant in the case, then obtained this Rule calling upon them to show cause why the acquittal should not be set aside.

The Magistrate found, in accordance with the allegations made by the petitioner, that the opposite parties had executed and registered a document purporting to be a *kabuliyat* in respect of certain land, which contained recitals designedly false. The document stated that the petitioner and his full brother and the other *maliks* of the land had demanded a *kabuliyat* from the opposite parties and that the *kabuliyat* had been executed in compliance with that demand. The petitioner denied that he or his full brothers had ever demanded or accepted the *kabuliyat*, and he further asserted that he and his brothers were the only *maliks* of the land and that the reference in the document to other *maliks* was made in support of some false claim.

The learned Sessions Judge held in effect that, assuming the falsity of the statements impugned, no offence had been committed either under section 423 or under section 193 of the Penal Code, nor under section 423 because a *kabuliyat* was not a document "which purports to transfer or subject to any charge any property or any interest therein" within the meaning of the section, and not under section 193 because the statements being made by the opposite parties could not be used by them in their own favour and would be inadmissible in evidence as against the petitioner and his full brothers.

As regards section 423 we are disposed to concur with the Sessions Judge's view. No doubt it has been held for some purposes that a *kabuliyat* when accepted operates as a lease [*Rai Moni Dasi* v. *Mathura Mohan Roy* (1)], but it is doubtful whether the language of section 423 could be so interpreted as to include a *kabuliyat* within its scope.

As regards section 193, however, the view expressed by the Sessions Judge is open to criticism. The meaning of the term 'fabricating false evidence' is defined in section 192 of the Penal Code, and in support of the construction of that section which the learned Sessions Judge has adopted he has cited the cases of *Empress* v. *Gauri Shankar* (2) and *Emperor* v. *Chandra Kumar Missir* (3). Some doubt has been thrown on the correctness of those decisions in Criminal

(1) 14 Ind. Cas. 540; 39 C. 1016; 16 C. W. N. 606; 15 C. L. J. 665.

(2) 6 A. 42; A. W. N. (1883) 189; 3 Ind. Dec. (N. S.) 597.

(3) 2 C. L. J. 46; 2 Cr. L. J. 383.

EMPEROR *v.* NURUL HASAN.

Revision No. 1989 of 1914 decided on the 2nd May 1915, *Baroda Kanta Sarkar* v. *Emperor* (4). But apart from that the learned Sessions Judge has overlooked the fact that according to the opposite parties the *kabuliyat* was accepted by the complainant and his full brothers. On that footing the recitals in the *kabuliyat* would be evidence against the complainant and his full brothers. Moreover, the learned Sessions Judge has omitted to consider whether circumstances might not arise in which the *kabuliyat* would be admissible in evidence under the terms of section 13 of the Evidence Act.

We need not, however, express a final opinion on any of the points argued before us. The decision of a Criminal Court on the truth or otherwise of the statements contained in the *kabuliyat* would not be binding on the Civil Courts should the question ever be raised in these Courts, and as the questions of law which arise are not in all respects free from difficulty, we have come to the conclusion that there is not a case in which we ought to interfere in the exercise of the revisional jurisdiction.

The Rule is discharged.

Rule discharged.

(4) 30 Ind. Cas. 444; 16 Cr. L. J. 620.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 375 OF 1919.

July 3, 1919.

Present :—Mr. Justice Ryves.

EMPEROR—APPLICANT

versus

NURUL HASAN—OPPOSITE PARTY.

Police Act (V of 1861), ss. 9, 29—Failure to return to duty after leave, conviction for—Order to return to duty, disobedience of—Offence—Conviction for failure to obey order, legality of.

Accused, a Police constable, failed to return to duty on the expiry of leave which he had obtained. He was prosecuted under section 29 of the Police Act and fined Rs. 30. During the pendency of this case he was placed under suspension, and on the conclusion thereof he was reinstated and directed to appear in the Police lines and there to give two months' notice as required by section 9 of the Act, if he did not wish to continue in the Police force. He failed to comply with this order and was again prosecuted under section 29 and sentenced to undergo imprisonment. The Sessions Judge recommended that the conviction and sentence be set aside on the ground that the accused's failure to return to duty was one single offence and he could not legally be again convicted merely because he still failed to return:

Held, that the second conviction was not for the same offence but for another similar offence—the first conviction being for failure to return to duty after leave and the second for failure to return after he had been reinstated. [p. 64, col. 1.]

Criminal reference made by the Sessions Judge, Saharanpur, dated the 19th June 1919.

JUDGMENT.—Nurul Hasan, Police constable, failed to return to duty on the expiry of "casual leave" and was in consequence prosecuted under section 29 of the Police Act and, on conviction, was fined Rs. 30. This was on the 17th January 1919. Pending that trial he had been suspended, but on the 1st February 1919 the Superintendent of Police passed an order reinstating him and called upon him to return to duty. Orders were repeatedly sent to him to this effect, and it is admitted that in spite of these orders he failed to return to duty. In consequence he was prosecuted under section 29 of the Police Act for his failure to comply with the order of the Superintendent of Police dated the 10th March 1919, directing him to appear in the Police lines and there give a two months' notice as required under section 9 of the Act. This order was so worded because Nurul Hasan had in the meantime sent in an application for leave to resign. This order was received by Nurul Hasan on the 13th March 1919. He failed to comply with it and in consequence he was prosecuted again under section 29 of the Act. The accused admitted the facts, but pleaded that as he had already been fined Rs. 30 for failure to return to duty, he was justified in disobeying subsequent orders calling him back to duty. The learned Magistrate convicted him and sentenced him to rigorous imprisonment for two months. The learned Sessions Judge of Saharanpur has referred the case to this Court, with a recommendation that the conviction and sentence be set aside on the ground that his failure to return to duty was one single offence. The Judge says: "He withdrew from his duties without giving two months' notice and he has been punished," and suggests that, therefore, he could not legally be again convicted, merely

because he still failed to return to duty. It seems to me that the accused has not been punished again for the same offence but for another similar offence. Section 9 of the Act provides that no Police Officer shall be at liberty to withdraw himself from the duties of his office except as provided in that section. At the first trial Nurul Hasan was punished for failure to return to duty after casual leave. On the second occasion he was prosecuted for failure to return to duty after he had been reinstated. These were two distinct and separate offences, though similar in character. It seems to me, therefore, that legally the conviction is right. At the same time I think under the circumstances of the case, a sentence of rigorous imprisonment for two months is perhaps unnecessarily severe. I reduce the sentence to one of one month's rigorous imprisonment from the date of his original sentence.

Let the record be returned.

Sentence reduced.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 108-B OF 1919.

May 14, 1919.

Present:—Mr. Justice Pratt.

S. PO THIT—APPLICANT

versus

MA SAW SHIN—ACCUSED.

Workman's Breach of Contract Act (XIII of 1859), s. 1, scope of—Contract to be performed outside British India—Jurisdiction of Magistrate to take action.

A contract to be performed outside British India does not come within the purview of the Workman's Breach of Contract Act.

Gregory v. *Vadakasi Kangani*, 10 M. 21; 1 Weir 671; 3 Ind. Dec. (N. S.) 765, relied upon.

Criminal revision against the order of the Sub-Divisional Magistrate, Kyaikto.

Mr. *Villa*, for the Applicant.

JUDGMENT.—S. Po Thit applied to the Sub-Divisional Magistrate, Kyaikto, to take action under the Workman's Breach of Contract Act, 1859, against Ma Saw Shin, a cheroot roller, who had taken an advance of Rs. 100 and agreed to proceed to Penang to work there.

The Magistrate held, following *Gregory* v. *Vadakasi Kangani* (1), that a contract to be performed outside British India does not come within the purview of the Workman's Breach of Contract Act.

The preamble of the Act runs :—

"Whereas much loss and inconvenience are sustained by manufacturers, tradesmen, and others in the several Presidency Towns of Calcutta, Madras and Bombay and in other places, from fraudulent breach of contract on the part of artificers, workmen, and labourers, who have received money in advance on account of work which they have contracted to perform; and whereas the remedy by suit in the Courts for the recovery of damages is wholly insufficient, and it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment. It is enacted as follows:—"

Section 1 of the Act provides that "When any artificer, workman or labourer shall have received from any master or employer resident or carrying on business in any Presidency Town, or from any person acting on behalf of such master or employer, an advance of money on account of any work, which he shall have contracted to perform, or to get performed by any other artificers, workmen, or labourers, if such artificer, workman or labourer shall wilfully, and without lawful or reasonable excuse, neglect or refuse to perform, or get performed, such work according to the terms of his contract, such master or employer, or any such person as aforesaid, may complain to a Magistrate of Police, and the Magistrate shall thereupon issue a summons or a warrant, as he shall think proper, for bringing before him such artificer, workman, or labourer, and shall hear and determine the case."

Although it is not expressly stated in the preamble or section 1, it is to my mind distinctly implied that the work contracted to be performed is to be within the limits of British India, and that the Act does not refer to contracts to be performed outside India. This was the view taken by a Judge of the Madras High Court in the case cited and it is, in my opinion, the correct interpretation of the Act.

I have been unable to find any Burma ruling on this particular point and the rulings quoted by Counsel for applicant are not on the same point.

The application for revision is dismissed.

Application dismissed.

(1) 10 M. 21; 1 Weir 671; 3 Ind. Dec. (N. S.) 765.

NANDA LAL BOSE *v.* ASHUTOSH GHOSH.

CALCUTTA HIGH CCURT.

CIVIL RULE No. 50 OF 1919.

March 24, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

NANDA LAL BOSE—DEFENDANT No. 5—PETITIONER

versus

ASHUTOSH GHOSH AND OTHERS—OPPOSITE PARTIES.

Limitation Act (IX of 1908), s. 10, applicability of—Money deposited as security—Payment to make good defalcations—Suit to recover money paid—Limitation.

The plaintiff, while filling the office of *gomasta* under the Court of Wards, deposited as security his Post Office Savings Bank Pass Book with the defendant, then manager of an estate under the Court of Wards. In 1910 plaintiff was dismissed, and it was found that a sum of money was due from him to the estate on account of defalcations he had committed. On 8th July 1913, the sum so due was, with the sanction of the Collector and the consent and authority of the plaintiff, withdrawn from the Savings Bank and credited to the estate. The plaintiff demanded the money from the defendant, and this was refused on 14th September 1913. The estate was released in 1917 and the plaintiff on 25th February 1918 brought the present suit to recover the money from the defendant, who contended that the suit was barred by limitation, more than three years having elapsed since payment was refused. The trial Court overruled the objection and gave the plaintiff a decree, holding that section 10 of the Limitation Act was applicable to the case, as the money, or the Post Office Savings Bank Pass Book which the defendant converted into money, was trust property. The defendant moved the High Court in revision reiterating his plea of limitation:

Held, that section 10 of the Limitation Act had no application to the case, as no property had vested in the defendant in trust for the plaintiff, as he had no control over it and could not withdraw the money without the consent and authority of the plaintiff, and that as the suit was instituted more than three years after the refusal to pay the money, it was barred by limitation. [p. 66, col. 2.]

Rule against the order of the Subordinate Judge, 3rd Court, 24-Pergannahs, exercising the powers of a Court of Small Causes, in Small Cause Court Suit No. 148 of 1918.

FACTS appear from the judgment.

Babu *Samatul Chandra Dutt*, for the Petitioner.—The defendant No. 5 is the petitioner before your Lordships. He was a manager of the Court of Wards. The plaintiff was a Tahsildar under them. Plaintiff had, under the rules, to deposit a Savings Bank Pass Book. He was there from July 1909 to February 1910. The defendant No. 5, the present petitioner, was the manager after the dismissal of the plaintiff from his office. Several proceedings were taken against the plaintiff. Defendant No. 5 withdrew the money with interest thereon from the Savings Bank on account of plaintiff's defalcations, with the sanction of the Collector in 1913. Plaintiff demanded the refund of the money deposited by him and was refused in September 1913. The estate was released from the management of the Court of Wards in March 1917. The present suit was instituted in February 1918. The defendants pleaded, *inter alia*, that they were entitled to a notice under section 80 of the Code of Civil Procedure and that the suit was barred by limitation. The learned Small Cause Court Judge, however, overruled the defendants' pleas and decreed the suit, holding that the defendant No. 5 was personally liable for the money withdrawn and that no notice was necessary under section 80 of the Code. The judgment was delivered on the 2nd September 1918. The defendant then applied for a review of the judgment but the application was forthwith dismissed. The defendant's ground for review was that he took a receipt from the plaintiff for the money withdrawn. This document was not entertained by the learned Judge. My points would be that the defendant is a public officer and, therefore, a notice under section 80 of the Civil Procedure Code is necessary. He withdrew the money as a public officer. See section 2 (17); *Collector of Bijnor* v. *Munuvar* (1); section 59 (*a*), Act I of 1906 (B. C.). The defendant has been served as a manager.

My next submission is that the suit is barred by limitation. The money deposited by the plaintiff was withdrawn by the defendant in July 1913. The suit was instituted in February 1918. The learned Small Cause Court Judge has held that the defendant No. 5 was a trustee and, therefore, section 10 of the Indian Limitation Act applies to the case. This, I submit, is an erroneous view of the law. The money could not be treated as trust property. The true test to determine whether the property is trust property or not is to see whether the trustee has got a full control over the property in question. See *Kathia*-

(1) 3 A. 20; 2 Ind. Dec. (N. S.) 6.

war Trading Co., Ltd. v. *Virchand Dipchand* (2). My submission is that Article 62 of the Indian Limitation Act would apply to the present case. An express trust must be proved under section 10 of the Limitation Act. See *Kherodemoney Dossee* v. *Doorgamoney Dossee* (3), *Mathuradas* v. *Vandrawandas* (4), *Bhurobhai* v. *Bai Luxmani* (5) and *Balwant Rao* v. *Puran Mal* (6). The suit ought to be dismissed on these points.

JUDGMENT.—This was a Rule calling on the opposite party to show cause why the judgment and decree of the lower Court passed against the petitioner should not be set aside.

The petitioner who was the manager of the estate of defendants Nos. 1 to 4 under the Court of Wards from 7th May 1911 to 30th April 1914, was defendant No. 5 in the suit. The plaintiff opposite party was a *gomasta* under the Court of Wards from July 1909 to February 1910. As *gomasta* he deposited his Savings Bank Pass Book as security with the manager. He was dismissed in 1910 and a certain amount was found due from him on account of defalcations made by him. The petitioner, who was then the manager under the Court of Wards, withdrew a sum of Rs. 224-14-5 from the Post Office Savings Bank account with the sanction of the Collector and with the consent of and under authority from the plaintiff on the 8th July 1913. The plaintiff demanded the money from the defendant No. 5 and this was refused on the 14th September 1913. The estate was released from the Court of Wards to the defendants Nos. 1 to 4 on the 1st March 1917. The present suit was instituted by the plaintiff on the 25th February 1918.

The defendant No. 5 contested the suit *inter alia* on the grounds, *first*, that the suit could not be maintained without a notice under section 80 of the Civil Procedure Code, *secondly*, that the suit was barred by limitation, having been instituted more than three years after the date of the refusal to pay the money, and *thirdly*, that he was not in any case personally liable for the amount, he having withdrawn the money with the sanction of the Collector and credited the same to the account of the estate.

The learned Small Cause Court Judge overruled the plea set up by the defendant and decreed the suit against the defendant No. 5 personally, holding that the defendants Nos. 1 to 4 were not liable.

The defendant No. 5 obtained this Rule.

We are of opinion that the suit is barred by limitation. The money was withdrawn on the 8th July 1913 and the suit was instituted on the 25th February 1918. The learned Judge below was of opinion that section 10 of the Limitation Act was applicable, as he held that the money in the hands of the manager or the Postal Savings Bank Pass Book which he converted into money was trust property. We are of opinion that there was no trust in favour of the plaintiff and section 10 of the Limitation Act is not applicable to the present case.

Apart from the question of the vesting in trust for a specific purpose, we think that no property had vested in the petitioner in trust for the plaintiff. So long as the money remained in deposit with the Savings Bank, the petitioner had no control whatever over it; he could not withdraw the amount without authority of the plaintiff and in fact when this amount was withdrawn, it was done with his consent and authority, though it is stated that the authority was obtained by means of threat. If there was any trust at all, the manager was trustee for the proprietor's estate. However that may be, the money having been withdrawn from the Post Office with the authority of the plaintiff cannot be said to have been held in trust for the plaintiff by the petitioner and section 10 does not apply to the present case. The suit having been instituted more than 3 years after the refusal to pay the money, it was barred by limitation.

Although this is sufficient for the disposal of the case, it may be mentioned that our attention has been drawn to

(2) 18 B. 119; 9 Ind. Dec. (N. S.) 588.
(3) 4 C. 455; 3 C. L. R. 315; 2 Shome L. R. 153; 2 Ind. Dec (N. S.) 289.
(4) 31 B. 229; 8 Bom. L. R. 328.
(5) 32 B. 394; 10 Bom. L. R. 540.
(6) 6 A. 1; 10 I. A. 90; 13 C. L. R. 39; 4 Sar. P. C J. 435; 3 Ind. Dec. (N. S.) 352.

certain documents certified copies of which have been produced before us and which show that the entire amount, namely, Rs. 222-14-5 withdrawn from the Post Office Savings Bank was credited to the account of the estate. It appears that these papers were not before the Court below at the original hearing and were produced before that Court when an application for review was made.

The Rule is accordingly made absolute and the suit against the petitioner must be dismissed with costs.

The petitioner is also entitled to costs of this Court, which we assess at two gold *mohurs*.

Rule made absolute.

ALLAHABAD HIGH COURT.

MISCELLANEOUS REFERENCE No. 263 OF 1919.

May 21, 1919.

Present :—Mr. Justice Walsh and Mr. Justice Stuart.

MOHAMMAD ABDUL BAQI KHAN —PETITIONER

versus

DR. SIRAJ-UL-HASAN AND OTHERS —OPPOSITE PARTIES

U. P. Municipalities Act (II of 1916), ss. 19 to 26—Election petition—Petition by unsuccessful candidate to unseat several successful candidates, whether permissible—Cause of action.

It is competent for an unsuccessful candidate at a Municipal election, petitioning against the election of more than one successful candidate, to join in one petition a claim that all or any of the candidates, being more than one, be unseated [p. 69, col. 2.]

Miscellaneous reference, under section 230 (*e*) of the U. P. Municipalities Act, from the Commissioner of the Allahabad Division.

Messrs. *B. E. O'Conor*, *Iqbal Ahmad* and *Umesh Shankar Bajpai*, for the Petitioner.

The Hon'ble Mr. *Moti Lal Nehru*, Dr. *Tej Bahadur Sapru*, Dr. *S. M. Sulaiman*, Messrs. *Bhagwati Shankar* and *Mukhtar Ahmad*, for the Opposite Parties.

JUDGMENT.— This is a question of procedure arising out of an election petition consequent upon a recent Municipal election in Allahabad which has been referred to us by the Commissioner, the tribunal appointed for the trial of the petition, such reference being in his opinion a question of law under section 23, sub section 2, clause (*e*) of the Municipalities Act.

The point may be shortly stated in this way:—Is it competent for an unsuccessful candidate petitioning against the election of more than one successful candidate to join a claim that all or any of the successful candidates, being more than one, be unseated in one petition? In this particular case there were six candidates, three of whom were elected, the present petitioner being the 4th, two other persons who were formerly respondents and have been struck out being 5th and 6th on the poll. The petition claims that upon various grounds raising questions of legality, corrupt practices, personation and so forth, the three successful candidates should be declared not to have been duly elected or in other words unseated and that the petitioner and his two colleagues (the two other unsuccessful candidates) should be declared elected in their places as members of the Board or that vacancies should be declared in respect of those candidates decided to be unseated. A further claim is made that in view of the practices alleged, the Court should take proceedings under other sections of the Municipalities Act against the respondents.

The provisions with regard to election petitions and the procedure thereunder are contained in sections 19 to 26 of the Municipalities Act and, with one possible exception which has given rise to the main argument on behalf of the respondents in this case, seem to us to be clear and free from any difficulty. By section 19 the lawful election of a candidate as a member of the Board may be questioned in an election petition on certain grounds. By section 20 such petition must be presented within 15 days of the election day and shall contain a summary of the grounds on which the election is challenged. Further, by the same section a right is given either to an unsuccessful candidate or to ten or more electors to present the petition. In the case of the candidate presenting the petition, he must be one who claims to be declared elected in the room of the person whose election is questioned. If this provision stood alone, it would appear to

indicate that the petition in the case of an unsuccessful candidate claiming to be elected in the place of the successful candidate, who is unseated, must be confined to one successful candidate. The result of this would be a somewhat clumsy arrangement, because there is nothing in the Act which indicates that if an unsuccessful candidate acting upon information in his possession believes that he has grounds for unseating all three but is uncertain of his success against either of the particular individuals, he may not, if he wishes to make assurance doubly sure, claim that each of the three be unseated and that he be elected in the place of either one or other of those whose election is declared void; he would be compelled in that case to file separate petitions against each. Clause 23, however, gets over this difficulty. By sub section 2 (*a*) it is provided that two or more persons whose election is called in question may be made respondents to the same petition and their cases may be tried at the same time, and any two or more election petitions may be heard together but so far as is consistent with such joint hearing, the petition shall be deemed to be a separate petition against each respondent. That section is perfectly clear. It provides in unmistakable language for a joint petition against more than one respondent, otherwise it would be inappropriate to deem it to be a separate petition; if only separate petitions were allowed there would be no necessity for the Legislature to provide for a petition to be deemed to be separate against each respondent. After all the argument would be the same if the unsuccessful candidate filed a separate petition against each of the three successful candidates claiming the seat of each. He could not fill more than one vacancy, if all his petitions succeeded. The word "petition" is clearly used in the section in two senses. In the earlier part of the clause "petition" means the paper or complaint which is originally presented and which must be presented within 15 days and must contain the summary of charges. That is the petition which is in question in this reference, the contention being that it is bad *ab initio* because presented against three respondents, but in the latter part of the section the word "petition" clearly means the procedure under which the complaints against the election of a candidate are investigated and decided. The word "petition" is quite common both in familiar use and in legal use in both senses and what that clause clearly provides is that a joint petition filed against one or more respondents who have been elected may be heard as one or as two and usually for the purpose of evidence be treated as separate petitions against each individual, giving the Court a wide discretion for its own conduct of its own proceeding but protecting the respondent against any unfair breach of the laws of evidence. This seems to us a perfectly reasonable provision on general grounds. The mere fact that so short a time as 15 days is allowed for the presentation of the petition places a very heavy burden indeed upon the petitioner to prepare any sort of case at all, in a matter covering such a wide area as a contested election, and it is far easier as a matter of procedure for the Court in the exercise of its discretion to separate cases which have once been united in a joint complaint than it is to consolidate several cases which have been originally filed as separate and distinct matters. So far as the consequences of the proceeding are concerned it is really unimportant, except for the purpose of qualifying the candidate who presents the petition to present the petition by declaring himself ready to fill a vacancy which he asks to be created, whether as a matter of law the Court decides in its discretion to declare the unsuccessful candidate elected in the place of the candidate unseated or whether it prefers to declare that the seat is merely vacant, and that a fresh election should be held. That decision does not in the least depend upon the claim made by the candidate presenting the petition, but upon the general circumstances of the case and the exercise of the Court's discretion which is wide under the Act.

The real difficulty of construction raised by Dr. Sapru in his argument on behalf of the respondent occurs in the use of these words in clause 20, sub-section 2. The candidate who presents a petition must be a person "who claims in the petition to be declared elected in the room of the person whose election is questioned", and it is said that this by implication imposes a limitation not upon the procedure but upon the right, that is to say, inasmuch as one man can take only one vacant place, if it is desired to challenge the election of more than one suc-

cessful candidate, it cannot be challenged by one man because he cannot ask to fill the vacancies of the persons whose election he questions. In other words, as he cannot fill the vacancy of three persons, he cannot by himself question the election of three persons. There is a good deal to be said for this argument, but on the whole we have come to the conclusion that it is not the correct view, for these reasons:—It seems to us that the intention of the Legislature really was, as is sufficiently expressed in this clause, that whereas any number of electors might question an election so long as they are not less than 10 in number without reference to any claim to succeed to the vacancy if one were created as the result of the petition, in the case of a candidate who no longer holds any position distinct from that of an ordinary elector after the election is over, he must show, so to speak, his *bona fides*, or at any rate his public spirit by following up the attack which he makes upon his successful rival by willingness to take his place if he is unseated, and reading the other portions of the Act in connection with clause 20, sub-clause 2, particularly section 25 which gives a wide discretion to the Court as to whether it shall or shall not declare any other candidate to have been duly elected or prefer to declare a vacancy and, therefore, involve re-election, all that was meant was that so long as the candidate claimed the vacancy, he was qualified to present a petition, but there is nothing in the rest of the Act to indicate that he may not do as this petitioner has done, that is, claim one vacancy in particular and leave it to the Court to decide whether the other vacancies which he has also attacked shall be filled by the other unsuccessful candidates or left vacant. As a general rule where a vacancy is declared for malpractices, corruption and so forth such as are alleged in this petition, it by no means follows that the unsuccessful candidate, in this case the petitioner, has any moral claim to the vacancy when it is declared; whereas if as the result of an election petition it is shown that, if the election had been conducted according to law, *i. e.*, there had been no personation or duplicate voting or vote by unqualified voters and so forth, the unsuccessful candidate would probably have succeeded, then no doubt the unsuccessful candidate is awarded the seat. But where the vacancy is created by a decision that the election has been carried through by improper practices, the usual consequence is that a vacancy is declared and a fresh election ordered. Having regard to these considerations, it seems to us that section 20, sub-section 2, does no more than require the candidate presenting the petition to claim the seat of the person or one of the persons whom he claims to have been unduly elected. This the petitioner has done. We think that it is in accordance with the Act and that the answer to the question must be that the claim (we think the words "cause of action" in connection with an election petition should be altogether avoided) made by the petitioner is properly made and that the petition is presented according to law.

We think, subject to any special reason to the contrary which the Commissioner may consider, that the costs of this proceeding should be costs of the petition.

Answered in the affirmative.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 8 OF 1919.

April 29, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

MOHAMMAD SARFARAZ HUSAIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MOHAMMAD SHAHIN KHAN—PLAINTIFF AND *Musammat* RABIA BIBI—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876*), s.* 9—*Pre-emption—Under-proprietary village, division of, into* mahals *and* pattis, *effect of.*

Where an under-proprietary village is divided and sub-divided into *mahals* and *pattis*, the sub-divisions must be recognised as separate entities for the purposes of section 9 of the Oudh Laws Act, although there is no separate engagement for the payment of the revenue in consequence of the division. [p. 70, col. 2.]

Therefore, a co-sharer in such an under-proprietary *mahal* falls under the category of the persons referred to in section 9, clause 2, of the Oudh Laws Act and can enforce his right of pre-emption, if he is

related to the vendor as against a person who is a co-sharer in the same *mahal* but is not related to the vendor or is a co-sharer in another under-proprietary *mahal*. [p. 71, col 1.]

Appeal against the decree of the District Judge, Fyzabad, dated the 7th February 1919, reversing that of the Munsif, Fyzabad, dated the 21st June 1918.

The Hon'ble Mr. *Wazir Hasan* and Syed *Ali Mohammad*, for the Appellants.

Chaudhuri *Nian at ullah*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre emption. The property sold is an under proprietary interest in the village Sarai Bhinauli. The village is divided into several *mahals*, one of which is called *Mahal* Sultan Muhammad Khan. *Mahal* Sultan Muhammad Khan is divided into three *pattis*: (1) *Patti* Sultan Muhammad Khan-Sultan Ahmad Khan, (2) *Patti Musammat* Mohamdi Bibi, and (3) *Patti* Dost Muhammad. The owner of *Patti Musammat* Mohamdi Bibi has sold that *patti* to defendants Nos. 1 and 2. Neither the plaintiff nor the defendants-vendees had any share in *Patti Musammat* Mohamdi Bibi. The plaintiff and one of the vendees are co-sharers in *Patti* Sultan Muhammad Khan Sultan Ahmad Khan. The other vendee is a co-sharer in another *mahal* of the same village. The plaintiff is related to the vendor.

The question for consideration in this appeal is whether the plaintiff is entitled, in the above circumstances, to claim pre-emption as against the defendants vendees. The Court of first instance dismissed the claim, but the lower Appellate Court allowed the appeal filed by the plaintiff and remanded the suit to the Court of first instance for its disposal on the merits.

The contention of the learned Counsel for the defendants-vendees is that the plaintiff did not hold a higher position than that of a member of the village community and he was not entitled, therefore, to any superior right. He argues that where a village is split up into superior proprietary and under proprietary rights, the division of under-proprietary rights into separate blocks does not operate as a partition of the village into *mahals*, unless the superior proprietary rights are partitioned at the same time and in the same manner.

A *mahal* is defined in section 4 of the U. P. Land Revenue Act (III of 1901) as meaning any local area held under a separate engagement for the payment of the land revenue or any revenue free area for which a separate Record of Rights has been framed. That definition does not apply, strictly speaking, to a division of an under-proprietary holding, for an under-proprietary holding is liable to pay rent to the superior proprietor and there is no separate engagement for the payment of the land revenue either to the superior proprietor or to the Government as such. Section 4, however, expressly excludes the above interpretation where such a meaning would be repugnant in the subject or context. Section 106 of the Act defines the perfect partition of a *mahal*, as a division of it into separate *mahals*, each severally responsible for the revenue distributed thereon. The definition of "*mahal*" as contained in section 4 applies to the word "*mahal*" as used in section 106 and the succeeding sections dealing with the partition of superior proprietary rights. It cannot, however, apply to section 138, which deals with the partition of under-proprietary *mahals* and of *mahals* held by lessees whose rent has been fixed by the Settlement Officer or other competent authority. Under section 74 what is payable by those *mahals* is rent and not revenue. There can be no separate engagement for the payment of revenue in case an under-proprietary *mahal* is divided in consequence. Section 138, clause (4), of the Act authorises the Revenue Court making a partition of an under-proprietary *mahal* to divide the rent payable by the under-proprietors to the superior proprietor, and empowers it to entertain and determine all objections to the distribution which may be made by the under-proprietors or, it may be by any of the superior proprietors thereof. Sections 100 and 101 of Act XVII of 1876, which were in force in Oudh before the U. P. Act III of 1901 came into force, contained similar provisions. It can hardly be argued consistently with the provisions of section 138 of U. P. Act III of 1901 that in the case of a division of an under-proprietary village the *mahal*, referred to in section 9, clause (2), of Act XVIII of 1876 has no existence in law. Such a *mahal* may exist, for section 138 of the U. P.

Act III of 1901 expressly contemplates its existence, and a person, who is a co sharer in such an under proprietary *mahal*, falls within the category of the persons referred to in section 9, clause (2), of Act XVIII of 1876 and can enforce his right of pre-emption, if he is related to the vendor, as against a person who is a co-sharer in the same *mahal* but is not related to the vendor or is a co sharer in another under-proprietary *mahal*.

On behalf of the defendants-appellants reliance is placed on the decision in *Sheoraj Kunwar* v. *Harihar Baksh Singh* (1). But in that case the so-called under-proprietary *mahal* was formed of blocks of villages and several village communities had been conglomerated for the purpose of forming a united holding. Three villages and two *pattis* were sold in that case by one of the under-proprietors and it was held that the under-proprietors who held shares in other villages had no right of pre-emption in respect of the three villages sold as against the Taluqdar who had purchased the same. Here the suit relates to one and the same village. The under proprietary *mahal* still exists as a separate entity. The vendor was a co-sharer in one subdivision of it. The plaintiff and one of the vendees were co-sharers in another subdivision. But as the plaintiff is related to the vendor and the vendees are not, the Court below rightly allowed the plaintiff a preference.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 7 Ind. Cas. 196; 32 A. 351; 20 M. L. J. 609; 14 C. W. N. 817; 12 C. L J. 40; 7 A. L. J. 709; 12 Bom. L. R. 508; 8 M L. T. 89; 1910) M. W. N. 351; 13 O. C. 165; 37 I. A. 124 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 234 OF 1917.

March 14, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

RAMESH CHANDRA ACHARJEE CHOWDHURY—PLAINTIFF—APPELLANT

versus

EASIN SARKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Principal and agent—Tahsildar of landlord, failure of, to inform landlord of arrears of rent Arrears barred through neglect of Tahsildar—Damages, suit for, maintainability of—Cause of action, accrual of—Accounts, suit for—Damages for laches, *claim for, whether can be joined.*

A Tahsildar appointed by a landlord, whether he has or has not the power to institute suits for arrears of rent, is certainly under an obligation to take steps in proper time to give information to the landlord that unless suits are brought in respect of certain arrears of rent, they would become barred by limitation [p. 72, col. 2.]

The omission of the Tahsildar to do so would make him liable for damages in respect of the arrears of rent thus becoming barred by limitation. [p. 72, col. 2.]

The cause of action for a suit against the Tahsildar for such damages arises when the arrears of rent become barred by limitation. [p. 72, col. 2.]

In a suit for accounts against an agent a claim for damages on account of loss caused by his *laches* can be included [p. 72, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, Mymensingh, dated the 19th July 1916, modifying that of the Munsif, 1st Court at that place, dated the 28th May 1915.

Dr. *Sarat Chandra Bysak* (with him Babu *Satish Chandra Bhattacharya*), for the Appellant.—The plaintiff is the appellant before your Lordships. This was a suit for accounts and damages for loss caused by the wilful negligence of the defendant, who was the Tahsildar of the plaintiff. The learned Munsif very rightly gave the plaintiff a decree also for a sum of Rs. 217-5-0, but the lower Appellate Court has set aside that part of the decree and has proceeded on a wrong view of the circumstances of the case. It has been distinctly found that the defendant caused a lot of rents to be barred by limitation, though as a Tahsildar of the plaintiff it was his duty to inform his master of the rents due from tenants which were going to be barred by limitation. Simply because there has been a claim granted against the defendant

for accounts for a certain period, there is no reason why the plaintiff should not be entitled to damages for the laches of the defendant though that fell in the same period.

Babu *Suria Kumar Guha*, for the Respondents.—In a suit for accounts a claim for damages cannot be included. Further, the defendant was not in duty bound to inform his master of the fact that certain rents were going to be time-barred. He could not institute the suit, it was the lookout of the plaintiff. Moreover, it is very strange that a claim for damages should be granted, though the claim for account for the period up to 1315 was disallowed.

Dr. *Sarat Chandra Bysak* replied.

JUDGMENT.

SHAMSUL HUDA, J.—The appeal arises out of a suit for accounts instituted by the plaintiff, who is the part proprietor of certain properties, against the defendant who was his Tahsildar. In addition to the ordinary claim for an account of receipts and disbursements there was a claim for damages on the allegation that the defendant had fraudulently and in collusion with the tenants allowed large sums of money to be barred by limitation. The allegation in the plaint was traversed in the written statement. There was a preliminary decree for account against the defendant. A Commissioner was appointed to examine the accounts and finally the matter came up before the Munsif, who decreed the suit in part and included in that decree a sum of Rs. 217-5-0, on the ground that this amount was not realised from the tenants on account of the default of the defendant and became barred.

The lower Appellate Court has set aside the decree of the Munsif so far as this amount is concerned. The sums which were allowed to be barred were payable by the tenants as rent for the years 1313, 1314 and 1315 and those sums could only have been barred if not realised respectively in 1316, 1317 and 1318. The lower Appellate Court gives two reasons for disallowing the plaintiff's claim in respect of these sums. In the first place, the learned Subordinate Judge says that as the claim for account for the period up to 1315 was disallowed, the plaintiff could not claim anything in respect of that period. It seems to me that the fact that these sums accrued due during a previous period makes no difference whatever. The cause of action in respect of these sums arose when they became barred by the law of limitation, and as already pointed out, all those sums were barred during the period for which the defendant has been made liable to render accounts to the plaintiff. The second ground of the Subordinate Judge's judgment seems equally untenable. The learned Judge observes with reference to the argument that the defendant by reason of his negligence failed to realise these sums during 1316 to 1318: "There was no contract or custom in support of the plaintiff's contention. The defendant was not hence liable for the omission." The defendant was a paid servant of the plaintiff. Whether he had or had not the power to institute suits himself, it was certainly his duty to take steps in proper time to give information to the plaintiff that unless suits were brought those sums would become barred. This, as found by the trial Court, he omitted to do. He was legally bound to take all the precautions which an ordinary prudent man of business would take in managing affairs of his own. This clearly he has not done and it seems to me that he is liable for the loss that has been occasioned to the plaintiff by his own default.

It has, however, been urged before us that in a suit for accounts a claim for damages cannot be included. On this point we have the authority of an unreported decision of this Court in Second Appeal No. 98 of 1917. That decision is exactly in point and I see no reason to differ from it.

For these reasons we decree this appeal and restore the decision of the first Court, with this modification only that the cost of the commission would be borne half and half by the plaintiff and the defendant.

The plaintiff is entitled to his costs in this Court and in the Court below.

RICHARDSON, J.—I agree.

Appeal allowed.

SAKHAWAT ALI *v.* ABU SAID.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 83 OF 1919.

April 29, 1919.

Present:—Mr. Daniels, A. J. C.

Chaudhri SAKHAWAT ALI—DEFENDANT—APPELLANT

versus

Haji ABU SAID AND OTHERS—PLAINTIFFS—RESPONDENTS.

Co-sharers—Partition, suit for—Partible property, whether can be converted into impartible property—Agreement not to apply for partition, effect of—Co-sharer in possession applying for partition—Revenue Court, order by, refusing partition—Declaration, suit for—Limitation—U. P. Land Revenue Act (III of 1901), s. 111—Limitation Act (IX of 1908), Sch. I, Art. 120.

The right to bring a suit for partition unlike other suits is a continuing right incidental to the ownership of joint property; and no agreement between the owners of that property, whether acted on or not, can operate to render the property permanently incapable of partition. [p. 74, col. 2.]

A co-sharer may be in possession of his share either by receiving profits from the *lambardar* or by collecting the profits himself from specific lands which, though they continue to be joint property, he holds in his separate possession. [p. 75, col. 1.]

Where a co-sharer in possession of his share applies for partition and the Revenue Court, without making an order under section 111 (1) (*b*) of the U. P. Land Revenue Act, declines to effect the partition until the applicant establishes his right in the Civil Court, the applicant is not bound to bring his suit within any particular period of time, provided he continues in possession of his share. [p. 75, col. 1.]

Appeal against the decree of the Subordinate Judge, Fyzabad, dated the 29th January 1918.

The Hon'ble Mr. *Wazir Hasan* and Mr. *Niamat-ul-lah*, for the Appellant.

Messrs. *M. Nasim*, *M. Wasim*, *M. Imatiaz Ali* and *Mohammad Ismail*, for the Respondents.

JUDGMENT.—This is an appeal in a suit brought by the plaintiffs Haji Abu Said and others against the defendant-appellant Chaudhri Sakhawat Ali for a declaration of their right to obtain a partition of their share of 2 annas 3 pies in Mauza Sukhrawal, *Mahal* Sakhawat Ali, and of 1 anna 6 pies in Mauza Raipur, *Mahal* Sakhawat Ali. The plaintiffs are the successors-in-title of Abdul Baki, the uncle of Sakhawat Ali, partly by direct purchase and partly by virtue of a decree for partition. The defences to the suit which have been urged in this Court as well as in the lower Court are, *first*, that the suit is barred by reason of an agreement effected between Abdul Baki and the defendant's father on 11th December 1882 and, *secondly*, that it is barred by limitation.

The circumstances under which the agreement of 1882 was entered into were these. A dispute had arisen between the parties as to the extent of Abdul Baki's share and the appellant Sakhawat Ali had instituted a declaratory suit in the Civil Court. In the course of that suit he and Abdul Baki and his uncle Ilahi Bakhsh, who represented the third branch of the family, entered into a compromise, whereby Sakhawat Ali admitted the extent of the shares of Ilahi Bakhsh and Abdul Baki and agreed to assign to them the possession of certain specific land rent-free as yielding profits equal to the profits of their share. Sakhawat Ali, it appears, was in possession of the whole property as *lambardar*. Then follows this clause:—

'We, Abdul Baki and Ilahi Bakhsh, agree that so long as Sakhawat Ali does not interfere with the land set apart for profits as noted below, we shall not claim partition of our shares privately or through Court. If they, contrary to this condition, claim partition, their claim will be considered false and untenable. The land which has been set apart for profits and is entered below has been taken by us in accordance with our shares. . . . . Abdul Baki and Ilahi Bakhsh shall have no claim to rendition of accounts."

It has been established in a number of cases, of which it is sufficient to mention *Rajender Dutt* v. *Sham Chund Mitter* (1) and *Pirojshah* v. *Manibhai* (2), that owners of property which is in its nature partible cannot by any agreement between themselves impress on it permanently the character of impartibility, and this position has not been challenged in this Court though it seems to have been a matter of controversy in the Court below. The matter was tersely put by their Lordships of the Privy Council in *Jafri Begam* v. *Syed Ali Raza* (3). The suit in that case was based on an arbitration award, one clause of which directed that there should be no partition. As to this their Lordships say :—

(1) 6 C. 106; 3 Ind. Dec. (N. S.) 70.
(2) 12 Ind. Cas. 543; 36 B. 53; 13 Bom. L. R. 963.
(3) 23 A. 333 at p. 392 (P. C.); 5 C. W. N. 585; 23 I. A. 111; 8 Sar. P. C. J. 27.

"It may have bound the parties who agreed amongst themselves to abide by it. But as against the present plaintiff" (the plaintiff, it may be noted, was the successor-in interest of one of the parties) "the clause has no effect whatever. The arbitrator.....had no power to make property which was divisible by law indivisible for ever."

The learned Advocate for the appellant has sought to distinguish this case on the ground that the agreement was made for consideration and was acted upon and, therefore, there arises something which in his own words "may, for convenience' sake, be called an *estoppel*." *Estoppel* in the ordinary sense there was not, as admittedly no false or misleading representation was made by Abdul Baki which caused the appellant to alter his position for the worse. The facts relied on are

(*a*) that in pursuance of the agreement Sakhawat Ali got his suit dismissed in the Munsif's Court,

(*b*) that one clause of the agreement was that Sakhawat Ali will have no claim in respect of debts, and

(*c*) that Abdul Baki and his successors-in-interest have continued, up to this time, in possession of the property assigned to them.

The learned Advocate also relies on the fact that the learned Subordinate Judge has decided the extent of the share on the basis of the agreement. It is urged that having done this he could not treat any other part of it as void. The learned Advocate is not altogether correct in his facts. The learned Subordinate Judge has, no doubt, treated the agreement as an admission by the appellant of the extent of the respondents' share, but he has at the same time stated that the amount of that share is further proved by the documentary evidence on the file. It has not been argued before me that the shares so found are incorrect and the learned Subordinate Judge's finding has only been used as an argument for treating the whole agreement as binding.

On the question of consideration very little need be said. If the fact of consideration being given could convert an illegal agreement into a legal one, section 23 of the Contract Act would become a dead letter. The word "agreement," as defined in the Contract Act, in itself implies that there is consideration and there certainly was consideration in several of the cases cited as, for instance, in the case of *Rajender Dutt* v. *Sham Chand Mitter* (1). The first two points relied on by the appellant amount to little more than saying that the agreement was for consideration and that the consideration agreed on was paid or rendered. The only act relied on not contemporaneous with the agreement is the fact that Abdul Baki and his successors in interest have continued in possession of the lands allotted to them. As to this the agreement itself shows that they were given possession of certain specific lands in order that they might realize the income thereof as equivalent to the profits which Sakhawat Ali must otherwise have paid to them in respect of the share to which they were entitled. In short, they were put in possession of the lands to save the necessity for a periodical rendition of accounts. The agreement would have been substantially complete if the clause relating to partition had been omitted altogether. In almost all the cases in which the effect of an agreement not to partition has been considered, the parties have continued in possession of their shares up to the time when the suit for partition was brought. In my opinion the rulings relied on by the appellant—*Sarat Chunder Dey* v. *Gopal Chunder Laha* (4) and *Jagannath Prashad Singh* v. *Abdullah* (5)—have no application to circumstances like the present. As was said by the Allahabad High Court in *T. C. Mukerji* v. *Afzal Beg* (6), the right to bring a suit for partition unlike other suits is a continuing right incidental to the ownership of joint property; and no agreement between the owners of that property, whether acted on or not, can operate to render the property permanently incapable of partition.

The argument of limitation depends to some extent on the same consideration as

(4) 20 C. 296 (P. C.); 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec (N. S.) 201.

(5) 45 Ind. Cas. 770, 45 C. 909; 18 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 403; 22 C. W. N. 893; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192; 20 Bom. L. R. 851; 35 M. L. J. 46; 45 I. A. 97 P. C.

(6) 27 Ind. Cas. 691; 37 A. 155; 13 A. L. J. 98,

the preceding issue. The property being revenue-paying property can only, under the provisions of the Land Revenue Act, be partitioned by the Revenue Court. In 1889, Abdul Baki applied to the Revenue Court to partition the property. The Revenue Court being doubtful of the effect of the agreement of 1882 declined to do so until the then plaintiff established his right in the Civil Court. The Commissioner's order in appeal is dated the 19th May 1890 and the appellant contends that because Abdul Baki failed to bring a declaratory suit within six years of that date his suit is barred by Article 120 of the Limitation Act. Another attempt was made in 1909 and a similar order was passed. The Collector's order is dated the 30th November 1909 and the suit is admittedly within time, if time is reckoned from that date. The Revenue Court did not, as it might have done, pass an order under section 111 (1) (*b*) of the Land Revenue Act, requiring the applicant to institute a civil suit within three months, and that section, therefore, admittedly does not apply. The appellant concedes that if the plaintiff was in possession of his share, the mere fact that the Revenue Court on a particular occasion declined to partition the property until he had got a declaration from the Civil Court could not debar him from applying for partition on a future occasion. He contends that under the agreement Abdul Baki was not in possession of his share but was given certain specific lands in lieu of it. This is, in my opinion, a mere quibble and quite unsustainable. A co sharer may be in possession of his share either by receiving profits from the *lumbardar* or by collecting the profits himself from specific lands which, though they continue to be joint property, he holds in his separate possession. It is clear that the latter course was taken by the agreement of 1882 to avoid the necessity for rendition of accounts. Abdul Baki was put in possession of certain specific lands, the produce of which was considered equivalent to the profits of his share. As was said in the case of *T. C. Mukerjee* v. *Afzal Beg* (6) already cited, the right to partition is a continuing right incidental to the ownership of joint property. "It may be that at one time the desire for partition may cease; circumstances may again occur which make it desirable or necessary that partition should take place." Abdul Baki and his successors have continued and still are in joint possession of their share by realizing the profits from the particular lands assigned to them, and the mere fact that they did not take steps to enforce their right to a partition in 1890 cannot deprive them and their successors of the right to do so for all future time.

The decision of the Court below is correct and I dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 93 OF 1917.

April 14, 1919.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

GUR SAHAI—DEFENDANT NO. 1—APPELLANT

versus

GIRDHAR LAL—PLAINTIFF AND BIHARI LAL AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Hindu Law—Alienation by father—Antecedent debt, transfer in consideration of, whether can be enforced during lifetime of father—Mortgage, whether constitutes antecedent debt—Sale-deed executed under order of Court, effect of—Necessity, proof of—Part of consideration not for necessity, effect of.

It is not correct to say that a conveyance by a Hindu father in consideration of antecedent debts can in no case be enforced during the father's lifetime. [p. 78, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 688; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 49; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), considered.

Where there is a personal debt enforceable apart from a prior mortgage, there is no reason why it should not have the same effect as any other antecedent debt. [p. 78, col. 1.]

Where it is found that the purpose for which a Hindu father agreed to effect an alienation of family property was one which would be binding on the sons and that a complete contract had been entered into by the father from which he could not legally withdraw, the liability of the sons cannot be affected by the fact that the father committed a breach of contract and that the vendee was com-

pelled to resort to the Court to enforce its execution. [p. 78, col. 2.]

Where it is found that the bulk of the consideration for an alienation of family property by a Hindu father was for antecedent debt or valid necessity so that it would have been impossible to raise the required amount except by effecting the sale in dispute, the fact that the vendor was able to obtain from the purchaser something over and above the amount binding on the estate is not a sufficient ground for setting aside the deed. [p. 79, col. 2.]

Appeal against the decree of the Subordinate Judge, Barabanki, dated the 25th July 1917.

Babu *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *A. P. Sen* and Rai *N. N. Ghoshal* Bahadur, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff Girdhari Lal for a declaration that a sale-deed executed by his father Behari Lal for a sum of Rs. 10,000 was not binding on him and for possession of the property. The actual figure entered in the deed was Rs. 9,999, as this was supposed to be a lucky number. It is admitted that the actual consideration agreed on was Rs. 10,000. The plaintiff is a minor and filed the suit through his mother *Musammat* Hardei, his next friend. Behari Lal, his adult son Gauri Shankar and the plaintiff form a joint family. The plaintiff's case is that the deed was not executed for any valid necessity and, therefore, cannot bind the joint family property. The suit was decreed by the Court below. The vendee Gur Sahai now appeals.

The case is complicated by the fact that the sale-deed was not executed voluntarily. Behari Lal entered into a contract of sale with the appellant on 16th October and a sale-deed was prepared, but owing to disagreement which arose between the parties, was never executed. The appellant subsequently brought a suit for specific performance against Behari Lal alone. The suit was decreed and the decree was upheld by this Court. The sale-deed wes actually executed by the Subordinate Judge on Behari Lal's behalf under Order XXI, rule 34, Civil Procedure Code, on 26th January 1916.

The details of the consideration are set out in the lower Court's judgment and are as under;—

	Rs
Left with the vendee to pay up two deeds of simple mortgage executed by Behari Lal, dated the 13th September 1904 and 25th May 1908, respectively	8,693
Received in cash as earnest money	65
Purchases of stamp ...	100
Cash	1,142
TOTAL ...	10,000

The two main questions which arise for decision are

(1) Whether the sum of Rs. 8,693 for payment of two earlier simple mortgages can be regarded as antecedent debt within the meaning of the Privy Council ruling in *Sahu Ram Chandra* v. *Bhup Singh* (1).

(2) Whether the fact that the deed was not executed voluntarily affects the plaintiff's liability.

Two propositions are contended for by the respondents:—

(1) that there can be no antecedent debt during the father's life, and

(2) that a debt secured by a mortgage cannot constitute antecedent debt.

Both questions depend on the interpretation of the ruling in *Sahu Ram Chandra* v. *Bhup Singh* (1). Their Lordships in that case, in the hope of putting an end to a conflict of decisions in India, went beyond what it was strictly necessary to decide for the purpose of the case before them. The only point actually arising in the case was whether a mortgage executed in lieu of a contemporaneous loan could, in a suit to enforce the mortgage against the sons of the mortgagor, be treated as having been made for antecedent debt. This point had been decided against the mortgagee by the Allahabad High Court in *Chandradeo Singh* v. *Mata Prasad* (2), and this decision was approved by their Lordships. Unfortunately the judgment delivered by Lord Shaw has itself given rise to considerable difficulty in this country. It has been considered by at least three High Courts with reference to the question how far it makes a change

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 1 Ind. Cas 479; 31 A. 176; 6 A. L. J, 263,

in the law as previously understood. The points in which the judgment modifies the law as previously understood in this part of India are, first, in laying down that the pious obligation of a Hindu son to pay his father's debts can never arise during his father's lifetime, and, secondly, in drawing a distinction between that obligation and the special exception in favour of an alienation effected by a father in lieu of antecedent debt. It had hitherto been understood that that exception, which is confined to the case of a father or grandfather, was founded solely on the doctrine of pious obligation, and this view derives some support from the observations of their Lordships themselves in *Girdharee Lall* v. *Kantoo Lall* (3) where it was said that the sons, *by reason of their obligation to pay their father's debts*, could not recover ancestral property which had passed from the family under a conveyance executed by their father in consideration of an antecedent debt, such debt not being contracted for illegal or immoral purposes.

In the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) there appears no room for doubt that a distinction is made between the two things. Their Lordships say that the two principles—(1) that the manager cannot dispose of joint family property without the consent of all the co parceners, and (2) that consent will be presumed for certain necessary purposes—would cover all the ground but for an exception hereafter to be noted. The exception in question is that in favour of an alienation made in lieu of antecedent debt. They then proceed: "Before dealing with that exception their Lordships desire to note an argument presented to the following effect." The argument here referred to is that based on the pious obligation of a Hindu son to pay his father's debts. Their Lordships held that no such obligation can be pleaded during the father's life and concluded with the words: "The whole of this part of the case is accordingly at an end." They then proceed to discuss separately, as a part of the case entirely separate from the principle they have hitherto been discussing, the exception in favour of a sale or mortgage by a father in consideration of an antecedent debt. They reject this exception as inapplicable to the facts before them, not on a consideration of whether the father was alive or dead, but on the ground that the debt was not independent of the mortgage transaction in support of which it was pleaded. It appears quite clear from this analysis that their Lordships did not intend to lay down that the exception in favour of antecedent debt could not be pleaded till after the father's death, and this is the view arrived at by the Madras High Court on a careful review of their Lordships' ruling in *Veda Vinkanna* v. *Sreenivasa Deekshatulu* (4). It is there said that their Lordships' judgment shows no indication of any intention to overrule a long course of previous decisions to this effect.

The Punjab Chief Court on a consideration of the same judgment of their Lordships has held in 15 Punjab Record 1918 [*Amar Nath* v. *Rustomji* (5)] that a money decree against a Hindu father for purposes neither illegal nor immoral can be enforced in execution against the joint family property even during his lifetime. In *Brij Narain Rai* v. *Mangla Prasad* (6), the Allahabad High Court, while taking a slightly different view from that taken by this Court as to what constitutes antecedent debt within the meaning of the Privy Council decision, clearly did not consider that the fact of the father being alive made any difference, for it appears from the report that the father was a party to the suit, which ended in an issue being remitted for the purpose of determining whether the debt was an antecedent debt. This view of the judgment derives some support from another judgment of the Privy Council itself in *Jogi Das* v. *Ganga Ram* (7). The judgment was delivered by Viscount Haldane, who said that in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage, or otherwise, except for necessity or for payment of an actual antecedent debt quite distinct from the debt incurred in the mortgage itself, and it was added that *the mere*

(3) 1 I. A. 321; 14 B. L. R. 187 (P. C.); 22 W. R. 56; 3 Sar. P. C. J. 380.

(4) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

(5) 43 Ind. Cas. 678; 15 P. R. 1918; 24 P. W. R. 1918.

(6) 50 Ind. Cas. 101; 17 A. L. J. 249; 1 U. P. L. R. (H. C.) 49; 41 A. 235.

(7) 42 Ind. Cas. 791; 21 C. W. N. 957; (1917) M. W. 739 (P. C.).

circumstance of a pious obligation doesnot validate the mortgage. In these words the validity of the transaction has to be determined quite apart from any question of pious obligation.

Reference has been made to certain decisions of this Court reported in the Oudh Law Journal, Volume V, but it is sufficient to say that there is none of those cases which is a direct authority for the proposition contended for by the respondents. In our opinion the Privy Council did not intend to lay down in *Sahu Ram Chandra* v. *Bhup Singh* (1) that a conveyance in consideration of antecedent debts can in no case be enforced during the father's lifetime.

As regards the second proposition the respondents were obliged to admit the existence of a Bench ruling of this Court which is against them. In *Ramman Lal* v. *Ram Gopal* (8) it was said with reference to *Sahu Ram Chandra* v. *Bhup Singh* (1): "What their Lordships seem to lay down is that an antecedent debt secured by a mortgage might be open to the same objection as a subsequent mortgage effected to pay the debt. They nowhere say that the personal obligation comprised in every simple mortgage cannot be separated from the mortgage debt and that..... the personal obligation to repay the money may not amount to an antecedent debt which the son may be under an obligation to pay if it was incurred for purposes neither illegal nor immoral."

The principle laid down in *Ramman Lal* v. *Ram Gopal* (8) has been followed in a number of subsequent cases in this Court, and on the principle of *stare decisis* we consider that we ought to follow it unless and until it is pronounced erroneous by higher authority. The words "wholly apart from the ownership of the joint estate" used by their Lordships must, we think, be interpreted with reference to the facts before them. Where there is a personal debt enforceable apart from the prior mortgage, we see no reason why it should not have the same effect as any other antecedent debt.

The next question is whether the plaintiff's liability is affected by the fact that the document was executed under a decree for specific performance of a contract to sell. The learned Subordinate Judge has treated this as an indication that the creditor did not act in good faith. He relies on the observation in the Privy Council judgment that the rule in favour of an alienation to meet antecedent debt, being an exception to a wider rule, should not be extended and should be carefully guarded. This is a view which cannot be accepted. The Privy Council judgment itself indicates the directions in which the exception should be limited. As regards good faith it certainly cannot be said that when the vendor has made a binding agreement for sale with the intending purchaser and then without any justification backs out of it, the latter is guilty of bad faith by seeking to enforce it by the ordinary legal remedy. It was conceded in argument before us that the property was sold for its full value. If, therefore, the sale was one which Behari Lal was entitled to make, no question of bad faith on the part of the purchaser can arise. It is worthy of note in this connection that the bargain was made with the full assent of Behari Lal's only adult son, the defendant Gauri Shankar. He was present when the draft was prepared, it was he who purchased the stamp for the actual deed and it was he who wrote the receipt for the earnest money. Order XXI, rule 34, Civil Procedure Code, provides that the execution of the document under that rule shall have the same effect as if it had been executed by the party himself. The purpose for which the deed was executed being one which would be binding on the sons and a complete contract having been entered into from which he could not legally withdraw, it does not appear to us that the liability of the sons can be affected by the fact that he committed a breach of contract and that the vendee was compelled to resort to the Court to enforce its execution.

There still remains one further point to consider, namely, the remaining portion of the consideration money and the effect on the suit, if it is found not to have been borrowed for valid necessity. The item for purchase of stamp goes with the main amount. If the sale-deed as a whole was binding, it was necessary to purchase a stamp in order that it might be executed in conformity with law. There remain the items of Rs. 65 paid as earnest money and Rs. 1,142

(8) 47 Ind. Cas. 987; 21 O. C. 200; 5 O. L. J. 629.

which was to be paid in cash. In this case there is no question of antecedent debt or of legal necessity. At the same time when the deed was finally executed, the creditor appears to have refused to repay this item retaining it against the costs due to him under the decree for specific performance. On this ground he ingeniously argues that it should be treated as an antecedent debt. This was, however, no part of the bargain between the parties. The bargain between the parties was that the amount should be paid in cash and it is impossible to treat it as an item binding on the sons. It has, however, been held in two cases, one of this Court and one of the Allahabad High Court, that where the bulk of the consideration is for antecedent debt or valid necessity so that it would have been impossible to raise the required amount except by effecting the sale in dispute, the fact that the vendor was able to obtain from the purchaser something over and above the amount binding on the estate is not a sufficient ground for setting aside the deed. The case in this Court [*Buniyad Husain* v *Mata Din* (9)] was the case of a Hindu widow who executed a sale-deed for Rs. 4,CCC. of which Rs. 3,782 4-9 was found to be for valid necessity. The whole deed was upheld on the authority of *Girdharee Lall* v. *Kantoo Lall* (3) and of *Deputy Commissioner of Kheri* v. *Khanjan Singh* (10). *Bal Krishna Das* v. *Hira Lal* (11) is a still more striking case. A house was sold by a Hindu daughter for Rs. 19,500, of which Rs. 7,775 was paid to a creditor of her father. The Court found that the debt could not have been paid off except by sale of the house, that the house could not be sold piecemeal, and that the price paid was a fair one, and upheld the whole transaction. These were cases of alienations by a Hindu female, but the same principle applies. At the time of the transaction in dispute in this case also there was a heavy and increasing debt capable of being ultimately realised from the family property.

(9) 36 Ind. Cas. 57; 3 O. L. J. 313; 19 O. C. 122.
(10) 29 A. 331; 9 Bom. L. R. 591; 5 C. L. J. 344; 11 C. W. N. 474; 4 A. L. J. 232; 2 M. L. T. 145; 17 M. L. J. 233; 10 O. C. 117; 34 I. A. 72 (P. C.).
(11) 50 Ind. Cas. 74; 17 A. L. J. 239.

For the reasons already given we allow the appeal and dismiss the suit with costs in both Courts.

No special sympathy need be felt for the plaintiff over this result. The plaintiff is a minor and there is very little doubt that the suit has really been brought at the instance of Behari Lal and Gauri Shankar in order to avoid the effect of the decree for specific performance passed against the former.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2129 AND 2131 OF 1917.

April 24, 1919.

Present:—Mr. Justice N. R Chatterjea and Mr. Justice Duval.

IN NO. 2129 OF 1917

GURU CHARAN NANDI AND OTHERS —
—PLAINTIFFS—APPELLANTS
versus
SARAB ALI—DEFENDANT—
RESPONDENT.

IN NO. 2131 OF 1917

GURU CHARAN NANDI AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
SHONA BIBI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885*), ss.* 35, 50, 102 (b), 115—*Scope of s.* 85—*Tenant recorded as occupancy* raiyat *under s.* 102 (b)—*Presumption under s.* 50, *applicability of.*

The presumption under section 50 of the Bengal Tenancy Act does not apply to the case of a tenant who has been recorded in the Record of Rights as an occupancy *raiyat* under section 102, clause (*b*), of the Act and not as a *raiyat* holding at fixed rates. [p. 81, col. 1.]

From the mere forbearance on the part of the landlord to claim enhancement of rent for a long period it does not follow as a matter of course that the original contract of tenancy was for payment of rent by the tenant at a fixed rate for ever. [p 82, col. 1.]

Section 35 of the Bengal Tenancy Act relates to the amount of assessment and does not refer to the grounds upon which a Court has to determine whether enhancement should be allowed or not. [p. 82, cols. 1 & 2.]

IN NO. 2129 OF 1917.

Appeal against the decree of the District Judge, Tipperah, dated the 24th May 1917, affirming that of the Munsif, Comilla, dated the 14th July 1916.

GURU CHARAN NANDI *v.* SARAB ALI.

IN No. 2131 OF 1917.

Appeal against the decree of the Subordinate Judge, Tipperah, dated the 16th of July 1917, affirming that of the Munsif, Comilla, dated the 24th July 1916.

FACTS appear from the judgment.

Babu *Upendra Nath Roy*, for the Appellants in Appeal No. 2129 of 1917.—The lower Courts have erred in law in not allowing enhancement of rent as claimed by the plaintiffs. In this case there was a Record of Rights and the particulars mentioned in section 102, clause (*b*), Bengal Tenancy Act, were recorded and so according to section 115, Bengal Tenancy Act, the defendants cannot claim the benefit of any presumption under section 50, Bengal Tenancy Act. The case of *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (1) is no longer good law and is not binding on your Lordships. It has been overruled by the case of *Pirthi Chand Lal Chowdhury* v. *Basarat Ali* (2). Moreover, the wording of the section itself is clear on the point. The Courts below thought a presumption would arise.

Babu *Gunoda Charan Sen*, for the Respondent in Appeal No. 2129.—It has been proved in this case by the defendants that they have been holding at a uniform rent which has not been changed during the twenty years immediately preceding the suit, so it shall be presumed, under section 50, Bengal Tenancy Act, that they have held at that rent from the time of the Permanent Settlement. So section 115, Bengal Tenancy Act, does not affect the facts and circumstances of the present case.

Babu *Upendra Nath Roy*, in reply, referred to *Harihar Persad* v. *Ajub Misir* (3) and the decision of Justices Woodroffe and Huda in *Muralidhar Aditya* v. *Radha Mohan Hazra* (4) decided on 9th April 1919.

Babu *Upendra Kumar Roy*, for the Appellants in Appeal No. 2131 of 1917.—The lower Courts erroneously relied on natural presumption and dismissed the plaintiffs' suit for enhancement of rent. There was a Record of Rights fourteen years before the institution of the suit. No presumption can arise for the period subsequent to the publication of the Record of Rights and it is clear that uniform payment of rent has been proved for only nine years prior to the publication of the record. Refers to *Pirthi Chand Lal Chowdhury* v. *Basarat Ali* (2).

The presumption is barred according to the provisions of section 115, Bengal Tenancy Act. Nineteen years before the suit the tenants were recorded only as occupancy *raiyats*.

Babu *Ram Dayal Dey*, for the Respondents in Appeal No. 2131.—The presumption in this case arises from the fact of uniform payment of rent for a long period. Fixed rent has been paid for a long period and there has no enhancement by the plaintiffs. The defendants have proved payment of a uniform rate of rent for 28 years. So section 50 (*b*), Bengal Tenancy Act, is clearly applicable to the facts and circumstances of this case. The plaintiff has not claimed any enhancement for about 40 years. It shows that the tenancy was at a fixed rate of rent in perpetuity.

Regard being had to the situation and condition of the lands, it is inequitable to grant any enhancement. Refers to section 35, Bengal Tenancy Act.

Babu *Upendra Kumar Roy* replied.

JUDGMENT.

SECOND APPEAL No. 2129 OF 1917.

This appeal arises out of a suit for recovery of arrears of rent and also for enhancement of rent.

The defendant was entered in the Record of Rights as an occupancy *raiyat* and not as a *raiyat* holding at fixed rates.

The Courts below have disallowed enhancement on the ground that the defendants have been holding at a fixed rent from the time of the Permanent Settlement.

It appears, however, that there was a Record of Rights in 1899, that is, 17 years before the institution of the present suit. A period of 35 years during which the defendant proved uniform payment of rent covers a period of 18 years before the final publication of the Record of Rights and another period of 17 years subsequent to such Record of Rights.

Section 115 of the Bengal Tenancy Act lays down that when the particulars mentioned in section 102, clause (*b*), have been recorded under this chapter in respect of any tenancy, the

(1) 12 C. W. N. 904.

(2) 3 Ind. Cas. 449 (F. B.); 37 C. 30; 13 C. W. N. 1149; 10 C. L. J. 343.

(3) 22 Ind. Cas. 604; 45 C. 930.

(4) 51 Ind. Cas. 552.

presumption under section 50 shall not thereafter apply to that tenancy.

In the present case the defendant was recorded in the Record of Rights as an occupancy *raiyat* under section 102, clause (*b*) of the Bengal Tenancy Act and the presumption, therefore, under section 50 cannot apply to the case.

In the case of *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (1), it was held by Mr. Justice Doss that notwithstanding the provisions of section 115 of the Bengal Tenancy Act, the tenant was entitled, upon proof of uniform payment of rent for 20 years before the Record of Rights were framed, to the benefit of the presumption under sub section (2) of section 50, and that the word "thereafter" in section 115 refers to a period subsequent to the publication of the Record of Rights. This latter proposition was not accepted in the case of *Pirthi Chand Lal Chowdhury* v. *Basarat Ali* (2) See also the case of *Harihar Persad* v. *Ajub Misir* (3) and the recent unreported decision in Second Appeals Nos. 2008 and 2483 of 1917, decided by Woodroffe and Huda, JJ., on the 9th April 1919 [*Muralidhar Aditya* v. *Radh Mohan Haera* (4)]. It is, however, unnecessary for us to consider whether any presumption arises with reference to uniform payment of rent before the final publication of the Record of Rights, because in the present case the period for which uniform payment of rent has been proved extends only to 18 years and no presumption under section 50 could, therefore, arise. So far as the period subsequent to the publication of the Record of Rights is concerned, no presumption arises under section 50 of the Bengal Tenancy Act, having regard to the provisions of section 115 of the Act. The period, moreover, is less than 20 years. The judgments of the Courts below, which proceeded entirely upon the presumption, which, in their opinion, arose in the case from the uniform payment of rent, must, therefore, be set aside on this point.

The decree of the lower Court, in so far as it relates to arrears of rent, is affirmed and the case must be sent back to the Court of first instance in order that the question of enhancement of rent may be tried out. Costs will abide the result.

S. A. No. 2131 of 1917.

In this case also, the plaintiff sued for enhancement of rent and the claim for enhancement has been disallowed on the ground that there was a "natural presumption" that the tenant was holding at a rent fixed in perpetuity.

In this case it is found by both the Courts below that the tenancy came into existence only 40 years ago and that the defendant had proved payment of rent at a uniform rate for 28 years. In this case, also, there was a Record of Rights 14 years before the institution of the suit. No presumption can arise for the period subsequent to the publication of the Record of Rights. There remains, therefore, only a period of nine years prior to the publication of the Record of Rights, for which uniform payment of rent has been proved.

It is said that apart from the presumption under section 50, a "natural presumption" as to the fixity of the rent arises from the fact of uniform payment of rent for a long period. As we have already stated, the tenancy came into existence only 40 years ago long after the Permanent Settlement; uniform payment has been proved only for 28 years and 19 years before the suit the tenants were recorded only as occupancy *raiyats*. We do not think, in these circumstances, that any presumption could possibly arise as to the rent being fixed.

With reference to the observations made by the learned Subordinate Judge as to the natural presumption arising from uniform payment of rent for 28 years, we may refer to the case of *Jagabandhu Saha* v. *Magnamoyi Dassi* (5) where the learned Judges observed (with reference to two plots of agricultural land held by occupancy *raiyats* whose rent had not been altered for 40 years) as follows: "Can we hold, as a matter of law, that the only inference legitimately deducible from the facts is that at the inception of the tenancies, the rent was, by agreement of parties, fixed in perpetuity? It is plain that the inference as to the terms of the original contract is drawn from the conduct of the parties. The only conduct of the plaintiff or his predecessor whereupon reliance is placed by the defendant is his

(5) 33 Ind. Cas. 884; 24 C. L. J. 363 at p. 370; 44 C. 555; 22 C. W. N. 189.

omission to claim enhancement of rent for a period of 40 years. Does such forbearance on the part of the landlord necessarily justify the inference that the contract of tenancy in its inception was for payment of rent fixed in perpetuity? The answer must, obviously, be in the negative. The conduct of the landlord, though consistent with the hypothesis that the rent was fixed in perpetuity, is equally consistent with a very different hypothesis. The landlord might not have sued for enhancement of rent, because, in view of the amount of rent already fixed, as well as the character of the land comprised in the tenancies, no further rent could be legitimately claimed. We have no information about the history of the holding or the condition of the land included therein. We do not know what would be the fair rent at the present time or would have been the fair rent during the years past. In these circumstances, from the mere forbearance on the part of the landlord to claim enhancement of rent even for 40 years, the inference does not follow as a matter of course that the original contract was for payment of rent by the tenant at a fixed rate for ever. If we were to accede to the contention of the defendant-appellant, we would be driven to hold, in substance, that every landlord who refrains from the institution of a suit for enhancement of rent of an occupancy holding, does so at his peril and that his forbearance, however just, will raise a presumption against him that the tenant held at a rent fixed in perpetuity." We entirely agree with these observations.

Much stress was laid by the learned Pleader for the respondent on the concluding portion of the judgment of the learned Subordinate Judge, where he says that the plaintiffs are not entitled equitably to enhancement of rent. The only ground upon which the learned Subordinate Judge so held is the position of the land by the side of a river and there being no crops grown on it. We do not think that that is what is contemplated by section 35 of the Bengal Tenancy Act. That section, we think, relates to the amount of assessment and does not refer to the grounds upon which a Court has to determine whether enhancement should be allowed or not.

The decree of the lower Court, in so far as it relates to arrears of rent, will stand and the case must be sent back to the Court of first instance for a decision of the question of enhancement of rent.

Costs will abide the result.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT

FULL BENCH.

MISCELLANEOUS CIVIL APPEAL NO. 29-B OF 1917.

February 27, 1919.

Present:—Mr. Drake-Brockman, J. C., Mr. Batten, A. J. C., and Mr. Mittra, A. J. C.

LAXMI NARAYAN RAMNARAYAN MARWADI—DEFENDANT NO. 2—APPELLANT

versus

VITHOBA AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1, 3, 4, AND 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Mortgage—Foreclosure suit—Person in possession of mortgaged property joined as defendant*—Ex parte *decree—Subsequent suit—Paramount title, whether can be pleaded.*

A decree for foreclosure passed *ex parte* against a person joined as defendant on the sole ground that he is in possession of the mortgaged property does not operate as *res judicata* so as to prevent him or his transferee from setting up a title paramount in a subsequent suit, where there has been no express adjudication on the question of title, though the final decree orders delivery of possession and possession has been accordingly delivered. [p. 83, col. 2; p. 84, cols. 1 & 2; p. 85, col. 2; p. 86, col. 1; p. 88, col. 1]

Appeal from the remand order, dated the 5th October 1917, passed by the District Judge, East Berar, Amraoti, in First Appeal No. 79 of 1917.

FACTS appear from the following Order of Reference made by

MITTRA, A. J. C.—(*June 25th*, 1918).—The plaintiff sues for possession of a half share in Survey No. 38 on the basis of a sale deed executed by the defendant Malai on the 14th April 1914. The defendants Nos. 2 and 3 obtained in Suit No. 56 of 1913 an *ex parte* conditional decree for foreclosure on the 28th April 1913. To this suit Malai was made a party defendant, apparently on the allegation that she was in possession of the mortgaged

property, and a decree passed against her. A final decree for foreclosure was passed on the 17th October 1914, which directed delivery of possession of the property against all the defendants. Possession was delivered on the 26th November 1914. The suit was dismissed by the Munsif on the ground that the former suit operated as *res judicata*. This decree has been reversed by the District Judge, East Berar, following the decision of this Court in *Hanumansingh* v. *Mannulal* (1). This decision is questioned before me, and it is urged that Mr. Skinner's ruling is inconsistent with the later Privy Council ruling in *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (2). On the other hand the case of *Hanumansingh* v. *Mannulal* (1) has been recently followed by Sir Henry Stanyon in Second Appeal No. 375 B of 1915 [*Kundanmal* v. *Karniram*]. I think it is necessary to refer to a Bench the following question:—

Whether a decree for foreclosure passed *ex parte* against a person who is impleaded on the sole ground that he is in possession of the mortgaged property operates as *res judicata* so as to prevent him or his transferee from setting up a title paramount in a subsequent suit.

The record is submitted to the Judicial Commissioner for orders.

The Judicial Commissioner ordered as follows:—

"The reference made by Mr. Mittra, A. J. C., will be heard and decided by a Bench composed of the Judicial Commissioner, Batten, A. J. C., and the referring Judge himself"

Messrs. *M. V. Joshi* and *V. V. Chitale*, for the Appellant.

Dr. *H. S. Gour* and Mr *S. Y. Deshmukh*, for Respondents Nos. 1 and 2.

OPINION OF THE FULL BENCH.

DRAKE-BROCKMAN, J. C.—(*February 26th*, 1919).—The question referred to the Full Bench as stated in the opinion of Mittra, A. J. C., requires to be narrowed down in view of the particular facts which have to be considered and may be thus stated:—

"Whether a decree for foreclosure passed *ex parte* against a person joined as defendant on the sole ground that he is in possession of the mortgaged property operates as *res judicata*, so as to prevent him or his transferee from setting up a title paramount in a subsequent suit where there has been no express adjudication on the question of title, though the final decree orders delivery of possession and possession has been delivered thereunder."

The facts are fully stated in the opinion of Batten, A. J. C., which I have had the advantage of reading. What has to be determined is whether *Musammat* Malai both might and ought to have advanced in the previous suit the plea that she had a title paramount to the mortgage on the foot of which the suit was brought That she must be dealt with on the same footing as if she had appeared in answer to a summons is conceded That if she had appeared and set up that title as a defence to the suit she would have obtained a decision as to its validity, is more than doubtful in view of the decision of the Privy Council in *Nilakant Banerji* v. *Suresh Chandra Mullick* (3) and of the views taken in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (4) and *Gobardhan* v. *Manna Lal* (5). On this ground alone, I think it may safely be held that we should not declare it to have been the duty of the woman to have raised the question of her paramount title. In *Henderson* v. *Henderson* (6) the Vice-Chancellor stated the rule in questions of the present kind to be as follows:—

"Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form

(1) 8 Ind. Cas. 1121; 6 N. L. R. 156.

(2) 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68 (P. C.).

(3) 12 C. 414 (P. C.); 12 I. A. 171; 9 Ind. Jur. 439; 4 Sar. P. C. J. 685; 6 Ind. Dec. (N. S.) 281.

(4) 33 C. 425; 3 C. L. J. 205.

(5) 46 Ind. Cas. 559; 40 A. 584; 16 A. L. J. 639.

(6) (1843) 64 R. R 213 at p. 223; 3 Hare 100; 67 E. R. 313.

an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

It being settled law owing to the decision of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (7) that it depends upon the particular facts of each case whether a matter ought to have been made ground of defence or attack in a previous suit, can we safely hold that Malai, if she had appeared in 1913, ought to have set up the title relied on in the present litigation, when it is at least highly improbable that any inquiry into that plea would have been undertaken? It may be said that the Court might have improperly gone into the question and come to a decision that the title alleged was unproved. This, however, does not seem to me to be a good reason for laying down that Malai was bound to invite an adjudication by setting up her title, and much less for laying down that she must now be treated as having had a decision adverse to that title recorded against her.

The decision of the Privy Council in *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (2) is not really apposite. There a point which might have been raised by a prior mortgagee joined as defendant in previous suits brought on foot of later mortgages was held to be *res judicata* by reason of his failure to raise it in those suits. Section 85, Transfer of Property Act, was in force when all the suits were instituted, and under that section the prevailing view was that a prior mortgagee was a necessary party to a suit for sale or foreclosure by a puisne mortgagee: see *Lakhmichand* v. *Ganpati* (8) and *Chulaji* v. *Fakir Shah* (9). I agree with Batten, A. J. C., that in the peculiar circumstances of this case Malai cannot be regarded as having lost by reason of the final decree in the suit of 1913 any possession other than such as she would have had under a title affected by the mortgage on which that decree was based. I would accordingly answer the question referred to us in the negative.

BATTEN, A. J. C.—(*February 22nd*, 1919).—The question referred for decision to the Full Bench has been put in the following terms:—

"Whether a decree for foreclosure passed *ex parte* against a person who is impleaded on the sole ground that he is in possession of the mortgaged property operates as *res judicata* so as to prevent him or his transferee from setting up a title paramount in a subsequent suit."

An answer in the affirmative to the above question would involve a disagreement with the decision of Skinner, A. J. C., in *Hanumansingh* v. *Mannulal* (1), which has been followed by Stanyon, A. J. C., in *Kundanmal* v. *Karniram* (Second Appeal No. 375-B of 1916). The following is the headnote of the reported case :—"If a person joined as defendant in a mortgage suit has a title paramount to that of the mortgagor, he is not bound to set up such a title by way of defence to the mortgage suit and his omission to do so will not, therefore, render the question of his title *res judicata* against him." It is desirable to consider the question with regard to the facts of the present case. The plaintiff sues for possession of a half share in survey No. 38 on the basis of a sale-deed executed by the 1st defendant, *Musammat* Malai, on the 14th April 1914. In Suit No. 56 of 1913 the 2nd and 3rd defendants obtained an *ex parte* conditional decree for foreclosure on the 28th April 1913. According to the allegations of the plaintiffs in that suit the then 1st defendant Ranu executed a mortgage deed in their favour and the plaintiffs sued for foreclosure of the mortgage. Paragraph 4 of the plaint ran as follows :—

"Defendant No. 3 (Akya) has taken on lease from defendant No. 2 (*Musammat* Malai) one of the mortgaged fields, namely, Survey No. 38, subsequently to the plaintiffs' mortgage and as this field is in possession of defendant No. 3, they have been impleaded as defendants in this suit."

The prayer was for a foreclosure decree in the ordinary terms and for possession. None of the defendants appeared and an *ex parte* preliminary decree for foreclosure was passed against all of them, which was followed in due course by an *ex parte* final decree against all of them. The final decree contains a direction that the defendants

(7) 20 C. 79 (P. C.); 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind. Dec. (N. S.) 53.
(8) 14 C. P. L. R. 177.
(9) 17 C. P. L. R. 139.

shall put the plaintiffs in possession of the property.

In the present suit the plaintiff's case is that the field was originally the property of Malai's husband Ramji, and that on his death it became the property of Malai. The first Court held that the plaintiff was estopped by the principle of *res judicata* from contesting the validity against Malai of the foreclosure decree obtained by the 2nd and 3rd defendants against Malai, because Malai ought to have raised the plea that she was not a necessary party to the foreclosure suit. On appeal the District Judge reversed the decision of the lower Court and remanded the suit for decision on its merits. The learned District Judge followed the reported case cited above.

In appeal it is urged that it was decided in the former suit that Malai was liable to be foreclosed merely because she was in possession through her tenant and a decree for foreclosure and possession was passed accordingly: the decision may be incorrect, but it is binding on Malai for the Court which passed the decree had jurisdiction to pass it. It is conceded by the learned Counsel for the respondents that the fact that the decree was *ex parte* makes no difference.

The question whether Malai had a paramount title which was not in any way affected by the mortgage was not put in issue in the former suit and was not decided. If the question is *res judicata* against Malai and her transferee, it can only be because of explanation IV to section 11, Civil Procedure Code. This explanation runs as follows:—

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

I do not think it necessary to express an opinion whether the Court in a mortgage suit has jurisdiction to decide a question of adverse title set up in such a suit. I will assume for the purposes of this case that the Court may go into such a question. It is undoubtedly the law that the Court need not go into a question of the paramount title of a party claiming adversely to the mortgagor, unless one of the parties to the suit invites such an enquiry. To decide whether Malai ought to have set up a paramount title as a defence within the meaning of explanation IV, we have to see what was the nature of the suit. The plaintiffs did not expressly allege that Malai was joined because she set up a paramount title; they merely said that she was in possession through her tenant and was, therefore, entitled to redeem the mortgage sued upon and was liable to be foreclosed. The suit was brought in the form of an ordinary mortgage suit for foreclosure and we must not read into the plaint more than what is found there. We must assume, in my opinion, that the then plaintiffs believed Malai to be in possession in consequence of some interest in the mortgaged property liable to be affected by the mortgage given by Ranu. We cannot assume, that the plaintiffs meant that in spite of having an interest not liable to be so affected she was nevertheless liable to be foreclosed. To such a claim it cannot, in my opinion, be said that Malai ought to have pleaded her paramount title which was not alluded to by the plaintiffs. I consider that the foreclosure decree was not a decree to the effect that because she held a paramount title she was liable to be foreclosed. The decree would be *res judicata* against her as far as it goes. She would be estopped by the rule of *res judicata* from setting up any title which could possibly be affected by the mortgage. She has lost any right to possession which she might have had under a title in any way connected with the mortgage. But she is not estopped from setting up any paramount title or her right to possession under such title, since in the former suit as brought by the then plaintiffs her rights under any paramount title were not brought before the Court.

The question referred for decision to the Full Bench should, with reference to the circumstances of the case before us, be amplified so as to read as follows:—

"Whether a decree for foreclosure passed *ex parte* against a person who is impleaded on the sole ground that he is in possession of the mortgaged property operates as *res judicata*, so as to prevent him or his transferee from setting up a title

paramount in a subsequent suit, where there has been no express adjudication on the question of title, though the final decree orders delivery of possession and possession has been accordingly delivered."

For the reasons given above I would answer the question in the negative.

MITTRA, A. J. C.—The question referred for decision to the Full Bench has been formulated in the following terms: whether a decree for foreclosure passed *ex parte* against a person who is impleaded on the sole ground that he is in possession of the mortgaged property operates as *res judicata*, so as to prevent him or his transferee from setting up a title paramount in a subsequent suit. The point which calls for a decision in the case is, however, somewhat narrower, and the question referred may be modified by the addition of the following words: "where there has been no express adjudication on the question of title, though the final decree orders delivery of possession and possession has been accordingly delivered."

This reference has been made in consequence of the decision of Skinner, A. J. C., in *Hanumansingh* v. *Mannulal* (1), which has been recently followed by Sir Henry Stanyon in *Kundanmal* v. *Karniram* (Second Appeal No. 375 B of 1916). The headnote in the reported case is to the following effect:—

"If a person joined as defendant in a mortgage suit has a title paramount to that of the mortgagor, he is not bound to set up such a title by way of defence to the mortgage suit and his omission to to do so will not, therefore, render the question of his title *res judicata* against him."

The defendant there was a purchaser from three brothers, one of whom had executed the mortgage deed sued upon. After the foreclosure decree he was allowed to set up his paramount title to a two third share in a subsequent suit, though neither the decree nor the proceedings had made any reservation in favour of such title.

The foreclosure decree in the present case was passed *ex parte* against the present plaintiff's predecessor in interest, *Musammat* Malai, and notwithstanding this the plaintiff sues for possession of one of the fields foreclosed. It is not contended that summons was not duly served on her. As possession in execution of the decree was delivered to the mortgagees long before the present suit, the time for setting aside the *ex parte* decree has expired, and the decree may now be regarded as final. It is not suggested in the argument at the Bar that the fact of the decree being *ex parte* makes any difference to the decision of the case.

On behalf of the plaintiff-respondent it is contended that there was really no decree against his predecessor. This argument is based upon the fact that in the printed form of the decree the word "defendant" appears in the singular number in some places, but on reading the judgment and the proceedings, it is perfectly obvious that the decree was passed against all the defendants in that suit. Moreover, this is a question not referred to the Full Bench.

It is urged that Malai was not a proper party to the previous suit for foreclosure, that the mere allegation that she was in possession of the mortgaged property did not disclose a cause of action against her, and that her paramount title was outside the scope of the suit. It cannot, however, be denied that the Subordinate Judge who decided the case had jurisdiction to do so. It was for him to decide who is a proper party, whether a cause of action has been disclosed and whether a decree, and what decree, should be passed. Whether he has decided rightly or wrongly does not affect the case. It is conceded that an erroneous decision will operate as *res judicata*. It is not open to the Court in a subsequent suit to review such findings as are expressly recorded or which follow by necessary implication from the decree. Therefore, the previous decree must be deemed to have held that Malai on the ground of her possession of the mortgaged property was a necessary party, that she had a right to redeem and was liable to foreclosure and to dispossession upon foreclosure.

It is, however, clear that Malai's paramount title was not expressly within the scope of the suit as framed, nor was there an express decision on it. Now the question is whether, in view of the fact that she must be deemed to have been properly made a party and the further fact that

the relief asked for included delivery of the property mortgaged, she was or was not bound to set up her title. In other words, whether explanation IV to section 11 of the Civil Procedure Code applies to the case.

When I made the reference my attention was mainly directed to a consideration of the questions whether the Court was competent to go into the matter of title and whether the Court ought to have decided it if raised by a defendant. There can be no doubt that the Court in a mortgage suit has jurisdiction to decide a question of adverse title set up in such a suit. *Joggeswar Dutt* v. *Bhuban Mohan Mitra* (4) is a clear authority in favour of this view. In a recent Allahabad case, *Gobardhan* v. *Manna Lal* (5), Banerji and Abdul Raoof, JJ., are reported to have said that a puisne mortgagee claiming to be owner of part of the mortgaged property could not set up his paramount title in the mortgage suit. If this is taken literally, it is opposed to the Calcutta case cited there as an authority in support of their Lordships' view. But I think the learned Judges meant no more than this, that the defendant could not insist upon a final decision on such a question of title.

Whether a Court ought to decide such a question when raised by a defendant who is a proper party to the mortgage suit, is a matter on which there may be difference of opinion. But it cannot be denied that ever since the decision of the Privy Council in *Nilakant Banerji* v. *Suresh Chandra Mullick* (3), our Courts have placed a restricted construction as to the scope of the inquiry in a mortgage suit. The Privy Council decision was with reference to a defendant who did not seek to redeem the mortgaged property. Although there is no statutory bar to the determination of a question of title raised by a defendant who is properly made a party to a suit, and although there is no authoritative decision laying down what should be done in such a case, the practice of the Court has been to regard such question as foreign to the mortgage suit. The two local judgments cited before impliedly recognise this practice. Whether that practice should in future be supported is a question not before us now, and if I had fully appreciated the importance of this, I would not have made the reference. The proper occasion for deciding that point will be when it arises in the mortgage suit itself.

The practice being as I have stated, the question now for decision is whether the fact that the defendant did not set up her paramount title in the mortgage suit brings the case within explanation IV to section 11. In deciding whether a ground of attack or defence ought to have been raised, regard must be had to the practice of the Court which probably influenced the conduct of the parties and their Pleaders. If such a title had been set up and Malai had not claimed to redeem the mortgage, she would have been discharged from the suit. If she had been interested in a part of the mortgaged property as the representative of the mortgagor and claimed title to another part of it, the Court might have either finally decided the question of title or left it open for future adjudication. This being in the discretion of the Court in view of the practice above stated, the Court was not bound to decide the question finally. There is no certainty that "the necessity for the present suit would have been avoided." This is the test which Mookerjee, J., interpreting the Privy Council decision in *Sri Gopal* v. *Pirthi Singh* (10) lays down in *Surjiram Marwari* v. *Barhamdeo Persad* (11). To hold a matter as finally decided when it has not been actually decided and when it need not have been so decided in view of our practice, is to unduly extend the doctrine of constructive *res judicata* beyond its proper limits.

The plaintiff did, no doubt, ask for possession in the previous suit, but it was only as consequential relief upon the relief by way of foreclosure. There was no prayer for possession upon the determination of a question of an adverse title. Under Order XXXIV, rule 3, there was an order for delivery of possession. The effect of the decree was that the defendant was debarred of all right to redeem the mortgage, and the right of the mortgagor, as it existed at the date of the mortgage, passed to the mortgagee free of all claims for further

(10) 24 A. 429 (P. C.); 4 Bom. L. R. 827; 6 C. W. N. 8[illegible]; 29 I. A. 118; 8 Sar. P. C. J. 293.

(11) 1 C. L. J. 337.

redemption by all persons made parties to the suit. It did not affect the title of the defendant so far as it was not derived from the mortgagor and so far as it was adverse to both mortgagor and mortgagee. If a person is properly made a party and a question of title to the mortgaged property is left undetermined, then the proper order, no doubt, is to leave the person in possession undisturbed until the question of title is finally decided. In such a case, if the mortgagee had asked for possession upon foreclosure and such possession was disallowed, it could not be held that the case came within explanation IV to section 11 of the Civil Procedure Code, so as to bar him from raising the question of title afterwards, for the relief that was refused was a relief consequential upon foreclosure and not consequential upon the determination of the question of title. But the Court had to pass some summary and provisional order with regard to possession and if it erroneously passed an order against the defendant as in this case, such order cannot be regarded as a final determination of the question of title. Whether this summary order shifts the burden of proof upon the party against whom it is passed need not be decided now.

For these reasons my answer is that the suit is not barred by *res judicata*.

On the 26th February 1919 the record was sent back to the referring Judge with the following remarks:—

"The Judges constituting the Full Bench having been unanimously of opinion that the question referred to for their decision should be answered in the negative, the case with the opinions recorded is remitted to the referring Judge for disposal."

FINAL JUDGMENT.

MITTRA, A. J. C.—(*February 27th*, 1919).—In accordance with the unanimous opinion of the Full Bench, I hold that the suit is not barred by *res judicata*. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 336 OF 1918.

April 16, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

GANGA PRASAD—PLAINTIFF—APPELLANT

versus

HAYAT MOHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Principal and surety—Surety, liability of, extent of—Principal contract found to be void, effect of.

The liability of a surety is co-extensive with that of the principal debtor, except in so far as the contract may otherwise provide. In other words, the quantum of the obligation of a surety is the same as that of the principal debtor, whether he signs the document executed by the latter as a surety or as a co-executant, unless there is a contract to the contrary. It does not, however, follow that a surety can never be liable where the principal debtor cannot be held liable. The creditor can fall back on the contract of indemnity and enforce the liability of the surety, if the contract entered into by the principal debtor is found for any reason to be void or voidable. [p. 89, col. 2.]

M. and *H.* mortgaged certain separate and distinct properties in favour of the plaintiff, but there was a condition in the mortgage-deed that the property mortgaged by *H.* would not be liable till for any reason the mortgage-money was found to be not recoverable from the property mortgaged by *M.* It was found that *M.* was of unsound mind at the time of the execution of the mortgage-deed:

Held, that the property mortgaged by *H.* was in the circumstances liable for the mortgage debt. [p. 89, col. 1.]

Appeal against the decree of the District Judge, Lucknow, dated 25th June 1918, confirming that of the Probationary Munsif, Lucknow, dated 13th December 1917.

Babu *Ishwari Prasad*, for the Appellant.
Mr. *S. N. Roy*, for Respondent No. 1.
Mr. *P. C. Gupta*, for Respondent No. 6.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for the recovery of money due on a deed of mortgage purporting to have been executed by Musahib Ali and Hayat Mohammad. The property mortgaged by each of these mortgagors was separate and distinct, but there was a condition in the mortgage deed that the property mortgaged by Hayat Mohammad would not be liable till for any reason the mortgage money was found to be not recoverable from the property mortgaged by Musahib Ali. As a matter of fact the money, for which the mortgage was made, was borrowed by

Musahib Ali, and though Hayat Mohammad was a co-executant, he was in substance a surety, who had hypothecated his property in order to indemnify the plaintiff in case he was unable to recover the mortgage money for any reason from the property mortgaged by Musahib Ali.

The Courts below dismissed the claim. Their finding is that Musahib Ali was of unsound mind on the date when the above mortgage was made and that no relief could be granted against Hayat Mohammad, because under the terms of the mortgage, he was to be made liable if the property mortgaged by Musahib Ali was found to be insufficient to satisfy the money due on the mortgage.

On behalf of the heirs of Musahib Ali the genuineness of the mortgage-deed was disputed. The Court of first instance found that its due execution was not proved but the finding of the lower Appellate Court is to the contrary. Hayat Mohammad, moreover, admitted having executed the mortgage-deed. The refusal of the Court below to enforce the mortgage against the property hypothecated by him rests on a very weak basis. The mortgage deed does not say that the property mortgaged by Hayat Mohammad was to be liable only in case the property mortgaged by Musahib Ali proved insufficient to satisfy the mortgage-money. The liability of Hayat Mohammad was contingent on anything happening which might prevent the realization of the mortgage-money from the property hypothecated by Musahib Ali. The contingency is not confined to the circumstances referred to by the Court below. The medical evidence adduced in the case shows that from before the date of the execution of the mortgage, the mental condition of Musahib Ali was more or less precarious. The Sub-Registrar, who registered the document, thought that he was of sound mind. The plaintiff had probably some apprehensions on the point, for he got a surety to mortgage his property as a co-executant with Musahib Ali before he lent money to the latter. The concurrent findings of the Courts below, the correctness of which cannot be challenged here, go to show that those apprehensions were justified.

A contract made by a person of unsound mind is legally void, but that fact does not discharge a surety. The liability of a surety is co extensive with that of the principal debtor, except in so far as the contract may otherwise provide. In other words, the quantum of the obligation of a surety is the same as that of the principal debtor, whether he signs the document executed by the latter as a surety or as a co executant, unless there is a contract to the contrary. It does not, however, follow that a surety can never be liable, where the principal debtor cannot be held liable. The creditor can fall back on the contract of indemnity and enforce the liability of the surety, if the contract entered into by the principal debtor is found for any reason to be void or voidable. In *Kashiba* v. *Shripat Narshia* (1) it was accordingly held that a surety to a bond passed by a minor for moneys borrowed for purposes of litigation not found to be necessary was liable to be sued on it, whether the contract of the minor was considered to be void or voidable. In *Debendra Nath Dutt* v. *Administrator-General of Bengal* (2) a person who stood surety for anadministrator to whom Letters of Administration had been granted was held liable, though the Letters of Administration granted to him were subsequently revoked on the ground that they had been obtained by fraudulent misrepresentations. The surety in that case was found to have been unaware of the fraud committed by the person for whom he stood surety; but their Lordships of the Privy Council held that the surety-bond did not become void, when the Letters of Administration were cancelled and the surety continued to be liable for the acts and defaults of the administrator, so long as the Letters of Administration were in force. The plaintiff is, therefore, entitled to enforce the mortgage made by Hayat Mohammad.

The appeal is allowed and the claim of the plaintiff decreed with costs and future interest at 2 per cent. per mensem from the date of the suit till six months from this date, after which further interest shall cease. The decree will be passed against the property mortgaged by Hayat Mohammad and will be framed in terms of Order XXXIV, rule 4, of the Code of Civil Procedure. Six months' time will be allowed for payment. The suit will

(1) 19 B. 697; 10 Ind. Dec. (N. S.) 466.
(2) 35 C. 955; 10 Bom. L. R. 648; 12 C. W. N. 802; (P. C.); 35 I. A. 109; 14 Bur. L. R. 197; 4 M. L. T. 21; 18 M. L. J. 367; 8 C. L. J. 94.

be dismissed as against defendants Nos. 2 to 6, who in the circumstances of the case will bear their own costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2980 OF 1912.

May 19, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Maharaja JAGADINDRA NATH ROY —PLAINTIFF—APPELLANT

versus

MOHENDRA NATH MOZUMDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Regulation VII of 1822, *s.* 9—*Settlement Officer, power of, to record fair rent—Landlord, whether can claim enhanced rent recorded by Settlement Officer—Suit for recovery of enhanced rent, whether can be treated as one for enhancement of rent.*

Section 9 of Bengal Regulation VII of 1822 does not authorize the settlement authorities to enhance the rent payable by *raiyats* Consequently a landlord cannot claim rent at the rate recorded by the Settlement Officer as the fair rent payable by cultivators. [p. 91, col. 2.]

It is well settled that a Settlement Officer under Regulation VII of 1822 does not settle rent but records rates of rent existing in the village. [p. 91, col. 1.]

Where a suit for recovery of enhanced rent, instituted on the theory that the rent payable by the defendants had been lawfully enhanced as a result of proceedings under Regulation VII of 1822, is found to be unfounded and is successfully contested by the tenant defendants, the suit cannot be treated as one for enhancement of rent, inasmuch as to do so would be to entirely alter the scope of the suit. [p. 91, col. 2]

Appeal against the decree of the District Judge, Nadia, dated the 12th July 1912, affirming that of the Subordinate Judge, Nadia, dated the 17th July 1911.

Babus *Dwarka Nath Chakrabutty*, *Rama Kanta Bhattacharjee* and *Jotindra Nath Lahiri*, for the Appellant.

Babu *Tarakchandra Chakrabutty* for Babu *Upendra Narain Bagchi*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent. The case for the plaintiff is that the defendants are occupancy *raiyats* in respect of a large tract of land within his estate which was last settled with him by Government for a period of 10 years from 1st April 1909. The plaintiff alleges that the rent payable by the defendants has been fixed at Rs. 1,659-13 0 in the settlement proceedings, and he claims to recover arrears at that rate. The defendants contend that the rent was payable at the annual rate of Rs. 1,239 9 12 *gds.* that such rate has not been affected by the proceedings of the settlement authorities and that whatever was due has been paid to the landlord. The Courts below have concurrently dismissed the suit.

On the present appeal it has been argued that under section 9 of Regulation VII of 1822, the rent payable by the defendants was, as a result of the settlement proceedings, enhanced to Rs. 1,659-13 0 per annum. In our opinion there is no foundation whatever for this contention. Section 9 of the Regulation prescribes the mode of investigation by Collectors who are called upon to make a revised settlement. The first paragraph of the first clause of that section is in these terms: "It shall be the duty of Collectors and other officers exercising the powers of Collectors, on the occasion of making or revising settlements of the land revenue, to unite, with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests and privileges of the various classes of the agricultural community." The second paragraph then provides that the proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures and of various other matters specified therein. The last paragraph of the first clause upon which reliance is specially placed provides that "the information collected on the points previously mentioned shall be so arranged and recorded as to admit of an immediate reference hereafter by the Courts of Judicature, it being understood and declared that all decisions on the demands of the

Zemindars shall hereafter be regulated by the rates of rent and modes of payment avowed and ascertained at the settlement and recorded in the Collector's proceedings, until distinctly altered by mutual agreement or after full investigation in a regular suit and all cesses for collections not avowed and sanctioned nor taken into account in fixing the Government *jama* shall be held illegal and unauthorised, unless now or hereafter specially sanctioned by Government." Stress is laid on the words "all decisions on the demands of Zemindars shall be regulated by the rates of rent and modes of payment avowed and ascertained at the settlement," and it is argued that this supports the view that the effect of an entry by the settlement authorities as to the fair rent payable by the cultivator has the effect of enhancement of his rent. In our opinion, the words, upon which reliance is placed, do not support the contention of the appellants. It is well settled that a Settlement Officer under Regulation VII of 1822 does not settle rent, but records rates of rent existing in the village. This view has been taken in a long series of cases, *Nawab Nazim of Bengal* v. *Ram Lal Ghose* (1), *D'Silva* v. *Raj Coomar Dutt* (2), *Enayetoollah Meah* v. *Nubo Coomar Sircar* (3), *Ledlie* v. *Sreemutty Doorga Monee Dossee* (4), *Reazooddeen Mahomed* v. *McAlpine* (5), *Akshoya Kumar Dutt* v. *Shama Charan* (6), *Watson & Co.* v *Mohendro Nath Paul* (7) and *Zamir Mandal* v. *Shama Charan Singh* (8). Reference, however, has been made to the provisions of section 195 of the Bengal Tenancy Act to show that nothing in the Bengal Tenancy Act, specially section 23, which provides that where an occupancy *raiyat* pays his rent in money his rent shall not be enhanced, except as provided by that Act, can affect the powers and duties of a Settlement Officer as defined by any law not expressly repealed by the Bengal Tenancy Act. This clause is of no assistance to the appellant, because section 9 of Regulation VII of 1822 does not authorise the settlement authorities to enhance the rent payable by *raiyats*.

It has finally been argued that the Act III of 1878 B. C. lends some support to the interpretation of section 9 of Regulation VII of 1822 put forward on behalf of the appellant. We are of opinion that the provisions of that Act justify precisely the opposite inference; it only shows that the settlement authorities had, in some instances, erroneously undertaken to settle fair rents and had thereby enhanced the rents payable by tenants, in contravention of the provisions of the Bengal Rent Acts of 1859 and 1868.

As a last resource, it has been argued on behalf of the appellant that the present suit may be treated as a suit for enhancement of rent and that the question of the fair rent payable by the defendants may be investigated herein. But it would be obviously unfair to the defendants to allow the plaintiff to treat this suit for rent as a suit for enhancement of rent. The suit was instituted on the theory that the rent payable by the defendants had been lawfully enhanced as a result of the proceedings under Regulation VII of 1822. That claim is unfounded and has been successfully contested. It is too late for the plaintiff now to turn round and ask that the scope of the suit may be entirely altered.

The result is that the decree of the District Judge is confirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 6 W. R. Act X Rulings, 5.
(2) 16 W. R. 153.
(3) 20 W. R. 207.
(4) 21 W. R. 410.
(5) 22 W. R. 540.
(6) 16 C. 586; 8 Ind Dec (N. S.) 337.
(7) 23 W. R. 436.
(8) 5 Ind. Cas, 256; 11 C. L. J. 60.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 232 AND 233 OF 1918.

April 28, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

NAROTAM PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHANKAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Consideration, failure to pay, effect of—

NAROTAM PRASAD *v.* SHANKAR SINGH.

Transfer of Property Act (IV of 1882), s. 95—Co-mortgagor redeeming mortgage—Charge, nature of—Covenant between mortgagor and mortgagee, whether can be set up as defence to suit for redemption by co-mortgagor.

The consideration for a mortgage may be money paid or promised to be paid afterwards. [p. 92, col. 2.]

A deed of mortgage whereof the consideration is promised to be paid afterwards cannot be held to be without consideration, unless the mortgagee expresses his unwillingness to keep his promise or has by his conduct disqualified himself from carrying out his part of the contract. [p. 92, col. 2.]

A co-mortgagor who redeems a joint mortgage is entitled to a charge on the mortgaged property under section 95 of the Transfer of Property Act, but he is not entitled to set up in defence to a suit for redemption a covenant which was only enforceable as between the original parties to the transaction. [p. 93, col. 2.]

Appeal against the decree of the District Judge, Hardoi, dated the 14th March 1918, reversing that of the Munsif, Hardoi, dated the 11th June 1917.

Mr. *Bisheshwar Nath Srivastava*, for the Appellants.

Mr. *H. K. Ghose*, holding brief of Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—These appeals arise out of a suit for redemption of a usufructuary mortgage effected by Lalta Singh, the father of Manna Singh, defendant No. 1, in favour of Bhau Singh and Rohan Singh, the ancestors of defendants Nos. 5 to 10, in lieu of Rs. 1,500, on the 25th September 1874. Lalta Singh died leaving three sons, Manna Singh, Kesri Singh and Baldeo Singh.

On the 27th October 1903, Manna Singh made a mortgage of his one-third share in the property previously mortgaged by his father in lieu of Rs. 500, leaving the entire consideration with Ganga Prasad, his mortgagee, for payment to the prior mortgagees aforesaid in satisfaction of his liability under the mortgage of the 26th September 1874. The mortgage-deed authorised him to take possession of that share on redemption. The prior mortgage-deed was not, however, redeemable till the expiry of 40 years from the date of the mortgage or in any month other than Jeth. The plaintiffs are the sons of Ganga Prasad.

On the 21st June 1915, Banke Behari Lal and Sitla Bakhsh, who had purchased the share of Kesri Singh and a portion of the interest of Manna Singh in the mortgaged property, tendered Rs. 1,500 to the defendants Nos. 5 and 6, the legal representatives of the prior mortgagees, under section 83 of Act IV of 1882, and obtained possession of the entire property mortgaged. The plaintiffs now seek to redeem the one-third share of Manna Singh mortgaged with them from the defendants Banke Behari Lal and Sitla Bakhsh, offering to pay to the latter Rs. 500 on account of their one-third share of what they had paid to the defendants Nos. 5 to 10. The Court of first instance decreed the claim but the lower Appellate Court dismissed it. The ground upon which the latter Court dismissed the suit was that the mortgage held by the plaintiffs was without consideration, and that the plaintiffs were not entitled in equity to enforce the mortgage by reason of their having failed to carry out their part of the contract so long.

The consideration for a mortgage may be money paid or promised to be paid afterwards. In this case there was a promise to pay, in so far as the consideration money was left for payment to the prior mortgagees; and so long as the plaintiffs are willing to keep up that promise and have not disqualified themselves by reason of any conduct of theirs to carry it out, the deed of mortgage, they held, cannot be deemed to be devoid of consideration. It is not contended that the mortgage executed by Manna Singh in favour of Ganga Prasad was fictitious or collusive. The only question for consideration is whether by reason of their failure to pay Rs. 500 to the prior mortgagees or their representatives-in-interest on account of the share of Manna Singh in the mortgaged property before the defendants Banke Behari Lal and Silta Bakhsh redeemed the same, the plaintiffs are estopped from redeeming that share from the persons last mentioned. The first opportunity for redeeming the prior mortgage arose in June 1915. The contesting defendants, Banke Behari Lal and Sitla Bakhsh, tendered the money due to the prior mortgagees in that very month. The present suit was filed on the 14th November 1916. The money due to the prior mortgagees was Rs. 1,500, but only Rs. 500 had been left with the plaintiffs by Manna Singh. It is stated that the plaintiffs had also purchased the one-third share of Baldeo Singh in the mortgaged property, but even if that was so, they could not have redeemed the mortgage without paying Rs. 1,500, unless the mortgagees were willing to allow redemption

piecemeal. No default or delay can, therefore, be attributed to the plaintiffs.

The mortgage made by Manna Singh in favour of Ganga Prasad fixed no time for the payment of Rs. 500 to the prior mortgagees. In fact it was recognised that the prior mortgage would not be redeemable till the expiry of 40 years from its date, and that the money left with Ganga Prasad was to be paid after it became redeemable. Before the plaintiffs could take any steps to offer Rs. 500 to the prior mortgagees and to ask them whether they would allow piecemeal redemption, the defendants, Banke Behari Lal and Sitla Bakhsh, tendered Rs. 1,500 and redeemed the entire mortgage. In the application tendering the money, they described themselves as the purchasers of the one-third share of Kesri Singh, and they sought to redeem the entire mortgage in that capacity. The plaintiffs were not entitled to claim any interest under their mortgage. They were only entitled to take possession and appropriate the profits from the date on which they obtained redemption from the prior mortgagees. The exact time when redemption could be effected was thus a matter of subordinate interest to the mortgagor, for his burden was not enlarged, and as explained in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1) an inference that time was of the essence of the contract would not be justified in the circumstances.

The decision in *Husaini* v. *Ram Charan* (2) does not apply, because in that case the mortgagee with whom money was left for payment to the prior mortgagees took no steps for 20 years to redeem the prior mortgage, being evidently contented with the position that he would get interest at the rate stipulated in the mortgage-deed on the portion of the consideration money actually advanced by him and be liable to account for the profits of only such portion of the mortgaged property over which he got possession. When the mortgagors redeemed the prior mortgages, he turned round and sought possession over the remainder of the mortgaged property, offering to pay what the mortgagors had to pay to obtain redemption but the Court refused to allow him to enforce the contract made by the mortgagors to deliver possession, because he had not performed his part of the contract within a reasonable time. In *Partab Singh* v. *Balwant Singh* (3) a mortgagor was held entitled to recover from the mortgagee damages sustained by him in consequence of the failure of the latter to pay the money left with him for the redemption of the prior mortgage within a reasonable time. Here such delay as occurred was due to the fact that the amount left with the plaintiffs was insufficient to redeem the entire mortgage, and before the plaintiffs could ascertain from the prior mortgagees whether they would allow redemption piecemeal, the entire mortgage-money was offered by the contesting defendants-respondents.

It is next urged that a suit for redemption was not maintainable, because no tender was made by the plaintiffs in Jeth as required by the terms of the mortgage. The contesting defendants-respondents occupy the position of co-mortgagors, who had redeemed a joint mortgage and in view of section 95 of Act IV of 1882, which holds them entitled to a charge, they are not entitled to set up in defence a covenant which was only enforceable as between the mortgagors and the mortgagees. It is unnecessary to consider whether the contesting defendants-respondents had, at the time of their purchase, an actual notice of the mortgage made by Manna Singh in favour of the father of the plaintiffs. That mortgage was registered.

The appeals are, therefore, allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs here and of the appeal below, the contesting defendants-respondents bearing their own costs therein.

Appeals allowed.

(1) 32 Ind. Cas. 246; 43 I. A. 26; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 40 B. 289 (P. C.).

(2) 32 Ind. Cas. 341; 18 O. C. 280; 2 O. L. J. 488.

(3) 48 Ind. Cas. 550; 5 O. L. J. 670.

RAMACHANDRA RAO v. RAMACHANDRA RAO.

MADRAS HIGH COURT.

CIVIL APPEAL No. 1 OF 1918.

October 8, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

A. N. A. RAMACHANDRA RAO—DEFENDANT No. 1—APPELLANT

versus

T. B. RAMACHANDRA RAO AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 TO 5—RESPONDENTS.

Hindu Law—Gift in favour of female—Presumption—Restraint against alienation, absence of—Absolute interest, passing of, to donee—Construction of document—Transfer of Property Act (IV of 1882), s. 8—Right of donee to make testamentary disposition of properties gifted.

There is no presumption that in all cases where gifts are made to Hindu females the donors intend to give them only estates for life. No difference should be made between a male and a female, provided the words of gift are sufficiently clear to convey the property. Unless there is an expressed or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted. If the language of the instrument is capable of conferring an estate of inheritance, considerations regarding the sex of the donee should be discarded. Where, however, the language is ambiguous recourse can be had to ordinary notions of Hindus, as a rule of construction in finding out what the intention of the donor was. [p. 95, col. 2; p. 97, col. 1.]

Surajmani v. *Rabi Nath Ojha*, 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231 (P. C.); 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17, relied on.

Moulvie Mohamed Shumsool Hooda v. *Shewukram*, 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226 (P. C.); 3 Sar. P. C. J. 405 and *Radha Prosad Mullick* v. *Ranee Mani Dassee*, 35 C. 896; 12 C. W. N. 729 (P. C.); 35 I. A. 118; 4 M. L. T. 23; 18 M. L. J. 287; 5 A. L. J. 460; 10 Bom. L. R. 604; 8 C. L. J. 48, explained.

The rule laid down by the Privy Council in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram*, 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226 (P. C.); 3 Sar. P. C. J. 405 is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument of gift. [p. 95, col. 2.]

Properties in which a Hindu widow has an absolute estate can be disposed of by her by a testamentary instrument. [p. 97, col. 2.]

Bhujanga Rau v. *Ramayamma*, 7 M. 387; 8 Ind. Jur. 238; 2 Ind. Dec. (N. S.) 853; *Nunnu Meah* v. *Krishnasami*, 14 M. 274; 5 Ind. Dec. (N. S.) 192, not approved.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Tanjore, in Original Suit No. 23 of 1917 (Original Suit No. 35 of 1916 on the file of the Tanjore Sub-Court).

FACTS appear from the judgment.

Messrs. *T. R. Ramachandra Ayyar* and *T. S. Narayana Ayyar*, for the Appellant.—

There is no hard and fast rule that every deed of gift conveys only a limited or life-estate to the donee. It is a question of the construction of the instrument of gift in each particular case. Where the language is clear and unambiguous, and there are no restrictions on alienation, an absolute estate passes, whether the donee is a male or a female. That is the rule of construction laid down by the Privy Council in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1).

Sex is no determining factor nor a disqualification.

In the present case half of the donor's estate is given to the adopted son and the other half to his two widows. The widows must be deemed to have taken a full estate equally with the adopted son. It is not necessary that the donor should expressly empower alienation. The same language covers the gift to the adopted son: see *Surajmani* v. *Rabi Nath Oha* (2). The word 'Inam,' which occurs in the deed, shows that a grant was made in perpetuity.

The widow, who took an absolute estate under the gift by her husband, was certainly competent to dispose of it by Will. See *Fateh Chand* v. *Rup Chand* (3).

The Hon'ble Mr. *K. Srinivasa Aiyangar* (Advocate-General), for the Respondents.—Ordinarily the rule is that a Hindu widow takes a limited estate under an instrument of gift unless the donor expressly gives a larger estate: see *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1).

Here there are no words giving an absolute power to the widows to make alienation: see *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1) and *Radha Prasad Mullick* v. *Ranee Mani Dassee* (4) where the Privy Council lay down the rule in a restricted form. Also *Hirabai* v. *Lakshmibai* (5).

The personal law of the donee should be considered in construing a deed of gift

(1) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226 (P. C.); 3 Sar. P. C. J. 405.

(2) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231 (P. C.); 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17.

(3) 37 Ind. Cas. 122; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567; 26 C. L. J. 182; 43 I. A. 183 (P. C.).

(4) 35 C. 896; 12 C. W. N. 729; 35 I. A. 118; 4 M. L. T. 23; 18 M. L. J. 287; 5 A. L. J. 460; 10 Bom. L. R. 604; 8 C. L. J. 48 (P. C.).

(5) 11 B. 573; 6 Ind. Dec. (N. S.) 377.

and the instrument should be construed with reference to the rules of inheritance applicable to the donees.

Assuming that the widow Tulja Boyee acquired an absolute estate under the gift deed, it was certainly not competent for her to dispose of the property by Will. The defendant gets nothing under the Will of Tulja Boyee: see *Bhujanga Rau* v. *Ramayamma* (6) and *Nunnu Meah* v. *Krishnasami* (7).

JUDGMENT.

WALLIS, C. J.—Construing this very deed in Appeal Suit No. 74 of 1896, Collins, C. J., and Shephard, J., observed: "There being no indication of intention to give a larger estate we must assume that the husband intended that a widow's estate only should pass." The trend of the later decisions in this Court beginning with *Sambasiva Ayyar* v. *Venkataswara Ayyar* (8) is against making any such assumption, and they appear to be supported by the judgment of the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha* (2), which cites with approval a ruling of Mitter, J., in *Musammat Kollany Kooer* v. *Luchmee Pershad* (9) that there is no presumption that a gift to a widow means a limited gift.

We must, I think, take it to be now settled, at any rate so far as this Court is concerned and until the decisions to which I have referred are overruled by higher authority, that the rule laid down by the Judicial Committee in *Moulvi Mohamed Shumsool Hooda* v. *Shewukram* (1) is a rule of construction to be applied only when there is some uncertainty or ambiguity in the language of the instrument before the Court.

The question then is, is there anything in the terms of Exhibit III which warrants the application of the rule. The opening recital is to the effect that the settler made "the following gifts (Inams)" of the properties belonging to him on the occasion of his adopting as his son a boy of ten years of age. There is, first, a gift of chattels and money to a maternal nephew, then directions that certain allowances of paddy should continue to be paid to two descendants of his maternal uncles, that six Brahmins should be fed daily from the income of certain lands, and that a saffron allowance of Rs. 25 should continue to be paid to his sister. Then comes the disposition in favour of the widows. Of the remaining property the adopted boy "is to be entitled to and enjoy one-half." "Of the remaining half these two persons, my senior wife Sowbagiavati Kamatchi and my junior wife Sowbagiavati Tulja shall each take a half." On the language of this instrument I have come to the conclusion that there is no sufficient reason for cutting down the disposition in favour of the widows. *Hirabai* v. *Lakshmibai* (5) was decided on the view that there is a general presumption that a gift to a woman is only of a woman's estate, though, on the language of that document which was different from the language here, the rule of construction laid down in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1) may have been applicable, as was held, though with a different result, in *Seshayya* v. *Narasamma* (10). Sir Charles Sargent, however, in the course of his judgment spoke of "the extreme improbability that, having adopted a son, the testator should have intended to give more than a life-estate, or, at the utmost, a widow's estate to his wife." As I stated at the hearing, my very general impression derived from the cases which have come before me is, that there is no such extreme improbability in this Presidency and my learned brother, whose opinion on such a point is entitled to much greater weight, is of the same opinion. I concur in the order proposed.

SESHAGIRI AIYAR, J.—I entirely agree. The suit is to recover possession of properties which were last in the enjoyment of one Tulja Boyee. Tulja Boyee's husband Ramojee Bavajee adopted plaintiff's father Bavajee. He executed Exhibit III on the 6th of August 1858, by which he settled one half of his properties upon his adopted son and gave the other half to his two wives. Tulja Boyee, the junior wife, took possession of a fourth share under that settlement. The defendant claims under her Will.

(6) 7 M. 387; 8 Ind. Jur. 238; 2 Ind. Dec. (N. S.) 853.
(7) 14 M. 274; 5 Ind. Dec. (N. S.) 192.
(8) 31 M. 179; 3 M. L. T. 369.
(9) 24 W. R. 395.
(10) 22 M. 357; 8 Ind. Dec. (N. S.) 255.

The points for consideration are whether Tulja Boyee took an absolute estate under Exhibit III and whether she was competent to dispose of the property by a Will.

I shall first deal with a few decisions of the Judicial Committee which were quoted as indicating the principles on which an instrument like the present should be construed. The learned Advocate General relied upon *Moulvie Mohamed Shamsool Hooda* v. *Shewukram* (1) and *Radha Prasad Mullick* v. *Ranee Mani Dassee* (4) Mr. Ramachandra Ayyar quoted *Surajmani* v. *Rabi Nath Ojha* (2). In the first two cases the facts were almost identical. In both of them the father gave properties to his daughter or daughters and their children. In both the Judicial Committee held that the daughter or daughters took only a limited estate and pointed out that, in construing Wills of Hindus, their ordinary notions as to the devolution of property may be taken into account. In these cases it was clear that the daughters and their children could not have been regarded as tenants-in-common, because the children were not mentioned by name and it was as a class that they were referred to. The question, therefore, was whether the words "and their children" should be regarded as mere surplusage or whether they should be referred to to ascertain the intention of the donor. Their Lordships held that, ordinarily, a Hindu would desire that his properties should remain in possession of his descendants, and that consequently the donor could not have intended to give absolute powers of disposition to the daughters. I do not think that these judgments are authorities for the proposition that in all cases where gifts are made to females, a Hindu must be deemed to have given them only an estate for life. On the other hand the decision in *Surajamani* v. *Rabi Nath Ojha* (2) relied upon for the appellant shows that, in the opinion of their Lordships, no difference should be made between a male and a female, provided the words of gifts are sufficiently clear to convey property. They quoted with approval the dictum of Mitter, J., in *Musammat Kollany Kooer* v. *Luchmee Pershad* (9), wherein the learned Judge stated: "We must hold that the gift in question was an absolute gift, unless it can be shown that, by the Hindu Law, a gift to a female means a limited gift or carries with it the effect of creating an estate similar to the 'widow's estate' under the law of inheritance. I am not aware of any such provision in the Hindu Law nor have we been referred to any authority in support of it." There can be no doubt that the Hindu Law does not enunciate that women as donees can only take an estate for life. The Judicial Committee say at the end of page 89*: "Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents, but the fact that the donee is a woman and a widow, which was expressly decided in the last mentioned case not to suffice." The case referred to is *Lalit Mohun Singh Roy* v. *Ohunkun Lal Roy* (11). If we remember that Mr. Justice Mitter's decision in *Musammat Kollany Kooer* v. *Luchmee Pershad* (9) was given after examining at some length the dictum of the Judicial Committee in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (1), it is clear that their Lordships advisedly approved the principle enunciated by Mitter, J. In recent years there has been practical unanimity in Madras as to the construction to be placed upon similar documents. The first decision was in *Sambasiva Ayyar* v. *Venkataswara Ayyar* (8), which was contemporaneous with *Surajmani* v. *Rabi Nath Ojha* (2), *Gudimetla Vencatarazu* v. *Bottozu Kottaya* (12), *Bodi Muttayya* v. *Kavoori Kodandaramayya* (13), *Ratna Chettiar* v. *Narayanaswami Chettiar* (14), *Gomattam Ramanuja Aiyangar* v. *Satagopachar* (15) and *Nimasivayam Pillai* v. *Kuthalalingam Pillai* (16) have decided that the sex of the donee is not a ground for cutting down an otherwise full estate.

The learned Advocate-General relied upon some decisions of the other High Courts. Most of them were earlier than *Surajmani* v. *Rabi Nath Ojha* (2) and I do not think it necessary to examine them at any length. I would only say with reference to the

(11) 24 C. 834 (P. C.); 24 I. A. 76; 1 C. W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1224.

(12) 16 Ind. Cas. 139; 23 M. L. J. 223; 12 M. L. T. 230; (1912) M. W. N. 831.

(13) 23 Ind. Cas. 594; (1914) M. W. N. 387.

(14) 24 Ind. Cas. 796; 26 M. L. J. 616.

(15) 24 Ind. Cas. 20; 27 M. L. J. 329.

(16) 38 Ind. Cas. 840; (1917) M. W. N. 78; 21 M. L. T. 30; 5 L. W. 211.

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observations of Sir Charles Sargent in *Hirabai* v. *Lakshmibai* (5) that at any rate so far as the Southern Presidency is concerned, there is nothing improbable in a Hindu giving an absolute estate to his wife when he directs an adoption to be made to him. Cases have not infrequently come before us in which, in order to avoid possible conflicts between an adopted son and his widow, a Hindu has been found to give a portion of his property absolutely to his widow and the other portion to his adopted son.

In deducing a rule of construction, a few considerations should be borne in mind. Section 8 of the Transfer of Property Act lays down: "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is capable of passing in the property or in the legal incidents thereof." Therefore, unless there is an expressed or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted. The Judicial Committee in the Supplemental Volume of Indian Appeals at page 47 *Jotendromohun Tagore* v. *Ganendromohun Tagore* (17)] recognised this principle. Consequently, if the words employed are clear and unambiguous, no matter who the donee is, whether a male or a female, the language of the gift must be given effect to. This is what was laid down in *Surajmani* v. *Rabi Nath Ojha* (2). But there may be cases in which it may be necessary, owing to the language employed not being clear and precise or being superfluous, to find out the intention of the donor. In such cases, as the learned Advocate General contended, the personal law of the donee may be taken into account. That is to say, the ordinary rule of inheritance applicable to him or her may be called in aid. This is not a rule of presumption so much as it is one for gathering the intention of the donor. Broadly speaking, it may be said that if the language of the instrument is capable of conferring an estate of inheritance, considerations regarding the sex of the donee should be discarded. Where the language is ambiguous, then recourse can be had to ordinary notions of Hindus as a rule of construction in finding out what the intention of the donor was.

Now I shall turn to Exhibit III and see whether, in the light of the above discussion, the document confers only a life estate upon Tulja Boyee. It was not seriously argued that there is any material difference between the words employed in the case of the adopted son and the words employed in the case of the two wives. Nor was it argued that the words employed in the case of the adopted son were not capable of conveying to him absolute rights in the property. I, therefore, fail to see why a distinction should be made between the two classes of donations. Further the preamble of the deed says: "I am giving these properties as Inam." The donor was a Maharatta Brahmin who lived in Tanjore and the document was written in Maharatti. Wilson in his glossary says about the word *inam*: "In India and especially in the south and amongst the Maharattas, the term was especially applied to grants of land rent-free, and in hereditary and perpetual occupation." In another dictionary by a Maharatta scholar the word *inam* is defined as meaning "a grant in perpetuity without conditions." These definitions support the conclusions at which I have arrived. In my opinion the gift to Tulja Boyee was an absolute one. There are certain legacies which have been directed to be paid out of the estate. As they are in terms only for life, the main dispositions are not affected by these life grants.

It was next argued by the learned Advocate General that even supposing that it was an absolute grant to Tulja Boyee, she was not competent to dispose of the property by Will. He relied upon *Bhujanga Rau* v. *Ramayamma* (6) and *Nunnu Meah* v. *Krishnasami* (7). At the same time, he frankly admitted that the two decisions are inconsistent with the conclusions of the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha* (2), where one of the widows who had acquired her property under a deed of gift from her husband disposed of it by a testamentary instrument. Their Lordships upheld the Will of the Hindu widow. Reference may also be made to *Fateh Chand* v. *Rup Chand* (3), where it was held that a widow could dispose by Will property which had come to her under a deed of gift. I am unable to find any valid reason for the view that

(17) I. A. Sup. Vol. 47: 18 W. R. 359; 9 B L. R. 377; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).

properties in which a Hindu widow has an absolute estate cannot be disposed of by her by a testamentary instrument. These two Madras decisions must be deemed to have been overruled by *Surajmani* v. *Rabi Nath Ojha* (2) and *Fateh Chand* v. *Rup Chand* (3). A portion of the property in suit is governed by the decision of this Court (*vide* Exhibit A). To that extent the defendants' claim is barred by *res judicata*. The decree of the Subordinate Judge must be reversed and the suit should be dismissed with costs, except in respect of the property which was the subject-matter of the suit under Exhibit A. The memorandum of objections is also dismissed with costs.

M.C.P.

Appeal allowed;
Memo. of objections dismissed

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 420 AND 421 OF 1918.

March 27, 1919.

Present:—Mr. Daniels, A. J. C.

BIPATI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Thakur RAM BAKHSH SINGH—DEFENDANT—RESPONDENT.

Jurisdiction of Civil and Revenue Courts—Suit decided by Revenue Court—Submission of parties to decree—Civil suit to set aside decree, maintainability of—Remedy, proper.

Where a Revenue Court decides a suit brought before it, holding that it has jurisdiction, and the parties submit to the decree and it becomes final, it is not open to one of them subsequently to ask a Civil Court to set aside the decree of the Revenue Court on the ground that it had wrongly decided the question of jurisdiction. If the suit has been decided wrongly, the remedy is by way of appeal. [p. 98, col. 2; p. 99, col. 1.]

Appeals against the decree of the Subordinate Judge, Unao, dated the 27th July 1918, upholding that of the Munsif, Purwa, dated the 26th March 1918.

Messrs. *Basdeo Lal*, *Ram Bharose Lal* and *Raja Prasad*, for the Appellants.

Mr. *Zahur Ahmad*, for the Respondent.

JUDGMENT.—In these two connected appeals the plaintiffs asked for a decree cancelling a decree of the Rent Court and awarding them the amount which by that decree has been made payable by them to the defendant-respondent Ram Bakhsh Singh. The latter is Lambardar of the Mahals in suit. He sued the present plaintiffs for the value of fish taken by them, treating it as *siwai* income and, therefore, rent. The plaint stated that the tank and the income from fish was treated as *shamilat* and was realised by the Lambardar alone.

The defendants filed written statements, in which among other pleas they challenged the jurisdiction of the Court on the ground that the sum sued for was not rent. Thereafter they failed to appear and the suits were decreed against them in part under section 108 (2) of the Oudh Rent Act. They did not appeal from these decrees, but they have now brought the present suits in the terms stated above. The lower Courts, both the Munsif as Court of first instance and the Subordinate Judge as Court of first appeal, have dismissed the suits on the ground that they are not entertainable. This and the question whether the Revenue Court had jurisdiction in the former suit have been the points argued in this Court.

It would certainly be somewhat startling to hold that when the Revenue Court has decided a suit brought before it and has decided, as it must by implication at least be held to have done, that it had jurisdiction and when the parties have submitted to that decree and it has become final, it should be open to one of them to come to the Civil Court and ask the Civil Court to set it aside. No parallel case has been shown to me. The appellants rely on those numerous cases in which after the Revenue Courts have ejected a man as a tenant he comes to the Civil Court for a declaration of his proprietary or under proprietary right. This is not quite a parallel case, as the question of proprietary right is one which the Revenue Courts have in this Province no jurisdiction to finally decide. It can only be settled in the Civil Court. In this case where a sum is alleged to be payable as rent and was

apparently, as appears from a reference to the Revenue Court's judgment, treated as such in the *wajib ul-arz*, it was fully within the competence of the Revenue Court to decide whether the sum was rent or not, and if it decided it wrongly the law allows a remedy by way of appeal. The unsuccessful party ought not, in my opinion, be allowed to come to a Court not of appellate but of co ordinate jurisdiction and ask it to cancel a decree properly passed by the Revenue Court in the exercise of its functions, on the ground that that Court had wrongly decided a question of jurisdiction.

I am not prepared to say that a fishing right might not in some circumstances come within the definition of rent. It may amount to a right in land covered by water, because the only occasion in which water is referred to in the definition of rent is water for irrigation. The reason for specifying this separately is, however, that water for irrigation may sometimes be supplied independently of any right in land and, therefore, would not come within the definition unless separately specified. The question had to be decided on the case put forward by the plaintiff in the Revenue Court and not on the allegations now made by the plaintiffs in this suit. Agreeing with the decision of the Courts below, I dismiss both appeals with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1224 OF 1913.

October 28, 1918.

Present:—Mr. Justice Martineau.

HARDWARI MAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHAMBHU NATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 47, 72, 74, 75, 85—Denial of execution—Compulsory registration—Enquiry delegated by Registrar to another officer, effect of—Registration, validity of—Priority.

A executed a sale-deed of certain land in *B*'s favour on 5th December 1916 but the deed was not registered. On 6th December 1916, *A* executed another sale-deed of the same land in *C*'s favour and the deed was followed by registration the same day. *A* refused to have the sale-deed in *B*'s favour registered. *B* thereupon applied to the Registrar for compulsory registration under section 73 of the Registration Act, who referred the matter for inquiry to the Sub-Divisional Officer and on receipt of the latter's report directed the deed to be registered in *B*'s favour under section 75 of the Registration Act:

Held, (1) that the registration of *B*'s deed was not rendered invalid by reason of the Registrar delegating the holding of the inquiry to another person; [p. 10', col. 1.]

(2) that the sale-deed in *B*'s favour took effect under section 47 of the Registration Act from the date of its execution and must prevail against the sale-deed in *C*'s favour, notwithstanding the latter's earlier registration. [p. 100, col. 1.]

Second appeal from the decree of the District Judge, Karnal, dated the 31st January 1918, reversing that of the Subordinate Judge, 2nd Class, Rohtak, dated the 18th October 1917.

Lala *Rama Nand*, for the Appellants.

Lala *Moti Sagar*, R S, and Lala *Shamir Chand*, for the Respondents.

JUDGMENT.—*Musammat* Ilahi Begam sold the land in suit to the plaintiffs for Rs. 250 on the 5th December 1916. On the following day she sold it to the defendants for Rs. 300 and the sale-deed being registered the same day, she refused to have the sale-deed in favour of the plaintiffs registered; so they applied for compulsory registration to the Registrar, who after having an inquiry made by the Sub-Divisional Officer of Sonepat ordered the deed to be registered, and in pursuance of his order it was registered under section 75 of the Registration Act.

The plaintiffs sue to establish their right to the land. The first Court passed a decree in their favour, but on appeal the learned District Judge has dismissed the suit, holding that the plaintiffs' deed was not validly registered because the Registrar had no power to order the Sub-Divisional Officer of Sonepat to make the inquiry prescribed by section 74 of the Registration Act, but should have made it himself. The plaintiffs have appealed to this Court.

It may be that section 74 of the Act contemplates an inquiry being made by the Registrar himself, but the ruling relied

upon by the lower Appellate Court, *Mata Dayal* v. *Queen Empress* (1), does not lay down that the registration of the deed would be invalid by reason of the Registrar delegating the holding of the inquiry to another person. That was a criminal case and the question as to the validity of the deed did not arise, the only question being whether an offence had been committed under section 82.

The lower Appellate Court has overlooked section 85, which lays down that nothing done in good faith pursuant to the Act by any registering officer shall be deemed invalid merely by reason of any defect in his appointment or procedure. The delegation of the inquiry to the Sub-Divisional Officer of Sonepat was purely a defect in procedure. Counsel for the respondent has referred to *Jambu Parshad* v. *Muhammad Nawab Aftab Ali* (2), but that was a case of a document being presented for registration by an agent who was not authorized by his power-of-attorney to present it, and is not in point.

I hold that the registration of the plaintiffs' deed is not rendered invalid by the defect in the procedure followed by the Registrar, and, therefore, that deed operates from 5th December 1916 under section 47 of the Registration Act and has priority over the defendants' deed, which was executed a day later. I accept the appeal, set aside the lower Appellate Court's decree, and remand the case to that Court under Order XLI, rule 23, Civil Procedure Code, for disposal, after a finding has been given in regard to the 4th ground of the appeal to that Court, which has not yet been dealt with. The stamp on the appeal in this Court will be refunded. Other costs will follow the event.

I may note that the learned District Judge's order, expunging for reasons given by him, certain remarks made by the first Court in its judgment will stand.

Appeal accepted.

(1) 24 C. 755; 12 Ind. Dec. (N. S.) 1172.
(2) 28 Ind. Cas. 422; 37 A. 49; 19 C. W. N. 282; 13 A. L. J. 129; 17 M. L. T. 148; 21 C. L. J. 218; 2 L. W. 277; 28 M. L. J. 577; 17 Bom. L. R. 413; (1915) M. W. N. 592; 42 I. A. 22 (P. C.).

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 5 OF 1918-19.

March 10, 1919.

Present:—Mr. Hopkins, J. M.

SHEO SHANKAR SINGH—APPELLANT

versus

RAO BATUK PRASAD—RESPONDENT.

Landlord and tenant—Maurusi *tenancy, whether transferable—Occupancy holding, transfer of—Estoppel, whether can validate void transfer.*

A *maurusi* tenancy which is transferable is unknown to the law.

A transfer of an occupancy holding which is void cannot be validated by estoppel.

Second appeal from the order of the Commissioner, Benares Division, dated the 16th August 1916, in the case of ejectment.

JUDGMENT.—This appeal relates to certain occupancy land attached to an indigo factory, which has been transferred to successive holders together with the factory. The appellant, the latest transferee, resists ejectment on two grounds: (1) that the land, though recorded as *maurusi*, is in fact transferable, (2) that the respondent-landholder is estopped by the acquiescence in the long series of transfers from now denying the appellant's occupancy right.

As regards (1) there is no tenancy known to the law, so far as I am aware, of the kind indicated and there is nothing on the record to show that the land is other than occupancy land.

As regards (2) the transfer being void, no estoppel could validate it [*cf. Ram Sarup* v. *Kishan Lal* (1)].

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 29 A. 327; A. W. N. (1907) 76; 4 A. L. J. 306.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1130 OF 1918.

November 21, 1918.

Present:—Mr. Justice Shadi Lal.

NATHU—PLAINTIFF—APPELLANT

versus

Musammat CHUHRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Suits Valuation Act (VII of 1887), s. 9, rules framed by Punjab Chief Court under, r. 1 (1)—Restitution of conjugal rights, suit for, valuation of—Injunction, prayer for, effect of—Value, whether enhanced.

Where a plaintiff sues for restitution of conjugal rights and for an injunction restraining certain persons from preventing the union of the plaintiff with the lady whom he claims to be his wife, the value of the suit for purposes of jurisdiction is Rs 1,000. The prayer for an injunction, being merely a relief ancillary and incidental to the main relief claimed, does not affect that value.

Second appeal from the decree of the District Judge, Gujrat, at Sargodha, dated 4th February 1918, reversing that of the Munsiff, 1st Class, Jhang, dated the 1st October 1917, decreeing the claim with costs.

Malak *Muhammad Husain*, for the Appellant.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—This was a suit for the restitution of conjugal rights brought by the plaintiff against *Musammat* Chuhri and also for an injunction restraining two persons from preventing the union of the plaintiff and the lady whom he claimed to be his wife. The sole contention for the appellant is that the Munsif had no jurisdiction to adjudicate upon the claim, inasmuch as the value of the first relief alone could not be less than Rs. 1,000 and that the value of both the reliefs must, therefore, exceed Rs. 1,000. I am unable to accede to this contention. The rule framed by this Court under the Suits Valuation Act provides that the value for the purpose of jurisdiction of a suit instituted by the plaintiff for a decree against the other party to the alleged marriage, either alone or with other defendants, for restitution of conjugal rights is Rs. 1,000. This rule it seems to me covers the present suit; the prayer for an injunction is merely a relief ancillary and incidental to the main relief claimed and does not affect the value for the purpose of jurisdiction. The judgment of a single Bench in Civil Appeal No. 1681 of 1915 [*Musammat Bhani* v. *Bansi* (1)] is directly to the point and I see no reason to dissent from the view taken therein.

Accordingly I hold that the Munsif had jurisdiction to entertain the suit and upon the finding of fact arrived at by the learned District Judge, there is no ground for a second appeal. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 33 Ind. Cas. 1002; 28 P. W. R. 1916.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 110 OF 1917.

March 3, 1919.

Present:—Mr. Daniels, A. J. C.

AJUDHIA PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GUR DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud—Decree, suit to set aside, on ground of fraud—Proof—Plaint, allegations in, whether must be adhered to—Failure to prove specific fraud alleged, effect of.

Where a decree is sought to be set aside on the ground of fraud, it must be shown that the plaintiff was prevented from putting his case before the Court or that some trickery or deceit was practised in connection with the proceedings. [p. 103, col. 1.]

Where the plaintiff fails to establish the fraud alleged in his plaint, he cannot be allowed to adduce evidence to show that the claim decreed against him was otherwise wrongly decreed. [p. 102, col. 2; p 103, col 1.]

A Court's decision cannot be called in question by a mere allegation offfraud in the pleadings or evidence, when the Judge after giving full opportunity to the parties to produce their evidence has decided rightly or wrongly in favour of one set of facts. [p. 104, col. 2.]

When the parties have had the opportunity of putting their respective cases before the Court and the Court after weighing the evidence has come to a decision the rule of *res judicata* comes into operation, and subject to the law as to appeal and review the decision is final between the parties. It is not open to the defeated party to re-open the matter merely by alleging that the evidence and the averments which the Court believed were untrue. [p. 103, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Lucknow, dated the 28th May 1917.

The Hon'ble Mr. *Wazir Hasan* and Mr. *B. N. Chakbast*, for the Appellants,

AJUDBIA PRASAD *v.* GUR DAYAL.

Messrs. *Mumtaz Husain* and *Haidar Husain*, for Respondents Nos. 1 and 2.

JUDGMENT.—This is a suit to set aside a mortgage decree on the ground of fraud. The answering respondents Gur Dayal and Thakur Prasad are creditors who have ob tained a mortgage decree against the plaintiff-appellant Ajudbia Prasad and his brothers, the defendants Nos. 3 to 5. The mortgage was executed while the plaintiff was still a minor by the plaintiff's brothers, the eldest of them Baldeo purporting to act as his guardian, on 24th May 1911. The decree *nisi* was obtained on 24th April 1913 and was made absolute on the 23rd August 1913. The first plaintiff was admittedly of age at the time of the suit and was a party to it. The second and third appellants are persons to whom the first plaintiff has sold a portion of his rights for the purpose of carrying on the litigation.

The facts set forth in the plaint are that after the death of the father of Ajudbia Prasad and his brothers, the brothers were men of loose character and of spend-thrift ways and being in need of money they executed a mortgage-deed which included the plaintiff's share, although the plaintiff was under no necessity of borrowing money and was not benefited by the transaction. The plaintiffs in paragraph 6 and in the succeeding paragraphs of the plaint make the following specific allegations of fraud:—

(1) that the defendants Nos. 3 to 5 undertook to defend the suit on behalf of the first plaintiff and got his signature to a written statement, alleging that the mortgage was not binding on him on account of his minority and his having received no benefit from it, but that the defendants colluding with the creditors never filed this written statement;

(2) thereafter they informed the plaintiff that the mortgage suit had been decreed against them but that his share had been exempted.

On receipt of a notice, dated 2nd August 1913, when proceedings to obtain a final decree were pending, he first got an inkling that what he had previously been told was untrue and that his share also was being put to sale.

On these pleas they asked for a declaration that the decree absolute and the sale proceedings held thereunder were null and of no effect against them, by reason of the decree having been procured by fraud, and for possession of the mortgaged property.

The learned Subordinate Judge has found, largely on the admission of the plaintiff himself and of his brother Sundar Lal, that the allegations of fraud set forth above were utterly and absolutely false, and this finding is now accepted by the appellants. It was challenged in the grounds of appeal, but at the hearing the appellants' learned Advocate intimated that he was not prepared to challenge the lower Court's findings of fact. The learned Judge, having disbelieved the alleged fraud by which the decree was said to have been procured, went on to hold that the mortgage was not binding on the minor and that out of Rs. 18,000, its alleged consideration, only Rs. 6,000 were genuine and that the deed was executed for the larger sum in order to save the family property from another creditor named Mewa Lal, who had obtained a previous decree against the brothers. This, it would be noted, is an allegation nowhere set up in the plaint and the fraud, if true, was one which was not directed against the first plaintiff but was intended to benefit him in common with his brothers. It was indeed alleged in the plaint that the deed was not binding on the first plaintiff, but this was on the ground that he was not a party to it and derived no benefit from it. It was nowhere alleged that the consideration was fictitious and there is no suggestion of its having been executed in order to defraud another creditor.

The respondents in supporting the judgment attacked the above finding and urged further that when the fraud set up by the plaintiff was found to be untrue, the lower Court should not have gone into any other question and should not have allowed the plaintiff to set up a case not raised by the pleadings.

It is contended for the appellants—and this is the only plea pressed on their behalf—that even on the findings of fact arrived at by the learned Subordinate Judge the suit should have been decreed. They contend that they are entitled, though they have failed to prove the case of fraud which

they set up and though that case has been found to have been false and perjured, to adduce evidence to show that the claim which was decreed against them was wrongly decreed and to succeed on the ground of fraud on this basis. This is, in my opinion, not the law. If it were, the rule of *res judicata* would cease to have any value. There is not five per cent. of cases depending on disputed issues of fact in which allegations of perjury are not made by one party against the other, and any litigant whose evidence has been disbelieved would on the plaintiffs' contention be at liberty to re-open the whole case under cover of an allegation of fraud. Something more than this is necessary. It must be shown that the plaintiff was prevented from putting his case before the Court or that some trickery or deceit was practised in connection with the proceedings. When the parties have had the opportunity of putting their respective cases before the Court and the Court after weighing the evidence has come to a decision the rule of *res judicata* comes into operation, and subject to the law as to appeal and review the decision is final between the parties. It is not open to the defeated party to re-open the matter merely by alleging that the evidence and the averments which the Court believed were untrue. The law has been fully considered and (apart from a decision to which reference will be made) may be regarded as definitely settled by important decisions of the Allahabad, Madras and Calcutta High Courts mentioned below:—

Chinnayya v. *Ramanna* (1), *Kadervelu Nainar* v. *Kuppuswami Naicker* (2), *Chhattar Singh* v. *Amir Singh* (3), *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (4), *Janki Kuar* v. *Lachmi Narain* (5), *Kusadhaj Bhakta* v. *Broja Mohan Bhakta* (6).

The judgments in *Chinnayya* v. *Ramanna* (1) and in *Ramratan Lal* v. *Bhuri Begam* (7) are particularly deserving of perusal.

(1) 19 Ind. Cas. 579; 38 M. 203; 25 M. L. J. 228; 13 M. L. T. 421; (1913) M. W. N. 387.
(2) 45 Ind. Cas. 774; 41 M. 743; 34 M. L. J. 590; 23 M. L. T. 372; 8 L. W. 103; (1918) M. W. N. 514.
(3) 32 Ind. Cas. 590; 38 A. 204 at p. 207; 14 A. L. J. 132.
(4) 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457.
(5) 30 Ind. Cas. 789; 37 A. 535; 13 A. L. J. 753.
(6) 31 Ind. Cas. 13; 43 C. 217; 19 C. W. N. 1223.
(7) 20 Ind. Cas. 792; 38 A. 7; 13 A. L. J. 901.

This rule, as was pointed in *Ramratan Lal* v. *Bhuri Begam* (7), holds good equally whether a case has been decided *ex parte* or after contest. In an *ex parte* case the defendant is informed of the claim and the law requires that he shall receive a copy of the plaint with the summons served on him. He has, therefore, a full opportunity of deciding whether to contest the claim or not, and if he deliberately elects not to do so the decree is just as binding on him as if he had put in a defence. If, on the other hand, he could show that owing to some trick practised by the plaintiff the summons never reached him, the matter would stand on a different footing and a genuine case of fraud sufficient to invalidate the decree will be made out. The matter was discussed by the Allahabad High Court in the following passage:—

"Some attempt has been made to distinguish between what is called an *ex parte decree* or order after contest. I do not think there is any just ground for such a distinction. Assuming a party to have been duly served with notice, if he neglects to come forward and avail himself of the opportunity of preventing a wrong order being made against him, I cannot conceive upon what possible ground he should be placed in a better position than the party who comes forward and informs the Court (in the manner provided by law) of his rights and prevents (so far as he can) a wrong order being made. In my judgment the party who after due notice allows the decree or order to be made without opposition is in the same position as a person who had a decree or order made against him after contest."

Though there have been some earlier Calcutta cases which have laid down a contrary law, they may now be taken to have been overruled. The only case in conflict with the above view of the law which it is necessary to notice is the case of *Sarup Narain* v. *Sheo Shankar Lal* (8) decided by the Judicial Commissioner in 1917. This case has not been included in the authorized reports but it is printed on page 522 of Vol. IV of the Oudh Law Journal. This was a case in which the plaintiff attempted to claim certain property as a reversionary

(8) 42 Ind. Cas. 416; 4 O. L. J. 522.

heir of the husband of one *Musammat* Gulaba, on an allegation that this lady had not been heard of for over seven years and might, therefore, be presumed to be dead. He obtained a decree on this allegation. In a later suit to set aside that decree on grounds of fraud, evidence was given which satisfied the Court that he knew her to be alive and had himself seen her alive shortly before the suit was filed. The learned Judicial Commissioner held that whether or not a decree could be set aside on the ground that it was obtained by perjured evidence—a question which he considered did not arise—a false averment in the plaint was a fraud sufficient to enable a decree to be set aside. It is perhaps possible to distinguish that case on the ground that it was based on a definite averment in the plaint, whereas in this case the plaint has not been put in evidence and all that the appellant can allege is that from the nature of the suit the plaint must have contained averments which were false to the knowledge of the plaintiffs. That case is also distinguishable on the ground that the fraud found by the Subordinate Judge in the judgment under appeal was never alleged in the pleadings. No rule is more firmly established in cases of this nature than that the fraud alleged must be specifically pleaded in the plaint: *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (9), *Nanda Kumar Howlador* v. *Ram Jiban Howlador* (4). If, however, it were necessary to do so, I should respectfully but strongly dissent from the view taken in the case just cited. It is difficult to draw any real distinction between a decree obtained by perjured evidence and a decree passed on false averments in the pleadings, since perjured evidence, which results in an erroneous decree being passed, is from the very nature of the case in the great majority of cases produced in support of false allegations in the pleadings. In every case the averments in the pleadings have to be solemnly verified by the parties, and in at least ninety-five per cent. of cases in which there are contested issues of fact, some at least of these averments on each side are alleged by the opposite party to be wilfully untrue. Several of the cases which are cited above are illustrations of this.

The English cases have been considered at length in the ruling in 38 Madras [*Chinnayya* v. *Ramanna* (1)] and I do not propose to review them here. Even if a different rule should ultimately prevail in England, this ought not, in my opinion, to affect the law in this country as now settled by the consensus of three High Courts. The circumstances of India are different in many respects from those of England and we have in this country a statutory rule of *res judicata* which would be to a large extent nullified by the adoption of the view of the law suggested by the appellant in this case. There is, as has been pointed out, no real contradiction between the rule of *res judicata* embodied in section 11 of the Code of Civil Procedure and the rule that a judgment may be avoided on the ground of fraud, provided that the fraud in question is understood as meaning a fraud which prevents a party from putting his case before the Court—such fraud in fact as was set up by the appellant in paragraphs 6 to 10 of his plaint in this case. Where, owing to the fraud of a party, there has been no proper adjudication, the rule of *res judicata* cannot apply. Where, on the other hand, the parties have or had the opportunity of putting their respective cases fully before the Court and the Judge rightly or wrongly has decided that one set of alleged facts is true and another set false, the parties cannot go behind that decision by merely alleging fraud either in the averments in the pleadings or in the evidence produced.

It may be added that the learned Subordinate Judge appears to have arrived on inadequate grounds at the finding of fact on which the appellant relies. That finding rests on the evidence of the first plaintiff's brother Sundar Lal, who is, on the findings of the Subordinate Judge himself, a hardened and shameless liar. The Subordinate Judge believes this part of his statement mainly on two grounds:—

(1) that the surviving mortgagee did not go into the witness box, and

(2) that the defendants did not produce their accounts.

To this the appellant adds as additional grounds;—

(9) 15 C. 533 (P. C.); 15 I. A. 119; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168; 7 Ind. Dec. (N. S.) 939.

(3) that the pro-notes in lieu of which the deed was executed had been mainly executed within one year, and

(4) that Mewa Lal had applied for attachment before judgment and had obtained an order for it two days after the mortgage was executed.

The plaintiffs tendered certain documents in proof of the last fact on the date on which the evidence commenced and the learned Subordinate Judge rejected them on the ground that they were produced late. I see no reason to interfere with the learned Subordinate Judge's discretion in this matter, but I am quite willing for the purposes of this appeal to accept the fact alleged as correct. The fact is not conclusive. It might form a motive for executing a false and fictitious deed; it might also constitute a reason why the respondents should wish to convert their pro-notes into a more solid form of security. It has been admitted by the plaintiff or his brother that they were carrying on very large contracts at this time and it is also admitted that they did borrow considerable sums of money on other occasions and that all these borrowings, except the one now in dispute, were genuine. The very witness relied on to prove the fictitious nature of the debt has admitted its genuineness on two occasions, namely, in partition proceedings and in insolvency proceedings. As to the defendant not going into the witness-box, I do not think that he or his advisers can reasonably have anticipated that the Court would attach any weight whatever to the evidence of Sundar Lal. As to the accounts not being produced they were never called for by the plaintiffs, nor did the plaintiffs put in any accounts on their own side. It is urged that the respondents have not proved affirmatively in this suit that the deed was binding on the plaintiff. It was not necessary for them to do so. This point is concluded by the decision in the mortgage suit to which the plaintiff was a party.

For the reasons already given I dismiss the appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1202 OF 1917.

June 24, 1919.

Present:—Mr. Justice Atkinson.

ASAN PANDEY—DEFENDANT No. 2—APPELLANT

versus

RAJMON MISSER—PLAINTIFF AND NANDAN PANDEY—DEFENDANT No. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. XXIII, r. 3, O. XXXIV, r. 1—Compromise, fraudulent —Court, whether bound to recognise compromise—Mortgage—Redemption, suit for—Tenant holding under mortgagee, whether necessary party to suit—Misjoinder of parties, effect of—Irregularity.

Every interest created by a mortgagee sought to be redeemed puisne to his own is an interest which in a redemption suit should be represented before the Court in order to enable it effectively to give relief between the parties to the mortgage-deed. Thus a tenant introduced by the mortgagee upon the mortgaged land subsequent to his mortgage is a necessary party to a suit for redemption of the mortgage. Even if he is not a necessary party, the joinder of such tenant as a party to the suit would not be a sufficient cause for dismissal of the suit on the ground of misjoinder of parties: his joinder in the suit would amount merely to an irregularity not prejudicing the trial of the merits of the case, within the ambit of section 99 of the Civil Procedure Code. [p. 107, col. 1.]

A Court is not bound to pass a decree in accordance with a compromise which is shown to be fraudulent. [p. 108, col. 2.]

Appeal from a decision of the Additional Subordinate Judge, Champaran, dated the 20th August 1917.

Mr. *Jalgobind Prosad Singh*, for the Appellant.

Mr. *Rajendra Prasad*, for the Respondents.

JUDGMENT.—This second appeal comes before me from the decision of the learned Additional Subordinate Judge of Champaran, dated the 20th August 1917.

The plaintiff institutes this suit claiming to exercise his right of redemption of a *sarpeshgi* mortgage-bond, dated the 18th March 1882. The mortgage-bond was for a term of 38 years subject to the annual rent of Rs. 10 8-0. The defendant No. 1 was the original mortgagee and entered into possession of the mortgaged premises; and the defendant No. 2 claims to be a tenant on the mortgaged property. Defendant No. 1 does not contest this suit.

The action proceeded to trial upon the defence filed by defendant No. 2. Defendant No. 2 put forward two defences; One, that he

was not a necessary party to the suit, and two, that the mortgaged property had been settled with him by the plaintiff's predecessor-in-title as tenant prior to the creation of the mortgage security dated the 18th March 1882.

The learned Munsif decided both these issues in favour of the respondent, and granted a decree for redemption coupled with a direction that on the payment of the mortgage money or the balance thereof due by the plaintiff, he should be entitled to *khas* possession of all the land which formed the subject-matter of the mortgage security discharged from the claim of defendant No. 2 in respect thereof.

From this decision defendant No. 2 appealed, and in appeal the Additional Subordinate Judge arrived at the conclusion that no settlement was ever in fact made with defendant No. 2 by the plaintiff or his predecessor-in-title prior to the date of the mortgage bond. The learned Subordinate Judge in my opinion gives very cogent reasons for concurring in the findings of fact arrived at by the learned Munsif.

In second appeal three objections have been urged against the validity and legal propriety of the decision of the learned Subordinate Judge.

It is contended, *first* of all, that the judgment of the learned lower Appellate Court is not a judgment in accordance with law.

I utterly fail to appreciate this contention, because, in my opinion, the learned Judge clearly shows by his judgment that he has carefully considered the material parts of the evidence dealing with the issue as to whether any letting had been created by the plaintiff or the plaintiff's predecessor-in-title with the defendant No. 2 prior to the date of the mortgage security.

The learned Judge, to my mind, satisfactorily shows that the defendant No 2 became tenant of the mortgaged premises subsequent to the date of the mortgage security and that the defendant No. 2 was then joint with the original mortgagee in mess and estate, and that collusively in the year 1898 the mortgagee in possession of the mortgaged property got defendant No. 2 recorded as tenant in respect thereof for a period of 7 years. The subsequent Record of Rights only carries this collusive entry one step further. The learned Subordinate Judge rightly laid great stress upon the fact that the defendant No. 2 dare not pledge himself on oath to the defence which he pleaded in his written statement relative to the alleged creation of a letting made to him by the plaintiff prior to the 18th March 1882.

I see no reason for holding that the learned Additional Subordinate Judge's judgment is unsatisfactory in any sense whatsoever. In my opinion, being a judgment of affirmance, it satisfies all the requirements of the law.

Secondly, it is contended before me that defendant No. 2 was not a necessary party to the suit, and that, therefore, the suit is bad for a misjoinder of parties and that the plaintiff's claim should have been dismissed.

I gather from the judgments of the lower Courts that this point was not pressed or urged before either the Munsif or the Additional Subordinate Judge. Before me, however, the matter has been strenuously argued and the learned Vakil appearing on behalf of defendant No. 2 contends that even assuming that defendant No. 2 was a tenant on the lands, under and by virtue of a letting made to him by the mortgagees in possession subsequent to the date of the mortgage security, that nevertheless he is not a person having an interest in the mortgage security which would justify his being made a party under the provisions of Order XXXIV, rule 1 of the Civil Procedure Code. In addition it is asserted that where a tenancy is created by a mortgagee in possession in favour of a tenant on the mortgage property, such tenant is not a person having an interest in the mortgage security whom in a suit for redemption it would be necessary to add as a party.

Now it must be remembered that this suit is not a suit by way of ejectment; but a suit by a mortgagor claiming to redeem his property from the mortgage-debt which was created in this particular case on the 18th March 1882. As I understand the law, the foundation of the right of a mortgagor to redeem is that upon payment to the mortgagee of the debt due by the mortgagor, the mortgagor shall be then restored by way of redemption to the lands which he pledged as security for the mortgage-debt, free and unfettered from the creation of any rights by the mortgagee puisne to such mortgage, save

such obligations and rights as a mortgagee by Statute may create.

No authority has been cited in support of the contention addressed to me on behalf of the appellants. But in Mr. Ghose's book on Mortgages, 4th Edition, at page 586, there is a passage which rather tends to support the view pressed by the respondents, *viz.*, that all persons having an interest of any kind in the mortgage property sought to be redeemed are necessary parties in a redemption suit.

This certainly conforms with my own view of what the law is. In my opinion the case of *Hood* v. *Easton* (1) tends to show that every interest created by a mortgagee sought to be redeemed puisne to his own is an interest which in a redemption suit should be represented before the Court in order to effectively give relief in a redemption suit between the parties to the mortgage-deed.

But even if the addition of defendant No. 2 as a party to the suit was unnecessary, and in that sense there was a misjoinder of parties, it would merely mean that the provisions of section 99 of the Civil Procedure Code apply to the facts of this case.

Section 99 provides that: "No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, *not affecting the merits of the case* or the jurisdiction of the Court."

In my opinion the provisions of that section of the Code apply with great force and effect to the facts of this particular case, because even if defendant No. 2 was not a necessary party, in my opinion his representation as a party in no way prejudiced the trial of the merits of the suit in so far as the suit has been decreed in favour of the plaintiff respondent.

These were the two issues arising for decision in this second appeal as originally presented to this Court.

Pending the hearing of the appeal, the plaintiff and the defendant No. 2 entered into the terms of a compromise embodied in a petition dated the 3rd of April 1919. By this petition of compromise the parties agreed that the plaintiff should recognise the defendant No. 2 as tenant of the premises originally offered as security by the mortgage deed of the 18th March 1882; and that defendant No. 2 should pay to the plaintiff the annual yearly rent of Rs. 10-8-0, being the rent recorded in respect thereof as being payable in the Record of Rights.

The date of this compromise is of vital importance, *viz.*, the 3rd of April 1919.

It is contended before me that the parties to the suit having entered into a compromise that this Court is, by virtue of the provisions of Order XXIII, rule 3, Civil Procedure Code, bound to accept the compromise and to pronounce a decree in accordance therewith.

This case originally came before Mr. Justice Das and upon the defendant No. 2 applying to have a decree pronounced in accordance with the terms of the compromise one Baldeo appeared and protested, claiming that the original plaintiff to the suit had no right to enter into the compromise which he did with defendant No. 2, inasmuch as the plaintiff had in the month of August 1918 sold all his estate and interest in the properties in suit to one Ramphal Pandey.

Baldeo purchased from Ramphal Pandey on the 8th November 1918 his interest in the premises which he had purchased from the plaintiff, and the sale-deed between Ramphal Pandey and Baldeo was effected by a registered deed of conveyance; and consequently it was contended by Baldeo that the compromise between the original plaintiff in the suit and the defendant No. 2 was clearly fraudulent in its design, inasmuch as the plaintiff had no right, title or interest whatsoever in the property in respect of which he sought to confirm and ratify a letting already made to the defendant No. 2.

Baldeo applied to this Court for leave to be substituted as a party on the record.

Mr. Justice Das conceived that Baldeo had an interest, and a very vital interest in contesting the validity of the compromise dated the 3rd April 1919 and he permitted Baldeo to apply to the Registrar to be substituted as a party.

The learned Registrar declined to add Baldeo as a party, upon the ground that Baldeo had been guilty of *laches* in not proceeding at an earlier date to have

(1) (1856) 2 Jur. (N. S.) 729; 2 Giff. 692; 4 W. R. 75; 128 R. R. 235; 66 E. R. 290.

himself substituted as a party upon the record.

From the order of the learned Registrar there was an appeal to a Division Bench of this Court, and my learned brothers Mr. Justice Roe and Mr. Justice Jwala Prasad conceived that Baldeo was entitled to be added as a party and by their order dated the 15th April 1919 they so directed, although they admitted that he had been guilty of some remissness, but that under the circumstances they considered he was entitled to assume that the original plaintiff would *bona fide* conduct the litigation then pending in this Court in an honest, open and fair-handed manner, but now that Baldeo had discovered that the plaintiff was acting fraudulently in defeasance of Baldeo's legal rights, that, therefore, he was a proper party to be substituted on the record.

The question which I have to consider now is, whether the compromise of the 3rd April 1919 ought to be made a decree of this Court. Under the provisions of Order XXIII, rule 3, Civil Procedure Code, the learned Vakil appearing on behalf of defendant No. 2 contends that his client dealt with the original plaintiff in the suit believing he had title; believing him to be an honest man, and that under the provisions of Order XLI, the rights which had accrued to him under the compromise ought not to be taken from him.

One might be inclined to attach some weight to that argument if it was founded upon any substratum of truth or fact; but it appears in this case that early in the present year a contest arose between Baldeo on the one hand and defendant No. 2 on the other, in which or out of which a proceeding under section 145 of the Criminal Procedure Code was instituted, and in which proceeding Baldeo claimed possession of the land in suit as a purchaser from Ramphal Pandey, who was the purchaser from the plaintiff in the original suit, and the defendant was the opposite party in the proceeding under section 145. Therefore, I hold that defendant No. 2 had notice of Baldeo's prior title, and that he must be deemed to have known that on the 3rd April 1919, when the compromise was entered into between the original plaintiff on the one hand and himself on the other, that the original plaintiff in the suit had no right, title or interest whatsoever in himself whereby he could make or enter into a valid, lawful and binding contract creating a tenancy in respect of the lands in suit.

I hold that the compromise of the 3rd of April 1919 did not sanction or create a lawful and binding contract between the parties thereto. It was a contract designed and conceived in fraud; and it is not such a contract as this Court under the provisions of Order XXIII, rule 3, Civil Procedure Code, is bound to accept and pronounce a decree in the terms thereof. Accordingly I hold that the three contentions submitted to me on behalf of defendant No. 2 as appellant in this case are unsustainable in point of law and I would dismiss this appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 44 OF 1918.

May 30, 1919.

Present:—Mr. Lyle, A. J. C., and Mr. Ashworth, A. J. C.

Nawab Mirza MUHAMMAD BAQAR ALI KHAN—PLAINTIFF—APPELLANT

versus

HAZARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law - Antecedent debt—Creditors, prior and subsequent, whether should be different—Father alive at time of suit, effect of—Joint family property, mortgage of, debt secured by, effect of—Sons, position of.

Under the Hindu Law in order to constitute an antecedent debt binding on the sons, it is not necessary that the prior and the subsequent creditors should be different persons or that the father should be dead at the time the subsequent creditor claims his debt which the father incurred to satisfy the prior debt, but it is necessary that such debt should not have been secured by a mortgage of the joint family property and that the prior and the subsequent debts should not be contemporaneous in fact. [p. 115, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 477; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126, (P. C.), discussed and explained.

Ramman Lal v. *Ram Gopal*, 47 Ind. Cas. 987; 21 O. C. 200; 5 O. L. J. 629, overruled.

MUHAMMAD BAQAR ALI KHAN *v.* HAZARI LAL.

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 23rd March 1918.

Babu *Ishwari Prasad*, for the Appellant.

Mr. *A. P. Sen*, for Respondents Nos. 2 to 4.

JUDGMENT.—In this case the plaintiff-appellant appeals from a decree of the Subordinate Judge of Sitapur dismissing his claim as against defendants Nos. 2, 3 and 4 for the recovery of Rs. 11,000 odd by sale of the 4 annas share of the defendants in the village of Binoura. The suit was decreed against defendant No. 1. The claim was based on a mortgage-deed dated the 23rd March 1910, said to have been executed to secure a previous debt of Rs. 7,000, and on a deed of further charge dated the 31st May 1915, said to have been executed to secure a loan of Rs. 2,000 borrowed for the purpose of opening a cloth shop. Both deeds are alleged to have been executed by the defendant No. 1, against whom the suit was originally brought. Defendants Nos. 2 and 3 are the sons and defendant No. 4 the grandson of defendant No. 1 and they were impleaded on their own application, as they said that the property alleged to have been mortgaged was the joint ancestral property of defendant No 1 and themselves. Defendant No. 1 did not put in an appearance and the case was decided *ex parte* against him and he has not appealed. The lower Court dismissed the claim as against defendants Nos. 2, 3 and 4 *inter alia* on the following grounds:—

(*a*) that there was no proof that the Rs. 7,000 to secure which the first mortgege was executed were in fact due,

(*b*) that in any case the debt of Rs. 7,000 to secure which the first mortgage was executed could not be said to have been incurred for legal necessity,

(*c*) that the second mortgage was likewise not executed to secure a loan incurred for legal necessity,

(*d*) that although defendant No. 2 was proved to have attested the second mortgage-deed, the attestation did not prove his concurrence in the mortgage or estop him from impugning the mortgage,

(*e*) that, as regards the plea that the first mortgage for Rs. 7,000 was binding on the family on the ground that it was to secure an antecedent debt, the arrears due under the *theka* could not be held to be an antecedent debt because they had already been secured by a mortgage of the family property dated the 15th February 1907, Exhibit 4.

All these findings of the lower Court are called in question in appeal. There is little difficulty about the facts in this appeal, but the findings of law have been strenuously contested.

As to finding (*a*) it is urged in the first place by the appellant that the pleadings of the defendants-respondents did not put him to the necessity of proving the existence of the debt of Rs. 7,000 to secure which the first mortgage was executed, and that no issue was framed on this point. We are of the opinion that this contention must prevail. The respondents' Counsel, when asked where they had denied the existence of this debt, could only point to paragraph 2 (*c*) of the written statement of defendant No. 2 which was his reply to paragraph 2 of the plaint. Now paragraph 2 of the plaint only purported to set forth the particulars of the mortgage in the manner prescribed by form No. 45 of the pleadings in Appendix A of the Code of Civil Procedure. A denial of the amount of the mortgage in such a paragraph only amounted to a denial that the mortgage purported to be to secure a debt of Rs. 7,000 The denial cannot be construed to mean that the respondents put the appellant to proof of the existence, at the date of the execution of the mortgage, of the debt. That the mortgage purported to be to secure the sum mentioned is not now denied by the respondents. Alternatively the respondents urge that at the date of the filing of the written statement they were under no necessity of denying the existence of the consideration. They argue that the plaint is based on the allegation that the debt was incurred for family necessity and not on the allegation that the debt was an antecedent one. The plea based on the doctrine of antecedency, they say, was only raised by the appellant after the issues had been struck, apparently in argument after the recording of evidence. They, therefore, maintain that, although the plea that there was never any debt due of Rs. 7,000

had not been raised earlier, it could be raised by them as soon as the first mortgage was defended by the plaintiff-appellant on the ground of its being to secure an antecedent debt. In our opinion there is no force in this argument. If the defendants had pleaded that no debt existed which it was necessary to secure, this would have been a complete answer to the appellant's claim that the debt was incurred for family necessity. A debt that does not exist cannot be for family necessity. The respondents' failure, therefore, to put forward this plea in their written statement, in our opinion, justified the appellant in considering that he was not put to proof of the existence of the debt. Again, the respondents urge that the non existence of the debt was impliedly pleaded in paragraph 3 of the written statement of defendant No. 2 Now paragraph 3 merely states that the cause of action is not admitted. This cannot be construed to be a denial of the existence of the debt at the time of the execution of the mortgage. Lastly, it is urged that in the written statement of the respondents Nos. 3 and 4 the appellant was put to proof of the "validity" of the deed, and it is urged that this would involve his being put to the proof of the existence of this debt at the time of the execution of the mortgage. Having regard to the pleadings, however, it is clear that by putting the appellant to proof of the validity of the deed the respondents at that time really meant that they put him to proof that the deed was properly attested. We are unable to find either in the written statement of defendants Nos. 3 and 4 any specific denial, or denial by necessary implication, of the allegation that the debt of Rs. 7,000 existed at the time of execution of the first mortgage. Consequently under Order VIII, rule 5, of the Civil Procedure Code the allegation of the fact of this debt must be taken to have been admitted.

As to finding (*b*), we are of the opinion that the finding is correct. The debt is said to have consisted of arrears for three years due on a *theka* taken by the defendant No. 1 under a *kabuliyat* dated the 3rd December 1906, Exhibit 3. The learned Subordinate Judge found that the *theka* could not be said to have been executed for the family benefit or necessity and consequently no money due under it could be a debt incurred for family necessity. The rental under the *theka* was Rs. 6,000. The gross rental due in respect of the leased villages, half of which were cash-rented and half of which were grain-rented, was Rs. 6,028. The lower Court has rightly pointed out that it is seldom possible to realise the rental demand in full. Paragraph 4 of the *kabuliyat*, Exhibit 3, excludes from the income leased all miscellaneous dues. In the four years preceding the execution of the lease or *kabuliyat* the average amount realised in respect of the two villages was only Rs. 4,159 a year. The appellant, on whom (as will be subsequently shown) rested the burden of proving that the lease was taken for the family benefit, is thus unable to prove that the defendant No. 1 had any reasonable expectation of making any profit. What the defendant No. 1 may have expected is also to a certain extent to be judged by results. Looking at results we find from the mortgage, Exhibit 1, that in three years out of the four years for which the *theka* was taken, the arrears of *theka* money amounted to Rs. 8,290. It is urged by the appellant that the *jamabandis* for the years of *theka* have not been produced. Whether, however, the *theka* could be expected to be a profitable enterprise, would depend rather on the collections previous to the time it was taken than on the collections subsequent. In any case the appellant could himself have produced the *jamabandis* and he cannot, therefore, plead their non-production by the respondents. It was for the appellant to prove that the lease was for the benefit of the family. Again the fact that in the mortgage sued upon the appellant gave up his claim to a portion of the arrears cannot be pleaded by way of showing that the demand for *theka* money was less than that entered in the lease. The appellant at the time of executing the lease could not anticipate any remission. There is more force in the appellant's contention that the high amount of arrears actually incurred by him was partly due to 1922 Fasli being a year of frost, in which the *rabi* crop was spoilt and remission of rent was imposed. There is no proof, however, of this and, even if it were proved, it would not explain away the large loss

incurred on the *theka* by defendant No. 1.

As to finding (*c*), the burden of proving that the second bond for Rs. 2,000 was to secure a loan for the family necessity was on the appellant. He has produced as a witness one Kirpa Dayal (P. W. No. 2) a clerk of the manager of his estate. This witness states that the money was borrowed to open a cloth shop and that the purpose of opening the cloth shop was represented to be the earning of profits wherewith to pay up the prior deed of Rs. 7,000 discussed above. It has not been proved that this admission was untrue, nor is it possible to say that it was untrue. Although, therefore, if the money had been borrowed merely to open a cloth shop, we might have been disposed to hold that it was a legitimate form of enterprise to increase the family income, it does not seem possible to discard the plaintiff's evidence that the shop was opened for the express purpose of earning money to pay up a previous bond executed to cover a debt not binding on the family. It scarcely appears necessary to go into the question whether the income of the family required supplementing. On this point we have divergent evidence. The appellant's witness No. 5, Gulzarilal, states that the family income was Rs. 600 or 700 a year, whereas defendant-respondent No. 2 states that the income of the family was between Rs. 1,000 and 1,200 a year and the average family expenditure only Rs. 30 or 40 a month. In either case, however, we should have been disposed to hold that the manager was entitled to open a cloth shop on behalf of the family if his experience justified him in anticipating this shop being a success. It appears that the shop was opened in May 1915 and was only closed when this litigation began in July 1917. The shop would, therefore, not appear to have been a failure. It follows, however, from the admission which I find binding on the appellant, that the shop was opened to defray a debt not due on the family, that the second mortgage was executed to procure funds for opening the shop, and that consequently this second mortgage cannot have been deemed to have been incurred to secure a loan necessary for the family.

As to finding (*d*), we are of the opinion that the learned Subordinate Judge was wrong. The defendant No. 2 himself in cross-examination had to admit that the shop was opened in his name and that he was fined by the Municipal Board for not giving information to that authority of its being opened. In examination-in-chief he admitted that he used to sit at the shop. There is, therefore, no reason to disbelieve the appellant's witness Kirpa Dayal (P. W. No. 2), when he says that not only was the deed executed with the knowledge and consent of defendant No. 2 but that he actually negotiated the transaction.

As to finding (*e*), this is the finding which the appellant has most strenuously contested. His Counsel admits that after execution of the lease by the defendant No. 1 but before it came into operation the defendant No. 1 executed a security bond (never acted upon), Exhibit 4, for Rs. 6,000 and agreed that this sum would be payable if in the course of the *theka* period the payment of any year's instalment fell into arrears. He, however, urges that this hypothecation would not prevent the appellant pleading that the arrears subsequently incurred were an antecedent debt and relies on a ruling of a Bench of this Court in *Ramman Lal* v. *Ram Gopal* (1). The learned Subordinate Judge held that the arrears could not be called an antecedent debt, inasmuch as it was held by their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2) that the debt must be incurred irrespective of the credit obtained from immoveable assets which did not belong personally to the manager but were joint family property. In the case of the Bench of this Court it was held as follows:—

"What their Lordships seem to lay down is that an antecedent debt secured by a mortgage might be open to the same objection as a subsequent mortgage effected to pay the debt. They nowhere say that the personal obligation compromised in every simple mortgage cannot be separated from the mortgage-debt, and that.....the personal obligation to repay the money may not

(1) 47 Ind. Cas. 987; 21 O. C. 200; 5 O. L. J. 629.
(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 457; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

amount to an antecedent debt which the son may be under an obligation to pay if it was incurred for purposes neither illegal nor immoral." This ruling was followed by another Bench of this Court in First Civil Appeal No. 93 of 1917 decided on 14th April 1919 [*Gur Sahai* v. *Girdhari Lal* (3)], and in the judgment in that case it is stated that the principle laid down in *Ramman Lal* v. *Ram Gopal* (1) had been followed in a number of subsequent cases in this Court and that on the principle of *stare decisis* it appeared desirable to follow it unless and until it was pronounced erroneous by higher authority. One of us was a member of that Bench, but the respondents have asked us in this case to dissent from the ruling in *Ramman Lal* v. *Ram Gopal* (1). They further contend that that ruling may be distinguished on the ground that it applied to a case where the mortgage was executed to secure a debt incurred in favour of a person other than the mortgagee, whereas in this case the debt was incurred in favour of the mortgagee. A certain passage is relied on in the Privy Council case of *Sahu Ram Chandra* v. *Bhup Singh* (2) mentioned above for the proposition that the mortgagee cannot plead that a debt incurred in favour of himself and secured subsequently by a mortgage is an antecedent debt. It is further maintained by the respondents that the Privy Council ruling should also be interpreted to mean that no mortgage can be binding on the sons under the doctrine of antecedency, unless it is proved that the father who executed the mortgage is dead. Their Counsel admits that this contention was rejected by the Bench of this Court in the judgment already mentioned of the 14th April 1919, where it was held that the validity of the transaction on the ground of its being to secure an antecedent debt has to be determined quite apart from any question of pious obligation, but he asks us not to follow this finding. These arguments raise several distinct questions as to the interpretation of the ruling of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2) and these questions can only be decided by a consideration of their judgment as a whole. We attribute to the failure to read the judgment as a whole all difficulty in interpreting it and all dissension as to its meaning. Isolated passages have been quoted apart from their context and thereby the meaning of this judgment in its logical cohesion has been missed.

The case was one where a father hypothecated family property to secure a loan of Rs. 200 in cash. The mortgagee's interest was subsequently acquired by the plaintiff in the suit, that plaintiff having had nothing to do with the execution of the original mortgage. The plaintiff sued on the mortgage and the dismissal of the suit was upheld by the Privy Council, on the grounds that the loan by the father to secure which the mortgage was executed was not for necessary purposes or for the family benefit, that the loan could not be considered as an antecedent debt, and that the doctrine of pious obligation could not be invoked to sustain the mortgage. The judgment contains an exposition generally of the law applicable to cases where the validity of a transfer by the father alone is called in question by the sons. This exposition is arranged in five separate parts dealing successively with the general principle against alienation by one of several co-parceners, the effect on this main principle of a second principle that sons are bound to discharge non-immoral debts of their father, the exceptions to discharge antecedent debts, the law as to the burden of proof in such cases, and lastly the definition and test of a legally antecedent debt. Each of these five parts may be summarised as follows:—

1. A sale, gift or mortgage of the joint family property cannot be effected by one co parcener alone without the consent, express or implied, of the other co-parceners.

Explanation. The consent of the other co sharers is implied where the transfer is by the manager or head of the family for necessary purposes.

2. A transfer by a father, although originally invalid under the principles stated in paragraph 1, is given effect to against the sons on the death of the father, provided that the transfer was to discharge or secure a debt not for immoral purposes, owing to the pious obligation of the sons to discharge such a debt of their father.

3. To the principle stated in paragraph 1 there is an exception (which as an excep-

(3) 52 Ind. Cas. 75; 22 O. C. 84.

tion from a general and sound principle must not be extended and should be very carefully guarded), namely, a sale or mortgage made by a father to discharge or secure an antecedent debt is valid, even though the transfer was not for the benefit of the estate.

4. The necessity of protecting the right of third parties, who have taken their title for onerous consideration and in good faith, has given rise to much of the law on the subject of the antecedent debt and is at the bottom of the doctrine of onus, but the onus of proof is nevertheless not capable of a general and inflexible answer.

Illustration (*a*). The actual mortgagee with whom the transaction took place is setting up a charge in his favour made by the father of a minor with the alleged object of obtaining an advance for family needs or for the repayment of a precedent loan. He may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, such as facts embodying the representations made to him of the needs of the estate and the motives influencing his own advance.

Illustration (*b*). The sons are seeking to defeat an alienation made by their father to discharge or pay off an antecedent debt or an alienation effected by a Court in execution of a decree for the father's debt. It is for the sons to show that the debt was contracted for an immoral purpose and that the purchaser had notice of the fact, that is to say, legal notice if a private transferee and actual notice if an auction-purchaser, the latter not being required to make an inquiry beyond what appears on the face of the proceedings.

5 (*i*). An alienation for an antecedent debt means that the sale or charge has been made in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate, that is to say, a father's debt will not be regarded as antecedent, unless incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property.

(*ii*). The doctrine of antecedency in time implies a long real dissociation in fact between the debt and the transfer, as otherwise the doctrine could be evaded.

It will be noted that we have treated that part of the judgment which deals with the main principle against alienation by a single co-parcener and the second principle arising from pious obligation as concluded before the question of the exception based on the doctrine of antecedency commences. That this is correct may be seen from their Lordships' sentence, "The whole of this part of the case is accordingly at an end." It will also be noted that we have treated the passage in the judgment beginning with the sentence, "They desire, in the first place, to make it clear that much if not all of the law upon this subject has arisen from the necessity of protecting the right of third persons," down to the words with reference to the pronouncement of Sir John Stanley, "In their Lordships' opinion this is a correct and useful statement of the law," as confined to an exposition of the law in respect of the burden of proof. It is to be regretted that this part of the judgment is not commenced by a new paragraph in the published reports. In our opinion not a single expression of their Lordships in this passage can be read as intended to apply to anything but the matter of the burden of proof, a matter considered in the light of English principles of equity and not of Hindu Law proper. It is equally clear that the rest of the judgment following on this exposition of the law as to the burden of proof deals solely with the doctrine of antecedency. It follows that the statement of their Lordships that in order to make the sons liable the father must have died, is made solely with reference to the question of pious obligation of the sons to pay their father's debts and is not made with reference to antecedent debts.

We, therefore, concur in the judgment referred to above of this Court dated the 14th April 1919 where it states, "In our opinion the Privy Council did not intend to lay down in *Sahu Ram Chandra* v. *Bhup Singh* (2) that a conveyance in consideration of antecedent debts can in no case be enforced during the father's lifetime." It also follows that we cannot accept the suggestion that their Lordships' judgment is to be interpreted as meaning that a

mortgagee can only take advantage of a prior debt when the debt was incurred in favour of some one else than himself. This suggestion is based on their Lordships' statement that "much of the law upon this subject has arisen from the necessity of protecting the right of third persons." This passage occurs in that portion of the judgment dealing only with the burden of proof and cannot be read into the portion of the judgment dealing with the doctrine of antecedent debts. The rejection of this suggestion involves our not accepting the contention of the respondents' Counsel that the case of *Ramman Lal* v. *Ram Gopal* (1) can be distinguished from the present case on the ground that in the present case the mortgagee was identical with the original creditor whereas this was not so in the case mentioned. No such suggestion or distinction, we hold, has been made by their Lordships of the Privy Council. They apply the test of dissociation in fact and time, and this implies that a transferee may plead that the transfer in his favour was to discharge a prior debt in his favour wholly dissociated in fact from the transfer. It has been argued, however, that the exception to the general principle against alienation by a single co-parcener made in favour of alienation to secure an antecedent debt must find its genesis either in the pious obligation of sons to discharge or secure their father's non immoral debts after his death or in the necessity of protecting third parties, purchasers of property for consideration and in good faith, which necessity their Lordships in the discussion in their judgment on the burden of proof have stated to be responsible for much of the law on this subject. In the former case it is urged that it would be natural to impose the condition that a debt shall not be regarded as antecedent until the father is dead, and in the latter case the condition that a person cannot defend a transfer in his favour, where it was to discharge or secure a debt in his own favour, however much dissociated in time and fact from the transfer. This argument may be permissible for suggesting what the law should be: it fails to show what the law is. Legal history contains numerous instances where the reason for a doctrine coming nto existence has been lost sight of during the course of its growth. Indeed conceding that the antecedent debt doctrine is an offshoot of the doctrine of the pious obligation of the sons to defray their father's debts, as appears unavoidable from the fact that the question of morality of the debt is a matter for consideration in the application of either doctrine, it is nevertheless clear from their Lordships' judgment that, while the fact of the debt being an immoral one is a complete defence by the sons against the invocation of the doctrine of pious obligation, in the case of an antecedent debt the sons have further to prove as against an alienee that the alienee had notice of the debt being an immoral one. (See the second line of page 444 in I. L. R. 39 Allahabad and the first passage quoted on page 446.) Hence it would appear that, under the impact of English equitable principles for the protection of third parties, the antecedent debt doctrine has developed on its own lines and independently of the doctrine of pious obligation. Had their Lordships felt justified on the materials before them in embodying these further restrictions in their definition of a legally antecedent debt, it may be presumed that they would have done so, anxious as they were not to extend the exception from a general and sound principle. In the case before them the father was still alive, but their Lordships did not invoke this fact for the purpose of rejecting the claim that the debt was an antecedent one, though they had already invoked it to defeat the plea of pious obligation.

It only remains for us now to deal with the contention that the personal obligation inherent in every simple mortgage may constitute an antecedent debt, although the simple mortgage is itself invalid because it was for the purpose of securing a debt contemporaneous with the mortgage. In support of this contention the decision of a Bench of this Court in *Ramman Lal* v. *Ram Gopal* (1) has been cited. This view, although followed on the principle of *stare decisis* by a Bench of this Court, on which one of us was sitting in the case decided on the 14th April 1919, does not seem consistent with the clear emphatic statement of their Lordships of the Privy Council set forth in paragraph 5 of the precis of their judgment given above. *Ramman Lal* v. *Ram Gopal* (1)

was decided soon after the Privy Council ruling and apparently there were no decisions on the point by any other Court, and the view in question has since been rejected by the Allahabad High Court in *Brij Narain Rai* v. *Mangla Prasad* (4). We do not, therefore, feel bound in this case to follow the view adopted in *Ramman Lal* v. *Ram Gopal* (1).

We find then that the arrears of rent due under the lease are not prevented from being regarded as an antecedent debt binding on the sons by the fact that the creditor was himself the mortgagee, nor again by the fact that the father is still alive, but they are prevented from being so regarded by the fact that they were secured in advance, at least partially, by the security-bond of the 5th February 1907, Exhibit 4, which hypothecated the joint family property.

Accordingly we dismiss this appeal except so far as a personal decree is claimed against defendant No. 2, on the ground that he attested Exhibit 2 creating a further charge of Rs. 2,000 on the mortgaged property in Exhibit 1 with full knowledge of the contents of Exhibit 2. We allow this appeal so far as to give against defendant No. 2 (as well as against Hazari Lal), jointly and severally, a decree for Rs. 2,000 with compound interest at six per cent. per annum from the 31st May 1915 to the date when the decree is drawn up and simple interest at the same rate from that date to the date of realisation. The plaintiff appellant will get costs in all Courts on this part of his claim against defendant No. 2. The appeal otherwise is dismissed with costs to the defendants-respondents.

Appeal partly allowed.

(4) 50 Ind. Cas. 101; 17 A. L. J. 649; 1 U. P. L. R. (H. C.) 49; 41 A. 235.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 925 OF 1918.

March 3, 1919.

Present:—Mr. Justice Broadway.

RAMJI LAL—PLAINTIFF—PETITIONER

versus

MANYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Material irregularity—Court taking erroneous view of law or omitting to decide question of fact.

Where a Court takes an erroneous view of the law, or omits to decide a question of fact, *e. g.*, whether or not a balance was struck, it commits a material irregularity, and its decision is open to revision by the High Court. [p. 116, col. 1.]

Petition under section 41 of Act III of 1914, for revision of the decree of the Senior Subordinate Judge, Gurgaon, dated the 27th June 1918, reversing that of the Munsif, 1st Class, Gurgaon, dated the 5th April 1918, decreeing plaintiff's claim.

Lala *Shamair Chand*, for the Petitioner.

Mr. *Sundar Das*, for the Respondents.

JUDGMENT.—The plaintiff in this case instituted a suit against the defendants claiming to recover from them Rs. 400, being principal and interest due on a *bahi* account. The account is a very ancient one and had been commenced in *Sambat* 1919, the defendants having dealings with Bansi Dhar father of the plaintiff. This Bansi Dhar died in *Sambat* 1956 (1899 A. D.) and at that time the plaintiff is said to have been aged two and a half years. His mother, who acted as his guardian, appointed one Laiq Ram as manager of the business and it is said that in *Sambat* 1957 (1900 A. D.) the defendants struck a balance acknowledging the correctness of the account in the books. The suit was brought on the 1st October 1917 and was decreed by the trial Court. The learned Senior Subordinate Judge, however, dismissed the suit on appeal on the ground that the claim was barred by limitation. In coming to this decision the learned Subordinate Judge directed his mind solely to the correctness or otherwise of an allegation to the effect that between *Sambat* 1956 1957 the defendants had taken a buffaloe valued at Rs. 35 from the plaintiff's shop. He held that this particular transaction had not been proved and came to the conclusion that it had only been brought forward with a view

to bringing the suit within time. The question as to whether any balance had been struck by the defendants in 1957 was completely lost sight of, and before me it has been contended by Mr. Shamair Chand on behalf of the plaintiff petitioner that if this balance be found to have been struck, then the suit must be regarded as within time. My attention was drawn to sections 19 and 6 of the Indian Limitation Act, 1908; and it is urged that the striking of a balance or an acknowledgment within the purview of section 19 of the Act results in the commencement of a fresh period of limitation to be computed from the time when the acknowledgment was signed, and that inasmuch as in *Sambat* 1957 the plaintiff was a minor, section 6 of the Act was applicable and the time from which the period of limitation was to be computed was postponed to the date when the plaintiff became a major. It was, therefore, contended that the suit was within time, and my attention was drawn to *Venkataramayyar* v. *Kothandaramayyar* (1), *Sarat Chandra Singh* v. *Sudhan Hari Mukerjea* (2) and Halsbury's Laws of England, Volume XIX, page 6, Mr. Sundar Das on behalf of the defendants-respondents admitted the contention but urged that there was really no proof of the striking of any balance by the defendants, and further that there was no proof that the debt was really due. It seems to me, however, that it is not for me sitting as a Court of Revision to go into the merits of the case. The learned Subordinate Judge has taken an erroneous view of the law and has acted with material irregularity in totally ignoring the alleged acknowledgment of *Sambat* 1957.

I, therefore, accept this petition and return the case to the Court of the Senior Subordinate Judge, who will hear the parties with regard to the striking of the balance and come to a decision whether or not as a matter of fact the balance was struck and whether the striking of such balance is sufficient to prove the case for the plaintiff. Costs will follow the event.

Revision accepted.

(1) 13 M. 135; 4 Ind. Dec. (N. S.) 806.
(2) 14 Ind Cas. 694.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 1 OF 1919.

April 4, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J C.

GULZARI LAL—DECREE-HOLDER—APPELLANT

versus

RAM BHAJAN—JUDGMENT DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), s. 15, Sch I, Arts. 181, 182 *Execution of decree—Stay of execution, effect of—Subsequent application, nature of Time during which order remains in force, exclusion of—Oral application to proceed with sale, whether step-in-aid of execution.*

Where an execution proceeding is stayed by an order of Court, a subsequent application for execution must be treated as virtually an application to continue the previous execution proceeding or to revive or carry through a pending execution suspended by no act or default of the decree-holder, and the limitation applicable to such an applicati n is that contained in Article 181 of Schedule I to the Limitation Act. [p. 117, col. 2.]

Where an execution proceeding is stayed by an order of Court, the decree-holder is entitled under section 15 of the Limitation Act to exclude the period from the date on which the order is made up to the date on which it is cancelled [p 1 , col. 2.]

An application made by a decree-holder, whether orally or in writing, to the Court charged with the execution of his decree for the issue of a proclamation of sale is an application to take a step-in-aid of execution within clause (5) of Article 182 of Schedule I to the Limitation Act and forms a fresh starting point of limitation. From the mere fact of payment of process-fees, however, an application to take a step-in-aid of execution cannot be inferred; there must be an actual application to the Court, oral or in writing, to proceed with the sale. [p. 118, col. 1.]

Appeal against the decree of the Subordinate Judge, Hardoi, dated the 4th September 1918, reversing that of the decree of the Munsif, Bilgram, dated the 19th February 1918.

Mr. *A. P Sen*, for the Appellant.

Mr. *Basudeo Lal*, for the Respondent.

JUDGMENT.

KANHAIYA LAL, A. J. C.—The question for consideration in this appeal is whether the application for execution made by the decree holder appellant is barred by time. The decree was for the sale of a certain house and was made absolute on the 26th August 1911. The first application for execution was made on the 11th July 1914 and asked for the realization of the

decretal money by the sale of the mortgaged property. On that application a notice was issued to the judgment-debtors under Order XXI, rule 22, of the Code of Civil Procedure, requiring them to show cause why the decree should not be executed. The judgment-debtors did not appear and the Court granted time till the 29th August 1914 to the decree-holder to produce evidence about the market-value of the property sought to be sold. On the 2 th August 1914 the *patwari* was produced and examined. The judgment debtors were absent on that day but the general agent of the decree-holder was present. It was found that the property had no encumbrances. The decree-holder requested that the sale might be proceeded with (*digridar ki istidua hai ke nilam jari kiya jawe*). The Court ordered a sale proclamation to issue, fixing the 23rd October 1914 for the auction, and asked the decree-holder to deposit the necessary process-fee. On the same date the decree holder filed the process-fee. No sale could, however, be held on the 23rd October 19 4 because there was no bidder. A suit had meanwhile been filed by certain persons, claiming a title to the property sought to be sold and denying that the judgment-debtor had any interest therein which could be brought to sale; and in that suit they obtained an order for the stay of the sale, pending the decision of the suit. On the 25th October 1914, the date fixed for the receipt of the report of the sale officer, the parties were absent and in consideration of the fact that an order for the stay of the sale had been made in the suit above referred to, the execution case was struck off for default.

The suit, in which the order for stay was made, was decreed against the present decree-holder in accordance with a compromise, to which he was an assenting party, on the 4th January 1915: *Musammat* Chhoti, the only judgment-debtor who was a party to that suit, having been exempted. The present application for execution has been made on the 18th August 1917 and seeks for the sale of the mortgaged property. It is within three years from the date when the decree holder orally applied to the Court to proceed with the sale and filed the necessary process-fee to enable the Court to issue the proclamation of sale and also within three years from the date when the preceding application for execution was struck off after the sale was stayed.

The order staying the sale of the mortgaged property prevented the decree-holder from taking any further steps in that execution proceeding against the mortgaged property; and as pointed out by their Lordships of the Privy Council in *Qamar-ud-din Ahmad* v. *Jawahir Lal* (1) and by this Court in *Girdhari Lall* v. *Damodar Das* (2), the present application for execution must be treated as virtually an application to continue the previous execution proceeding or to revive or carry through a pending execution, suspended by no act or default of the decree holder. Article 181 of the Indian Limitation Act applies to such an application and in that view of the matter, this application is within time.

The Court of first instance treated the declaratory decree above referred to, to which neither of the judgment-debtors was a party, as no impediment to the present application for execution. If that view be correct, the decree-holder is entitled under section 15 of the Indian Limitation Act to exclude the period from the 23rd October 1914, when the order staying the sale was made, to the date up to which it lasted. In that view too the present application for execution would be within time.

A third view, pressed on behalf of the decree-holder, is that the oral application made by the decree-holder on the 29th August 1914, asking the Court to proceed with the sale, saves limitation. On behalf of the judgment-debtor respondent, who is a subsequent mortgagee of the mortgaged property, it is suggested that the order of the Court of that date merely recites what the decree-holder had asked for in his original application for execution. But as no previous order contained any such recital as a preliminary to what was to be done, it is reasonable to presume that the general agent of the decree-holder, who was present, had made such a request and offered his readiness to pay the ne-

(1) 27 A. 334 (P. C.); 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810.

(2) 25 Ind. Cas. 160; 17 O. C. 169.

cessary process-fee to enable the proclamation of sale to be issued. In *Ambica Pershad Singh* v. *Surdhari Lal* (3) Garth, C. J., pointed out that notwithstanding the relief claimed in the application for execution, the proceedings for enforcing the sale have from time to time, as a matter of practice, always to be initiated by the decree-holder, who has to pay the necessary costs at each step in execution. An application made by him, whether orally or in writing, to the Court charged with the execution of his decree for the issue of a proclamation of sale is, therefore, an application to take some step in-aid of execution and forms a fresh starting point of limitation. The decisions in *Chowdhry Paroosh Ram Das* v. *Kali Puddo Banerjee* (4) and *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (5) enforce the same view. In *Maneklal Jagjivan* v. *Nasi Raddha* (6) and *Abdul Kadir Rowther* v. *Krishna Malamal Nair* (7) it was held that an application to take a step-in-aid of execution need not be in writing.

The learned Counsel for the judgment debtor-respondent relies on the decision in *Juggi Lal* v. *Ganga Prasad* (8), which was followed in *Manna Lal* v. *Sardar Singh* (9). But in those cases there was no direct application, oral or in writing, to take a step-in-aid of execution. In the former case the agent of the decree-holder had asked the Court to issue a warrant of arrest at once instead of attempting to serve the judgment-debtor with a notice to show cause why he should not be arrested; in other words, the Court was requested to dispense with the issue of a notice preliminary to the arrest and the Court held that such a request did not amount to an application to take a step-in-aid of execution. In the latter case, all that was held was that the mere payment of process-fee by the decree-holder could not be treated as an application to take some step-in aid of execution, a view which the decisions in *Malukchand Ratanchand* v. *Bechar Natha* (10) and *Sheo Prasad* v *Indar Bohadur Singh* (11) also emphasise. The reason is obvious. From the mere fact of payment of the process-fee an application to take a step-in aid of execution cannot necessarily be inferred: at most it may amount to an application to receive the money and the payment by itself might mean nothing more than the performance of a condition essential to the order for execution. Here there was something more than a mere tender of the process-fee. It was preceded by an application made orally to the Court to proceed with the sale, and that application saves time.

The question of the saleability of the mortgaged property as affected by the declaratory decree obtained by Bhagwan Din and others against the present decree-holder has not, however, been decided by the lower Appellate Court. The order for stay has merged in the decree. The judgment-debtor-respondent is a subsequent mortgagee and the property sought to be sold is still the same.

The appeal is, therefore, allowed and the execution case sent back to the Court below with a direction to re-admit the execution appeal under its original number and to dispose of it, after determining the remaining points involved in the appeal in the manner required by law. In view of the circumstances of the case the parties will bear their own costs of this appeal.

DANIELS, A. J. C.—I concur in the order proposed by my learned colleague, on the ground that if the property is otherwise liable to sale—a point which still remains to be determined—limitation is saved by section 15 of the Limitation Act. This was a point not taken by the appellant in his memorandum of appeal but was apparent on an examination of the record. The appeal is not, in my opinion, sustainable on the ground urged by the appellant. That ground was that certain proceedings which took place on 29th August 1914 constituted an application in accordance with law to the Court to take some step-in aid of execution within the meaning of Article 182 (5) of the Limitation Act. The execution application which is now in question was present-

(3) 10 C. 851 at p. 856 (F. B.); 5 Ind. Dec. (N. S.) 569.
(4) 17 C. 53; 8 Ind. Dec. (N. S.) 574.
(5) 28 M. 399.
(6) 15 B. 405; 8 Ind. Dec. (N. S.) 276.
(7) 23 Ind. Cas. 533; 38 M. 695; 26 M. L. J. 433; 15 M. L. T. 305; (1914) M. W. N. 563; 1 L. W. 271.
(8) 10 Ind. Cas. 182; 14 O. C. 124.
(9) 43 Ind. Cas. 342; 20 O. C. 332.
(10) 25 B. 639; 3 Bom. L. R. 275.
(11) 30 A. 179; 5 A. L. J. 258; A. W. N. (1908) 74.

ed on 18th August 1917. The last previous application was made on 11th July 1914, more than three years earlier. If, however, the proceedings of 29th August 1914, give a new starting point for limitation, the present application is within time. The plea pressed by the appellant is that an oral application to the Court to issue a sale proclamation is within the term of Article 182 (5). There is authority for this contention in *Ambica Pershad Singh* v. *Surdhari Lal* (3). A reference to the order-sheet of the case does not, however, in my opinion, show that any such oral application was presented. On 11th July 1914 the decree-holder applied that notice under Order XXI, rule 22, might be sent to the judgment-debtor, more than one year having elapsed since the date of the decree, and further asked that after issue of notice the decretal amount might be realised by sale of the mortgaged property. Notice was issued and was duly served, but on the date fixed, the 29th August 1914, the judgment-debtor did not appear. The order sheet of that date recites the fact that the decree-holder's agent was present and that the judgment-debtor was absent, and then proceeds: "The prayer of the decree-holder is that sale may be proceeded with," and an order was thereupon passed that sale proclamation should be issued and that the decree-holder should pay the necessary process-fee. The words relied on, *digridar ki istidua hai ke nilam jari ho*, merely, in my opinion, refer back to the prayer contained in the petition of 11th July that after notice to the judgment-debtor sale proceedings should be taken, and do not indicate that any fresh application was made on 29th August. It is well settled by the rulings of this Court in *Juggi Lal* v. *Ganga Prasad* (8) and *Malukchand Ratanchand* v. *Bechar Natha* (10) that the mere deposit of process-fees is not enough to give a fresh starting point for limitation under Article 182 (5).

The point raised by my learned colleague at the hearing of the appeal results in a very curious circumstance. But for the order staying the sale the present application would, in my opinion, be undoubtedly beyond limitation. The proceedings in which that order was passed resulted in a decree declaring the property not liable to sale. The decree holder now seeks to sell the property in spite of that decree. The respondent Ram Bhajan Lal is apparently a subsequent mortgagee from *Musammat* Chhoti, the mother and heir of the original judgment-debtor Hardwari Lal, or her husband. I express, however, no opinion on this question at present, as it has not yet been gone into by the lower Court.

Appeal allowed.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 156 OF 1918.
June 23, 1919.
Present:—Mr. Justice Das.
Thakur RUDRESHWARI PRASAD SINGH—PLAINTIFF—APPELLANT
versus
DHANA MAHTO AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 74—Landlord and tenant—Abwab, *meaning of—Rent, what is—Construction of document—Appeal, second, whether maintainable.*

A question of the construction of a document, if it is a document of title and not merely a piece of evidence in the case, is a question of law, and the High Court will interfere in second appeal where the lower Appellate Court has misconstrued the document or has made no attempt to construe it. [p. 120, col. 2.]

The defendant executed a *kabuliyat* in favour of the plaintiff covenanting to pay Rs. 167-7-5 as *mal jama*, the amount being made up as follows:—*Mal jama* Rs. 156-9-0; *dasahra salami* Re. 1, *dasahra patta*, Rs 3, price of *ghee* Re. 1; price of *dahi*, Re. 1; *tahrir* of *patwari* Rs 4-14-5; total Rs. 167-7-5. It was contended on behalf of the defendant that Rs. 156-9-0 formed the rent, and that all the other items were illegal impositions not forming part of the rent:

Held, that, on a proper construction of the document, it was clear that the consideration for the use and occupation of the land was a certain amount of rent in cash and the price of certain other articles, and that the total of these items was to constitute one whole rent or *jama* which was payable by the defendant, and that there being no indication whatever that the price of the articles mentioned was in any case intended to be an imposition independent of the rent of the land which the defendant was leasing from the landlord, the amount claimed must be held to be part of the total rent payable for the land. [p. 121, col. 2.]

Appeal from a decision of the District Judge, Bhagalpur.

Mr *Purnendu Narayan Sinha*, for the Appellant,

RUDRESHWARI PRASAD SINGH *v.* DHANA MAHTO.

Mr. *Lalit Mohan Ghosh*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by the appellant for the recovery of arrears of rent for the years 1322 and 1323 F. S., and for four-annas *kist* of 1321 F. S., and the only question which I have to determine is whether certain items called Hak Patwari, Salami, etc., should be disallowed as illegal cesses or Abwabs. The lower Appellate Court is of opinion that they are not part of the rent but are illegal impositions by the landlord and has accordingly disallowed those items. The whole judgment of the lower Appellate Court consists of two sentences and is as follows:—"It is difficult to define exactly when items like these are really part of the rent and in the present case I am not inclined to hold so. I prefer to follow the Record of Rights, and do not agree with the Munsif holding it to be incorrect." Why the learned District Judge does not agree with the learned Munsif he does not say, but apparently he relies on the Record of Rights because the subject of investigation is difficult and somewhat tedious. It is greatly to be regretted that a judgment of reversal, such as the judgment of the lower Appellate Court is, should be so perfunctory in its character, and I am not prepared to accept this judgment as a judgment in accordance with law. Under ordinary circumstances I would have felt compelled to return the records to the lower Appellate Court in order to enable it to write out a proper judgment, but as the question involved in the appeal is a question of law and depends on the construction of a single document, I have thought it unnecessary to remand the case to the lower Appellate Court.

A preliminary question arises whether the finding of the lower Appellate Court is a finding of fact and, therefore, binding on this Court. "The question whether any particular item is, or is not, an Abwab, must depend upon the construction of the contract of lease in each case, and the question in each case is whether the sum claimed in each case is really part of the rent agreed upon to be paid as consideration for the lease;" *Upendra Lal Gupta* v. *Ataulla* (1). In this case there is a written contract of lease between the parties, and the rights and liabilities of the parties must depend on the construction of the document which constitutes the contract between the parties. It is well settled that a question of construction of a document, if it is a document of title and not merely a piece of evidence in the case, is a question of law, and the High Court will interfere in second appeal if the lower Appellate Court has misconstrued such a document. In this case, of course, the lower Appellate Court has not attempted to construe the document. It thought that it was a matter of some difficulty and, therefore, it threw the whole responsibility on the Revenue authorities. In my opinion, this is clearly a case entertainable by the High Court in second appeal.

As I have said before, the tenancy in this case commenced with a document dated the 15th Aghan 1310. This is a Kabuliyat executed by the respondents in favour of the appellant. By this document the tenants covenanted to pay *mal jama*, amounting to Rs. 167 7-5, annually together with Zemindari *rasum* year after year as per details given. The details are as follows:—Mal Jama, Rs. 156-9-9. Dasahra Salami, Re. 1. Dasahra Patta, 3 heads, price Rs. 3. Price of Ghee for Shami Puja, 1½ seer, Re. 1. Price of Dahi for Dasahra, Re. 1. Tehrir of Patwari, Rs. 4-14 5. It will be noticed that if all the items are added up, the total comes up to Rs. 167-7-5 which is described as the *mal jama* and which the tenants covenanted to pay "as per instalment year by year."

It is argued on behalf of the appellant that the document shows that the sums claimed are really part of the rent agreed to be paid as consideration for the lease and, therefore, no portion of it should have been disallowed by the lower Appellate Court. The respondent, however, argues that the details show clearly that Rs. 156-9-0 is the rent, and that all the other items are illegal impositions not forming part of the rent but forming part of the "Zemindari *rasum*" and that they were rightly disallowed by the lower Appellate Court.

The question was debated in the case of *Kalanand Singh* v. *Eastern Mortgage Agency*

(1) 36 Ind. Cas. 404; 21 C. W. N. 108.

Company, Ltd. (2). In that case the lease provided that the lessee shall pay to the lessor year by year a fixed sum of Rs. 4,310, of which the sum of Rs. 4,300 was described as *jama*, Rs. 5 as Salami Touzi and Rs. 5 as "Tehwari Dasahra." It was argued on behalf of the lessee that the imposition of Salami Touzi and Tehwari Dasahra was illegal and could not be recovered by the lessor. The learned Judges in the course of their judgment said: "Now, no doubt, if the lease had provided for an annual payment of only Rs. 4,300 and the landlord had at some subsequent date demanded from his tenant a further sum or sums by way of Salami and Tehwari, such additional demands, even if for sometime acquiesced in, would still be regarded as Abwabs or illegal cesses not recoverable in law. But where (as in the present case) the payment of these specific sums is provided for and agreed upon in the lease creating the tenancy, the stipulation for such payment is not, in our opinion, a stipulation or reservation for the payment of arbitrary and indefinite cesses but in the language of section 3 of Regulation V of 1812 is 'a definite clause in the engagement contracted between the parties,' which should be 'maintained and given effect to.'" The learned Judges proceeded to say: "In fact the two sums now in question, though not described in the lease as rent, are in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid." In the case of *Radha Charan Ray Chowdhry* v. *Golak Chandra Ghose* (3) Maclean, C.J., said that "a fixed sum mentioned in a lease as payable annually for collection charges, in addition to rent, the total being described as the *jama* and forming the consideration for the lease, is not to be regarded as an Abwab, but is in reality a part of the rent and recoverable as such."

The two cases above cited were considered and followed in this Court by Mullick and Atkinson JJ., in the case of *Sadanand Tewari* v. *Deb Nath Manjhi* (4). The learned Judges laid down that where upon the contract entered into by the defendants it was clear that the consideration for the use and occupation of the land was a certain amount of rent in cash and the price of certain quantities of paddy or *ghee* or both, as the case might be, and that the total of these two items was to constitute one whole rent or *jama* which was payable by the defendants, and there was no indication whatever that the price of paddy and *ghee* was in any case intended to be an imposition independent of the rent of the land which the defendant was leasing from the landlord, the amounts claimed for *ghee* and paddy must be held to be part of the total rent payable for the land and the objection on the ground that the Zemindar was claiming as Abwab would not be tenable.

I entertain no doubt whatever that, if the test laid down in these cases be the correct test for ascertaining whether particular items claimed as rent are or are not Abwabs, the items in the case before me which are objected to by the tenants must be held to be part of the rent agreed to be paid by the tenants to the Zemindar and must accordingly be allowed. As I read the agreement between the parties, the items in respect of Dasahra Salami, Dasahra Patta, price of *ghee* and price of Dahi are in substitution of a portion of rent and not in addition thereto. The total rent agreed to be paid by the tenants is clearly and definitely stated to be Rs. 167-7-5, and, in my opinion, it does not matter that he takes Rs. 10-14-6 out of the total rent, and not in addition thereto, under other heads, the charges being definite and certain in their nature and forming part of the consideration for the lease.

But it has been argued on behalf of the respondents that those cases were wrongly decided and that the learned Judges who heard those cases did not pay sufficient attention to two Full Bench decisions of the Calcutta High Court and a decision of the Judicial Committee in appeal from one of the Full Bench decisions. The learned Vakil insists that if the principle laid down in those cases be adopted, I am bound to hold that the items claimed in this appeal are illegal impositions and cannot be allowed. Having regard to the confident manner in which the case has been argued by the learned Vakil on behalf of the respondents,

(2) 19 Ind. Cas. 701; 18 C. L. J. 83.
(3) 31 C. 834; 8 C. W. N. 529.
(4) 37 Ind. Cas. 980; (1917) Pat. 287; 3 P. L. W. 270.

I have thought it necessary to deal with these cases very shortly in order to show that they were decided on their own facts and do not support the contention of the respondents.

The first case relied upon by the respondent is that of *Chultan Mahton* v. *Tilukdari Singh* (5). In that case the plaintiff himself claimed the disputed items as Abwabs, but he insisted that he was entitled to them as they were "old usual Abwabs" and had been paid by the tenants for many years. In other words, he admitted that the items claimed by him were Abwabs, but he relied upon custom as sanctioning his demand. It was admitted in the case that the contract of tenancy did not provide for the payment of these disputed items and that these Abwabs were not consolidated with the *assal* rent, the only question before the Full Bench being whether, assuming that the Abwabs in question had by the custom of the estate of which the lands formed part, been paid by the defendant and his ancestors for a good many years, they were legally recoverable by the plaintiffs although they were not actually proved to have been paid or payable before the time of the Permanent Settlement. And the Full Bench had no difficulty in answering the question in the negative. It will be noticed that Sir Richard Garth presided over the Full Bench and, in the course of his judgment, said as follows:—"They are called Abwabs by the plaintiff himself, and they are Abwabs, as it seems to me, to all intents and purposes, and I consider that the Regulation VIII of 1793, as well as the Rent Law of 1859, intended to put an end to the Abwab system, and to render them illegal." The same learned Chief Justice in the case of *Mahommed Fayez Chowdhry* v. *Jamoo Gazee* (6) laid down that "a condition in a lease that a tenant will pay to the landlord collection charges can be enforced, if the condition is definite and certain in its nature and forms part of the consideration for the lease." I cannot think that the late Chief Justice of the Calcutta High Court intended, in the Full Bench case, to go back on his opinion expressed three years previously and to hold that even if the conditions for payment were definite and certain in their nature and formed part of the consideration for the lease, they could not be insisted upon in a suit between the landlord and the tenant if they were not called rent by the landlord. The decision of the Full Bench was affirmed by the Judicial Committee in the case of *Tilukhdari Singh* v. *Chulhan Mahton* (7). Some of the Judges in a subsequent Full Bench case thought that the Judicial Committee went further than the Full Bench, but I cannot agree that it did. The Judicial Committee said: "If they were payable at the time of the Permanent Settlement, they ought to have been consolidated with the rent under section 54 of Regulation VIII of 1793. Not being so consolidated, they cannot now be recovered under section 61 of that Regulation. If they were not payable at the time of the Permanent Settlement, they would come under the description of new Abwabs in section 55." It seems to me that the decision of the Judicial Committee is an authority only for the proposition that if there are impositions on the tenant subsequent to the contract of tenancy, they cannot be enforced because it is impossible to say that they form part of the consideration for the lease.

The next case relied upon by the respondent is that of *Radha Prosad Singh* v. *Bal Kowar Koeri* (8). In that case the plaintiff alleged that the yearly rent of the tenant was Rs. 22-2-0. The defence was that the yearly rent was Rs. 18-10-6 and that the difference was made up of illegal cesses which were not recoverable. The lower Appellate Court came to the conclusion that the yearly rent was Rs. 18-10-6, although for years the tenant had paid Rs. 22-2-0 as rent. In coming to this conclusion the lower Appellate Court relied upon the *jamabandi* of 1286, which showed that the rent in 1286 was Rs. 18-10-6 and that the difference was made up of various impositions and charges. So far as facts are concerned it was established, therefore, that the original consideration for the letting was Rs. 18-10-6 and that the difference was

(5) 11 C. 175 (F. B.); 5 Ind. Dec. (N. S.) 876.
(6) 8 C. 730; 4 Ind. Dec. (N. S.) 471.
(7) 17 C. 131 (P. C.); 16 I. A. 152; 13 Ind. Jur. 251; 5 Sar. P. C. J. 408; 8 Ind. Dec. (N. S.) 625.
(8) 17 C. 726 (F. B.); 8 Ind. Dec. (N. S.) 1026.

made up of cesses which must have been subsequently imposed by the landlord. Ghose, J., in the course of his judgment said: "There is nothing to show that these items ever formed any part of the consideration for which the land was leased to the defendant; for if they did, they would, I think, be really rent, though described in the Zemindari papers under other denominations. They were apparently Abwabs imposed subsequent to the rent being fixed at Rs. 18-10-6; and it is not proved that the *ryot* at any time agreed to pay an enhanced rent including the said items as part of the rent." It is difficult to see how the actual decision of the Full Bench is or can be any authority in favour of the respondents' contention, though it must be freely admitted that certain observations of O'Kinealy, J., went further than the actual decision of the case demanded.

All the cases relied upon by the respondents were fully considered by the learned Judges in the case of *Kalanand Singh* v. *Eastern Mortgage Agency Co., Ltd.* (2). With reference to these cases, the learned Judges said as follows:—"In these cases there were no written engagements and the sums claimed represented impositions or demands made upon the *ryot* defendants at various times subsequently to the creation of their tenancies and settlement of their rents. It was, therefore, held, and no doubt properly held, that though in accordance with practice or custom the tenants had paid these impositions for a long period, yet by virtue of the provisions of sections 54, 55 and 61 of Regulation VIII of 1793, they were not legally recoverable." In my opinion the cases relied upon by the respondent do not support the broad contention advanced by him and I entertain no doubt whatever that every item is recoverable as rent if it did form part of the consideration for the letting, though it might not have been described in the lease as rent. If that test is applied in this case, then, in my opinion, all the items are recoverable as rent, as I have no doubt that the rent agreed to be paid by the tenant is Rs. 167-7-5 annually.

It was next contended by the learned Vakil on behalf of the respondent that, in any event, the item of Rs. 3 for Dasahra Patta (goats for Dasahra festival) must be disallowed, as goats can never stand for rent, and he relied on the case of *Gayratulla Sardar* v. *Girish Chandra Bhaumik* (9). It is true that that case supports the contention of the respondent, but, as no reasons are given for that decision, I cannot see on what principle that case was decided. The true test is to see, not whether any particular item is or can be rent, but whether it is in substitution of any portion of rent. If I were to disallow this item, the total rent payable by the defendant would be Rs. 164-7-5, although he agreed to pay Rs. 167-7-5 as rent. If Salami Touzi, Tehwari Dasahra and collection charges may be said to form part of rent, I cannot see on what principle it can be said that an item for Dasahra Patta is not recoverable as rent. Certainly the definition of rent in the Bengal Tenancy Act does not support the contention of the respondent. Having given the subject my most anxious consideration, I have come to the conclusion that the appellant is entitled to recover every item which the respondent agreed to pay or deliver to the appellant by his Kabuliyat, dated the 15th Aghan 1310. I would, therefore, allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore the jndgment and decree of the Court of first instance. The appellant must have his costs throughout.

Appeal allowed.

(9) 12 C. W. N. 175.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 347 OF 1917.

June 4, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.

PATESHWAR—DEFENDANT—APPELLANT

versus

AJODHIA—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—Partition proceedings affecting minor represented by guardian, whether can be challenged—Civil Procedure

PATESHWAR *v.* AJODHIA.

Code (Act V of 1908), O. XXXII, r. 3—Guardian ad litem, appointment of—Provisions, whether applicable to partition proceedings.

Where in imperfect partition proceedings under the U P Land Revenue Act a minor is represented by a guardian and no question of title is raised on his behalf, it is not open to him to challenge those proceedings subsequently by suit.

The provisions of the Civil Procedure Code regarding the appointment of a guardian *ad litem* for a minor defendant do not apply to partition proceedings under the U. P. Land Revenue Act.

Appeal against the order of the District Judge, Gonda, dated the 24th May 1917, confirming the decree of the Subordinate Judge, Gonda, dated the 2nd April 1917.

Mr. *Ram Bharose Lal*, holding brief of Mr. *Aditya Prasad*, for the Appellant.

Mr. *H. N. Misra*, for the Respondent.

JUDGMENT.—The dispute in this appeal relates to a number of villages which belonged to Dharamraj. Dharamraj had by one wife a son named Pateshwar and by another wife two sons named Ajudhia and Biddam. On the death of Dharamraj mutation of names was effected in favour of these sons. On the death of Biddam a question arose as to who should get his share. He had left a widow *Musammat* Gujrati. The Revenue Court allowed mutation of names to be effected in favour of Pateshwar and Ajudhia in equal shares. In the present suit Ajudhia claims to recover a half share out of the property of Biddam, alleging that mutation of names was improperly allowed in respect of that half share in favour of Pateshwar. In other words, he claims the entire property of Biddam, alleging that he was his full brother and lived jointly with him. He also claims mesne profits. The Courts below decreed the claim for possession but disallowed the claim for mesne profits, holding that no proof was given in regard to the latter.

The only points raised for consideration in this appeal are whether the plaintiff had any right to sue in face of the fact that the widow of Biddam was alive, and secondly, whether the claim of the plaintiff in regard to the villages Pipra Buzurg and Parsa Udekar was barred by section 2[illegible]3, clause (*k*) of the U. P. Land Revenue Act (III of 190).

In regard to the first matter, it appears that Pateshwar admitted that Ajudhia was living jointly with Biddam. Pateshwar himself was found to have separated from him in his lifetime. Ajudhia and Biddam having been joint, Gujrati could only claim maintenance.

In regard to the second point, the partition proceedings of the villages in question show that by virtue of an imperfect partition, separate *pattis* were formed and the land allotted to the share of Pateshwar was separated from that allotted to the share of Ajudhia. No question of title was then raised on behalf of Ajudhia by his certificated guardian. There is nothing to show that the Code of Civil Procedure was applicable to the partition proceeding. The U. P. Land Revenue Act (III of 1901) expressly mentions the portion of the Code of Civil Procedure which applies to proceedings under that Act.

The procedure regarding the appointment of the guardian *ad litem* provided by the Code of Civil Procedure is not one of them. The minor was properly represented by his mother and certificated guardian. The decisions in *Har Charan Singh* v. *Har Shankar Singh* (1) and *Aisha Begam* v. *Abdullah Khan* (2) are hardly applicable in view of the provisions of section 106 of the present U. P. Land Revenue Act (III of 1901), which lays down that the procedure prescribed for imperfect and perfect partitions shall be the same except where it is otherwise expressly declared. It is not open to the plaintiff, therefore, to go behind the partition proceeding

The appeal is allowed in so far that the claim of the plaintiff in regard to the disputed share in the villages Pipra Buzurg and Parsa Udekar, forming items Nos. 1, 4, 5 and 6 of List A appended to the plaint, shall be dismissed. In other respects the decree of the Court below will be confirmed. The parties will bear their own costs of this appeal.

Appeal partly allowed.

(1) 18 A. 59; A. W. N. (1895), 164; 8 Ind. Dec. (N S.) 745

(2) A. W. N. (1899) 190.

BHADAI SAHU *v.* MANOWAR ALI.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 966 OF 1917.

June 20, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

BHADAI SAHU—DEFENDANT—APPELLANT

versus

Shaikh MANOWAR ALI AND ANOTHER—PLAINTIFFS AND *Saiyid* MIR BADARUDDIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 25—Appeal—Remand, order of, under rr. 23, 25, whether competent—Failure to appeal against order of remand, effect of—Appeal, second Question of law, whether can be raised for first time—Question of fact, whether can be raised.

The landlord of a holding sued the recorded tenants thereof for rent and obtained an *ex parte* decree in execution of which he brought the holding to sale, the purchaser being defendant No 1 in whose favour the sale was confirmed. The plaintiffs instituted the present suit to set aside the sale, claiming to be private purchasers of a portion of the holding and alleging that defendant No. 2 was a private purchaser of the remainder. The trial Court decided all the material issues in favour of the plaintiff but dismissed the suit on the ground that it was not maintainable because the plaintiff had not applied under Order XXI, rule 90 of the Code of Civil Procedure to set aside the sale. The plaintiff appealed and the lower Appellate Court, disagreeing on the point of maintainability, set aside the whole decree and remanded the suit for trial, adding two new issues. The trial Court found that defendant No. 1 was *benamidar* for defendant No. 2 and decreed the suit, which decree was upheld on appeal. The defendant No. 1 appealed to the High Court and contended that the suit was not maintainable under Order XXI, rule 92 of the Code, and that the order of remand was not an order under Order XLI, rule 23, because the suit was not disposed of on a preliminary point, the trial Court having determined and recorded findings upon all the issues in the suit:

Held, that as the sole reason for dismissing the suit was that it was not maintainable, the suit was disposed of on a preliminary point and the fact that the Court decided the other issues in the suit made no difference, and that the defendant not having appealed from the order remanding the case, that order was now final. [p 2', col 2.]

It was also contended that the suit was barred by limitation under Article 2 of the first Schedule to the Limitation Act, there being an admission in the plaint that the plaintiff came to know of the sale more than a year before instituting the suit:

Held, that as this plea was not taken in either of the Courts below and as the determination of the point required a finding of fact after taking additional evidence, it could not be entertained in second appeal. [p. 127, col. 1.]

It was urged on behalf of the respondent that the sale was a nullity, inasmuch as after the decree one of the two judgment-debtors had died, and the sale was held without the issue of any process to his heirs:

Held, that as the point was not taken at any stage of the suit and no opportunity had been given of showing that the surviving judgment-debtor was entitled to represent the heirs of the deceased, it was impossible, upon the facts as found, to say that the sale was a nullity. [p. 128, col. 1.]

Appeal from a decision of the Subordinate Judge, Purneah.

Mr. *Hassan Jan*, for the Appellant.

Messrs. *Syed Mohammad Tahir* and *Narendra Nath Sen*, for the Respondents.

JUDGMENT.

MULLICK, J.—This is a litigation which has lasted six years. It appears that on the 25th September 1913 the plaintiffs brought a suit against three sets of defendants to set aside the sale of a non-transferable occupancy holding held by the defendants second party, namely, defendants Nos. 3 and 4.

The facts appear to be that defendant third party, Mr. Forbes, who is the landlord of the holding, brought a suit against the recorded tenants defendants Nos. 3 and 4 for rent, obtained an *ex parte* decree, and in execution brought the holding to sale. The purchaser at the auction was defendant No. 1 Bhadai. The sale was confirmed in November 1910.

The plaintiffs claim to be private purchasers of about four acres out of the holding and allege that the defendant No. 2 is a private purchaser of the rest of the holding.

They attacked the sale on the ground that there was fraud between the decree-holder and the defendant No. 2 in the matter of the suit, the decree and the sale. The Munsif who tried the suit in the first instance decided all the material issues in favour of the plaintiffs, but he came to the conclusion that the suit was not maintainable because the plaintiffs had not made an application under Order XXI, rule 90 of the Civil Procedure Code to set aside the sale, and that they could not be permitted to institute a separate suit for that purpose after confirmation.

The plaintiffs thereupon appealed, and the Subordinate Judge, disagreeing with the finding of the Munsif upon the point of maintainability, set aside the whole decree and remanded the suit for trial. At the same time he added two new issues, which ran as follows:—

(1) Whether the defendant No. 1 is a *benamidar* of the defendant No. 2: if not whether he is privy to the fraud by which the sale was brought about? and

(2) On what terms the sale should be set aside, if it be set aside at all?

The case then went back to the Munsif, who came to the conclusion that the defendant No. 1 was in fact the *benamidar* of the defendant No. 2. He held that in consequence of this finding it was not necessary to consider whether the defendant No. 1 was privy to the fraud by which the sale was brought about. The Munsif in the result decreed the suit against the defendants.

There was again an appeal and the Subordinate Judge affirmed the finding of the Munsif on the point of *benami* and dismissed the appeal.

The defendant No. 1 now comes on second appeal to us. The first point taken by the learned Vakil for the appellant is that under Order XXI, rule 92, of the Civil Procedure Code, no suit is maintainable after confirmation.

Now this point would perhaps have been a good point if the previous proceedings in this suit had not stood in the way of the appellant.

It appears that the order of remand made by the Subordinate Judge on the 28th April 1915 was made under Order XLI, rule 23, and also under rule 25 of the Civil Procedure Code. It is said that the order could not have been an order under rule 23, because the suit was not disposed of upon a preliminary point and because the Munsif had in fact determined and recorded findings upon all the issues in the suit.

In my opinion this argument is not well founded. The findings upon all the other issues except the issue as to maintainability were in favour of the plaintiffs, and the sole reason for dismissing the suit was that in the opinion of the Court the suit was not maintainable by reason of the provisions of Order XXI, rule 92.

It is quite clear in these circumstances that the suit was disposed of upon a preliminary point. The contention that a Court cannot be said to dispose of a suit upon a preliminary point if it takes the trouble to decide the other issues framed in the suit, cannot be entertained. Then it is said that inasmuch as there was an order framing two new issues and remanding the suit for trial of those issues, there was an order under rule 25, and the addition of such an order makes the whole order of remand one under section 151 of the Civil Procedure Code. The argument is that as it is not an order wholly and exclusively under rule 23 or rule 25 and is a composite order under the provisions of both rules, it must be an order made under the inherent powers of the Court. This argument too is one with which I have no sympathy. There is no reason why there cannot at one and the same time be an order under rules 23 and 25. The two orders, although made upon the same piece of paper, are in effect quite separate, and the party affected is competent to pursue the remedy by way of appeal provided by the Code in respect of each.

With regard to the order under rule 23, it is open to him either to appeal against the whole decree or to appeal against the order of remand only under Order XLIII.

With regard to the order under rule 25, he has no right of appeal against the order itself but he can attack the remand in second appeal against the final decree in the case: so that I see no difficulty in regarding the order of the Subordinate Judge in this case, so far as the preliminary point is concerned, as an order under rule 23.

Now it was open to the defendants to appeal against that order, or against the decree. They did neither. They might also, if they had succeeded in defeating the plaintiffs upon the preliminary point, have got the Court to set aside the order so far as it related to the trial of the two additional issues: but that is not the immediate point before us. The point immediately before us is whether the omission to appeal against the decision upon the preliminary point now renders the defendants incompetent to attack the decision of the Subordinate Judge regarding that point in second appeal. In my opinion clearly it does. The decision of the Subordinate Judge, therefore, holding that a suit was maintainable is, in my opinion, now final.

The next point raised by the learned Vakil is that the suit is barred by limitation,

It is pointed out that in the plaint there is an admission by the plaintiffs that they came to know of the sale more than a year before the suit was actually instituted.

Therefore, it is said that under Article 12 of Schedule I of the Limitation Act the suit is barred by time.

Now the difficulty in the way of the defendants on this point is, that the plea as to limitation was never taken in this form either in the Court of the Munsif or in the Court of the two Subordinate Judges who have dealt with the case. It is now taken for the first time in second appeal.

Now our rule is that if a point of law requires a finding of fact for its determination, we cannot allow it to be entertained in second appeal in this Court.

The admission relied upon in the plaint has to be construed and is always subject to be rebutted by evidence in the suit itself. There is no finding on any evidence adduced at the trial which would go to show affirmatively that all the plaintiffs did come to know of the sale more than twelve months before the institution of the suit.

I do not think in these circumstances that we should remand the suit for the taking of additional evidence upon this point. It is to be noticed that the only ground of limitation upon which the suit was resisted was that it came under the special limitation provided by the Bengal Tenancy Act.

With regard to this point the finding of fact in the Courts below was that the dispossession was not made by the landlord. It is now attempted to show that the defendant No. 1 was put into possession in furtherance of a conspiracy by the landlord and that, therefore, the dispossession was by the landlord himself.

The rule in this Court is that a Court will not favour these allegations of constructive dispossession, and it must be shown on clear evidence that the landlord himself was the party who dispossessed the tenant.

The decisions which have proceeded on what has been called the landlords having a hand in the ouster cannot, in my opinion, be followed in the present case.

Therefore, the point of limitation also fails. But the third ground taken by the learned Vakil for the appellant seems to me one which should succeed. There is no finding by any Court that the defendant No. 2 had any connection with the fraud by the decree-holder. The last Court of fact has indeed found that the decree was a valid decree but that the sale was irregular and fraudulent, but I cannot discover a single sentence in any of the judgments to the effect that the defendant No. 2 had anything to do with the decree-holder in bringing the properties to sale.

The learned Vakil for the respondents contends that it was accepted in the Court of the Subordinate Judge, who first dealt with the case and who framed the additional issues, that the defendant No. 2 was in conspiracy with the decree-holder and, therefore, all that it was necessary to determine for the ultimate decision of the suit was whether or not the defendant No. 1 was entitled to set up the plea of being a *bona fide* purchaser for value.

I am unable to see upon what evidence such a contention can be supported. There is nothing to show that there was any admission by the defendants that the defendant No. 2 was in conspiracy and concert with the decree-holder. The omission of the defendant No. 2 to enter appearance in the original suit does not dispose of the matter. It was incumbent upon the plaintiffs to establish an affirmative case that notwithstanding the *benami* purchase by the defendant No. 1 on behalf of the defendant No. 2, the sale could be set aside against the defendant No. 2. The defendant No. 1 was throughout contending that the sale could not be set aside and, therefore, the finding that he was a *benamidar* did not dispose of the substantial question whether or not the principal and the real purchaser was a *bona fide* purchaser for value.

We must assume, therefore, in the absence of evidence that there was no fraud on the part of the defendant No. 2.

The learned Vakil for the respondents, however, takes another ground for the purpose of attacking the sale. He contends that after the decree one of the two judgment-debtors died and the sale was held without any issue of process upon his heirs. It is contended that the sale is, therefore, a nullity.

Now the sale can only be a nullity if it is held without jurisdiction. Reliance is placed upon the case of *Khiarajmal* v. *Daim* (1). But that case does not really assist the respondents. In that case the property of two persons who were not represented in the trial was sold in execution; and it was held that the omission to implead them as defendants rendered the decree void and without jurisdiction and that the subsequent sale was bad because the decree itself was bad.

Their Lordships of the Privy Council distinguished the case of *Malkarjun* v. *Narhari* (2), on the ground that in the latter case the decree was a perfectly good decree and the omission to bring upon the record the true heir of the deceased judgment-debtor was only an irregularity which could not vitiate the sale held with jurisdiction.

The principle of *Khiarajmal's case* (1) above referred to has been followed in this Court in the case of *Syed Muhammad Rafi* v. *Syed Muhammad Askari* (3).

It is impossible, therefore, to say that the sale in the case now before us was a nullity. The point, moreover, was never taken at any stage, and it is possible that if it had been taken, the defendants might have been able to show that the sole judgment-debtor against whom the execution proceedings were continued was entitled to represent the heirs of the deceased.

The result, therefore, is that the appeal succeeds and the decree of the lower Appellate Court is set aside with costs in all Courts. The suit of the plaintiffs will be dismissed.

JWALA PRASAD, J.—I agree.

Appeal accepted.

(1) 32 C. 296; 1 C. L. J. 584; 32 I. A 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201 (P. C.); 2 A. L. J. 71; 7 Bom. L. R. 1.

(2) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 10 M. L. J. 368; 7 Sar. P. C. J. 734; 27 I. A. 216 (P. C.).

(3) 37 Ind. Cas. 433; 1 P. L. J. 261; 3 P. L. W. 390.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 353 AND 354 OF 1918.

February 26, 1919.

Present:—Mr. Daniels, A. J. C.

KANHAIYA LAL—DEFENDANT—APPELLANT

versus

MUNNA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easement, natural—Water, flow of, from higher to lower level—Higher and lower owners, rights of.

Where there is a competition between the rights of the owner of land on a higher level to let his water pass in its natural flow without obstruction and the right of the owner of the lower land to deal with it as he likes, the latter right must give way to the former specially where its free exercise would obstruct the passage of water and would cause damage to the *abadi*. In such a case the owner of the lower land has no right to erect a *bund* and thus to obstruct the flow of water. [p. 129, cols. 1 & 2]

Appeals against the decree of the Subordinate Judge, Bara Banki, dated the 10th June 1918, modifying that of the Munsif, Fatehpur, Bara Banki, dated the 28th February 1918.

Messrs. *B. N. Srivastava* and *Rajeshri Prasad*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra* and Babu *Sarju Prasad*, for the Respondents.

JUDGMENT.—These cases relate to the overflow of the water of the tank No. 216/1 in years of heavy rainfall. It appears that in such years the overflow of this tank passes, as the lower Court has found, through a plot No. 218/1 belonging to the appellant Kanhaiya Lal, in which he has planted fruit trees. In the year 1917 he had built a high bank or *bund* to prevent the water passing on to his plot. The result was to force the water over the inhabited site of the village with risk of very serious consequences to the houses of the inhabitants. The latter applied to the Sub-Divisional Officer, who ordered the demolition of the *bund*. As a result two suits were launched which have resulted in the connected appeals now before me. The appellant Kanhaiya Lal asked for a declaration that there was no passage of rain water across his land and for an injunction preventing the opposite party from doing anything to cause the water so to flow. The respondents asked for a perpetual injunction debarring the appellant from preventing the flow of water across the land.

KANHAIYA LAL *v.* MUNNA.

The parties in their pleadings set up two totally divergent routes by which they alleged the water ordinarily flowed. The Munsif appointed a Commissioner, who, after a careful inquiry on the spot, came to the conclusion that the course alleged by the respondents was the only possible course in which the water could flow in a season of heavy rain.

Exception is taken to this finding on the ground that the Commissioner (not being an engineer or surveyor) did not take levels and that owing to the respondents not being able to state definitely whether they claimed the right as an easement or as a natural right, they were prejudiced and did not adduce evidence on the subject which they might, possibly otherwise have adduced. On this point I am not prepared to interfere. The report of the Commissioner and the finding of the lower Appellate Court are very clear and are decisive in favour of the respondents. The question of pleadings I shall have to refer to later, but so far as this point is concerned, it certainly is not the case that the appellant was prevented from producing any evidence. The respondents stated the facts fully both in their plaint in their own suit, and in their written statement in the cross suit, and left the Court to decide as to the nature of the right to which they were entitled on those facts.

The lower Appellate Court has decided the appeal on the basis of the rulings in *Ambica Saran Singh* v. *Debi Saran Singh* (1) and *Kaseswar Mukerjee* v. *Annoda Prosad Patra* (2), on the ground that the natural flow of the water is across the appellant's land and that there is a natural right in favour of the respondents not to have that natural flow interfered with. The appellant in reply relies strongly on the case of *Mahamahopadhyaya Ringachariar* v. *Municipal Council of Kumbakonam* (3). In that case it was held that where there is a competition between two natural rights the right of the owner of higher land that the owner of the lower land shall allow the water to flow over his land from the higher land and the natural right of the owner of lower land to deal with it as he likes and to build on it as he wishes to, the former right is the weaker and must give way to the latter. This decision may be all right with reference to its own circumstances. It was concerned with a plot of land in a Municipality, where the right of building is of supreme importance and where it is easy to arrange for the drainage of the surface water. This case has been distinguished by the same High Court in *Sankarappa (Ramasawmy) Naicker* v. *Pari (Rasi) Naicker* (4), where the right of the owner of the upper agricultural land to let his water flow in its natural flow without obstruction by the owner of the lower land has been specifically affirmed and where it was held that the owner of the lower land was not entitled to raise a *bund* which would have the effect of seriously interfering with the upper owner's cultivation. Certainly where the question is, as in this case, between possible damage to the appellant's fruit trees (which he can avoid by making a definite channel for the escape of the water) and the probable washing away of a considerable portion of the *abadi*, there can be no question that the right to the natural passage of water is the more important right.

The appellant has further attempted to distinguish this case on the ground that the question arises only in exceptional years. As to this, years of heavy rainfall may occur irregularly but they do occur with sufficient frequency to make some provision for the disposal of the flood water necessary, specially in view of very serious consequences which may ensue for failure to do so.

Cross-objections have been filed by the respondents in both appeals and have been pressed on the question of costs only. The lower Appellate Court disallowed costs of the original Court, on the ground that the failure of the respondents to state definitely whether they based their claim on easement or on natural right had necessitated the introduction of a considerable amount of unnecessary evidence and thereby involved unnecessary expense to the opposite party. This is a very reasonable view to take and I see no reason to interfere with the order passed in this respect.

The result is that the appeals and the cross-objections are both dismissed with costs.

Appeals dismissed.

(1) 24 Ind. Cas. 91; 12 A. L. J. 685.
(2) 41 Ind. Cas. 863; 22 C. W. N. 666.
(3) 29 M. 539; 1 M. L. T. 333; 16 M. L. J. 582.
(4) 21 Ind. Cas. 62; 38 M. 149; 25 M. L J. 276; (1913) M. W. N. 640.

KHILLOORAM LOKURAM *v.* LOUIS DREYFUS & CO.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 2 OF 1915.

February 19, 1917.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

MESSRS. KHILLOORAM LOKURAM—APPLICANTS

versus

MESSRS. LOUIS DREYFUS & Co. AND OTHERS—OPPONENTS.

Arbitration Act (IX of 1899), ss. 4 (a), 19—Arbitration, reference to—Suit by one party—Stay of suit, order for—Court competent to pass order—Award, validity of.

K., a Shroff at Multan, entered into an agreement with L. D. and Co., a firm at Karachi, to finance their Multan Agents. The agreement contained a clause for submission of differences to arbitration. *K.* made a demand on L. D. and Co. in connection with an advance made by him. L. D. and Co., on 11th May, refused to meet the demand, claimed arbitration, appointed an arbitrator and called on *K.* to appoint his arbitrator within 7 days. *K.* made no reply and L. D. and Co. appointed a second arbitrator on behalf of *K.*, and on 21st May informed *K.* On 23rd May *K.* repudiated the arbitration and filed a suit in the Court of the Sub-Judge at Multan. L. D. and Co. proceeded to arbitration in Karachi and on 17th June an award was made and L. D. and Co. made an application for the award to be filed under the Arbitration Act. On 4th August the Sub-Judge stayed the suit. It was contended that the case was not one to which the provisions of the Arbitration Act applied, that the award was invalid by reason of a concurrent suit in the Court of the Sub-Judge of Multan, the arbitrators having no jurisdiction to proceed after the suit was filed; that the stay order made by the Sub-Judge of Multan was incompetent as no such order could be made after a reference to arbitration and the order did not validate the arbitration proceedings, and that such order could only be made by a District Court:

Held, (1) that the Arbitration Act applied to the case and the fact that *K.* resided in an area where that Act was not applicable did not affect the matter, as his suit could have been instituted at Karachi where the firm on whom he made the demand carried on business and where that Act was applicable; [p. 131, col. 1; p 135, col. 1.]

(2) that the mere fact of a suit being filed did not invalidate arbitration proceedings, and as the Court made a stay order, the effect of which was to decline jurisdiction in favour of the arbitrators, the award was a valid award and the Court had jurisdiction to allow it to be filed; [p. 133, cols. 1 & 2; p. 135, cols. 1 & 2.]

Per *Pratt, J. C.*, (1) that the stay order made by the Sub-Judge was an order which he was competent to make either before or after reference and award; [p. 135, col. 1.]

(2) that upon a proper construction of section 4 (*a*), read with section 19, of the Arbitration Act, the Court which could make the stay order was the Court in which the suit was pending and that, therefore, the Sub-Judge was competent to make the order. [p. 135, col. 1.]

Mr. *Rupchand Bilaram*, for the Applicants.

Mr. *Gulabrai Nihalchand*, for the Opponents.

JUDGMENT.

PRATT, J. C.—This is an application for revision of an order allowing an award to be filed under the Indian Arbitration Act.

The application proceeds on two main grounds; (1) that the case is not one to which the provisions of the Indian Arbitration Act apply; and (2) that the award is invalid by reason of a concurrent suit in the Court of the Sub-Judge of Multan. Other objections raised in the application are not fit grounds for revision and these are the only two which we shall consider.

The applicant Khillooram is a Shroff in Multan who used to finance the Multan Agents of Messrs. Louis Dreyfus and Co. under an agreement which contained a clause for submission of differences to arbitration. He made a demand on Louis Dreyfus in connection with an advance made by him to that firm's Multan Agents. Messrs. Louis Dreyfus replied on the 11th May refusing to meet the demand, claiming arbitration and appointing an arbitrator and requesting Khillooram to appoint his arbitrator within 7 days. Khillooram, made no reply and Messrs. Louis Dreyfus wrote again on the 21st May appointing a second arbitrator on behalf of Khillooram, which they were empowered to do by the arbitration clause in the agreement.

On the 23rd May, Khillooram telegraphed repudiating arbitration and on that day filed a suit in the Court of the Sub-Judge of Multan.

Louis Dreyfus, however, proceeded with arbitration in Karachi and on the 17th June an award was made by the arbitrators.

On the 4th August, an order was made by the Sub-Judge of Multan staying the suit.

It is contended that as the money was payable in Multan, and Seth Khillooram lived in Multan, the suit would have had to be instituted in Multan where the Act is not applied and so arbitration in Karachi was incompetent. But this was a demand by Seth Khillooram on Louis Dreyfus and as that firm carries on business in Karachi,

Khillooram's suit could have been instituted here. The Arbitration Act, therefore, applies.

The second ground involves an attack upon the award for different reasons.

It is first contended that the arbitrators had no jurisdiction to proceed after the suit was filed and that, therefore, those proceedings and the award are invalid.

In the second place, it is contended that the stay order made by the Sub-Judge of Multan is incompetent as no such order can be made after a reference to arbitration, and that, therefore, this order does not validate the arbitration proceedings.

And lastly it is said that such an order could only have been made by a District Court.

Now as to the first point, it is true that Messrs. Louis Dreyfus and Co. proceeded with arbitration although a suit had been filed against them by Khillooram on the same cause of action. But there is no provision in the Indian Arbitration Act that forbids them from doing so. If the mere filing of the suit had the effect of invalidating a pending arbitration, this anomalous result would ensue—that after an order were made staying the suit it would be necessary to recommence arbitration proceedings *de novo*.

Again I think it clear that the Legislature does contemplate and has made, provision for, concurrent proceedings before an arbitration and before a Judge.

In 1872 section 28 of the Contract Act enacted that agreements which absolutely ousted the jurisdiction of the Courts were void. To this section there were two exceptions. Exception I referred to the special case dealt with in *Scott* v. *Avery* (1), where the agreement provides that no action shall be brought until after the award of the arbitrator. As explained in the *Coringa Oil Company, Limited* v. *Koegler* (2), there is here no ouster of the jurisdiction of the Court for there is no cause of action until an award has been made; and the second part of the exception was repealed in consequence of this decision. But Exception II is very important, for it saved agreements to refer to arbitration from the scope of the section. It was thus clearly enacted that agreements to refer to arbitration are not agreements to oust the jurisdiction of the Court. This was in accordance with the English rules that the pendency of an arbitration proceeding cannot be pleaded as a bar to a suit.

In 1877 section 21 of the Specific Relief Act enacted the general law that contracts to refer to arbitration cannot be enforced by suit, but can be enforced by the procedure of the Code of Civil Procedure, *i. e.*, section 326 of the Code of 1859 and section 523 of the Codes of 1877 and 1882, and now rule 17 of the Arbitration Schedule to the Code of 1908.

It further enacted that the existence of such a contract was not a bar to a suit unless the plaintiff before suing had refused to arbitrate. This exception paid greater respect to arbitration than the English Law did. Under that law the party who had refused to arbitrate might sue, but by the Specific Relief Act he was debarred from suing though the innocent party might still seek his remedy in Court.

In 1899 the Indian Arbitration Act set up a special machinery for arbitration in the cases to which it applied in substitution of the provisions of the Civil Procedure Code. In these cases a contract to refer disputes to arbitration could not be specifically enforced by suit but could be enforced by the provisions of the Indian Arbitration Act, *i. e.*, by sections 8 to 15. But the last 37 words of section 21 of the Specific Relief Act were repealed so that a suit could be filed on the same cause of action even by a party who had refused to arbitrate. For this, provision was made in section 19 which gave power to apply for stay of the suit. The refusal to arbitrate was no longer a bar to the suit but the suit could be stayed by application under section 19.

There was thus a difference between cases where arbitration was enforcible under the Civil Procedure Code and the cases where it was enforcible under the Indian Arbitration Act. In the former a refusal to arbitrate was a bar to the suit, in the latter it was not. This distinction was abolished when the new Code of Civil Procedure was enacted.

(1) (1853) 8 Ex. 487; 22 L. J. Ex. 157; 17 Jur. 810; 155 E. R. 1442; 91 R. R. 580.

(2) 1 C. 466; 1 Ind. Jur. 170; 1 Ind. Dec. (N. S.) 291.

In 1908 the Arbitration Schedule of the Civil Procedure Code repealed by rule 22 the last 37 words of section 21 of the Specific Relief Act and made a provision for stay of the suit by rule 18. The relation of the suit to arbitration was, therefore, the same whether the arbitration was enforcible under the Civil Procedure Code or under the Indian Arbitration Act.

Now what are the inferences to be drawn from these series of enactments? In the first place, section 28 of the Contract Act makes it clear that an arbitration agreement is not to be regarded as an attempt to oust the jurisdiction of the Court and is not, therefore, invalid. If the agreement is not in itself invalid, why should the filing of suit invalidate proceedings held in pursuance of a lawful agreement?

Next the Specific Relief Act makes the refusal to arbitrate a bar to the suit. Here it is the arbitration agreement which operates to invalidate the suit.

Lastly this bar on the suit is removed and provisions for stay of the suit are substituted.

Now if the mere filing of a suit superseded arbitration, these provisions for stay of suit would be unnecessary for the arbitration proceeding or agreement would be dead as soon as the suit was filed.

The cases decided prior to the enactment of the provisions for stay of suit lead to the same conclusion. In *Harivalabdas Kalliandas* v. *Utamchand Manekchand* (3), Sir Charles Sargent held that parties to a pending suit might agree to refer to arbitration and enforce the agreement by application under section 523 of the Civil Procedure Code. This was followed by Sir Lawrence Jenkins in *Pragdas* v. *Girdhardas* (4), where parties to a suit were to obtain an award by arbitration while the suit was pending and record it as a compromise of the suit.

These cases are no longer good law, because they have been rendered obsolete by the provisions for stay of suit but they prove that the mere filing a suit does not supersede arbitration.

The effect of the provisions for the stay of suit is that as soon as a stay order is refused or as soon as a party has by pleading in the suit waived arbitration, the arbitration proceedings are invalidated and the Court alone has seizin of the dispute. But, on the other hand, if a stay order is made, the arbitration proceedings may commence or may continue and the rights of the parties are decided by the arbitrator.

This was decided in *Doleman & Sons* v. *Ossett Corporation* (5). There an award made pending suit was held to be invalid for no application had been made for a stay order. There are no doubt some expressions in the judgment of Fletcher Moulton, L. J., which might bear the construction that the filing of a suit invalidates arbitration, but that case was not before the Court. The judgment was dealing with an arbitration which had begun after the suit had been filed; the defendant had pleaded to the suit instead of applying for a stay order. As I read the judgments, they depend solely on the defendant's failure to obtain a stay order and Fletcher Moulton, L. J., said at page 269: "There is nothing strange in the conclusion that the Court has sole seizin of the dispute *where it has allowed the action to proceed.*" Again Farwell, L. J., said at page 273: "It is not a question of revoking the submission; it is a question of the construction of section 4 of the Act (which corresponds to section 19 of the Indian Act). It is impossible to suppose that the Court, on refusing an application to stay, and deciding that the suit must go on, means to allow the arbitration to go on also with the result that the decision first obtained will prevail, or that one or other proceeding will be an idle waste of time and money." When Farwell, L. J. said that it was not a question of revoking a submission, he was dealing with an argument that the arbitration must prevail as the Court had not revoked the submission. The answer to this was that it was not a question of the authority derived by the arbitrator from the party. He may have that authority but it ceases to confer jurisdiction upon him as soon as the Court decides to try the suit. (I may perhaps pause here to observe that the remark in *Dhanpatmal Diwanchand* v. *Kishinlal Indraj* (6), that the delegation of authority to an arbitrator could, until the passing of the

(3) 4 B. 1; 4 Ind. Jur. 410; 2 Ind. Dec (N. s.) 511.
(4) 26 B. 76; 3 Bom. L. R. 431.
(5) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.
(6) 35 Ind. Cas. 536; 10 S. L. R. 1.

Indian Arbitration Act, be revoked, is an obvious slip.] The judgment of Lord Romilly in *Pestonjee Nussurwanjee* v. *Manockjee & Co.* (7) explained that this obsolete common law doctrine was abolished by the Civil Procedure Code of 1859 and indeed this case was cited by the same Judge in *Sanday Patrick & Co.* v. *Ramrattan* (8). The authorities on this point are collected at pages 54 and 55 of Mr. Gopaldas's work on Arbitration.

I am, therefore, of opinion that the mere fact of a suit being filed does not invalidate arbitration proceedings. It has been faintly suggested that the award has been improperly procured because the arbitrators should not have proceeded after Khilloomal had filed his suit. In the cases of *Louis Dreyfus & Co.* v. *Seth Shivakram Harkarandas* (9) and *Sawyer* v. *Louis Dreyfus & Co.* (10) it was said that an arbitrator may proceed in spite of a suit filed after the reference to the arbitration, but that when the suit is filed first the party must not seek to oust the jurisdiction of the Court by appointing arbitrators. I think that there is no good ground for this distinction. Since the law has provided for stay of the suit so no party can oust the jurisdiction of the Court, for it is the Court that decides whether it should try the suit or not. The Court comes to this decision in the exercise of its jurisdiction. If the matter is tried by the arbitrator, it is not because the Court's jurisdiction is ousted but because the Court by making a stay order commits the matter in dispute to the arbitrators. If the party to an agreement to arbitrate files a suit in violation of the agreement, there is no misconduct in the other party seeking to enforce the agreement by appointing arbitrators. But he does so at his own risk, for if the Court refuses to stay the suit the arbitration proceedings will become void. Similarly if the party who has filed the suit ignores the arbitration proceedings, he also does so at his own risk, for if the Court stays his suit he is bound by the arbitration proceedings.

The filing of the suit did not, therefore, affect the validity of the reference to arbitration, and as the Court made a stay order the arbitrators had jurisdiction to make their award. The next two points affect the stay order.

The reference to arbitrators was made on the 21st May, and the suit was filed on the 23rd May. It is said that section 19 of the Indian Arbitration Act is only applicable before a reference has been made to arbitrators. This is the view expressed in *Sawyer* v. *Louis Dreyfus & Co.* (10) and *Dhanpatmal Diwanchand* v. *Kishinlal-Indraj* (6). Curiously enough an exactly opposite view has been taken by the Calcutta and Bombay High Courts in *Ramjidas Poddar* v. *Howse* (11) and *Peruri Suryanarayan & Co.* v. *Gullapudi Chinna* (12). The Calcutta and the Bombay cases decide that the stay order can only be made after reference. They proceed on the assumption that the word "submission" in section 19 refers to the delegation of authority to an arbitrator. The judgment of Fletcher Moulton, L. J., in *Doleman & Sons* v. *Ossett Corporation* (5) (at pages 270 & 271) completely disposes of this fallacy. The word submission in section 19 (or in section 4 of the English Act) means the agreement to submit and is so defined in section 4 (*b*). The opposite construction is said in *Dhanpatmal Diwanchand* v. *Kishinlal Indraj* (6) to be supported by the history of the section and the wording of the section. The history of the section has already been discussed. It is said that the section is an indirect means of compelling specific performance of contracts to refer to arbitration, and must, therefore, be applicable only when the contract has not been performed by a reference. But the Judge is wrong in saying that before the Arbitration Act contracts to arbitrate could not be specifically enforced. He overlooks the provisions of the Civil Procedure Codes of 1859, 1877 and 1882. It is true that the effect of the section is to leave no other remedy open but arbitration—but it is an error to regard the section as a mode of specific performance. That is already provided for by sections 8 to 15 of the Act. The real purpose of the section is to prevent the conflict of jurisdiction which would arise if there were concurrent proceedings before a Judge and an arbitrator. The difficulty

(7) 12 M. I. A. 112; 10 W. R. 51; 2 Suth. P. C. J. 164; 2 Sar. P. C. J. 390; 1 Ind. Jur. (N. S.) 69; 20 E. R. 283.
(8) 7 Ind. Cas 590; 4 S. L. R. 14.
(9) 1 S. L. R. 255.
(10) 20 Ind. Cas. 504; 7 S. L. R. 1.
(11) 35 C. 199.
(12) 4 Ind. Cas. 133; 34 B. 372; 11 Bom. L. R. 106.

is well illustrated by the case itself, where the Judge refusing to apply section 19 had to fall back upon his inherent jurisdiction under section 151 of the Civil Procedure Code. It was said in *Sawyer* v. *Louis Dreyfus & Co.* (10) that there can be no conflict of jurisdiction between the Court and the arbitrator, because the original cause of action is merged in the agreement to refer. But this is incorrect, for the Court and the arbitrator both adjudicate on the original cause of action. Moreover the case of *Doleman & Sons* v. *Ossett Corporation* (5) now makes it quite clear that it is the conflict of jurisdiction that the section is intended to remove. That being so, the reason for resort to the section is more urgent after the reference than before; in *Doleman & Sons* v. *Ossett Corporation* (5) the award had been made before the defendants filed their written statement and yet it was the ground of the decision that no stay order had been applied for. Clearly, the Judges were of opinion that a stay order could be made not only after reference but even after award (as appears to have been the case here). There is nothing in the wording of the section that it is only applicable before a reference. The phrase "party to a submission" means party to an agreement to submit and is equally applicable before and after the reference. The phrase "should not be referred" does not limit the section to matters which have not already been referred. They have nothing to do with the stage which the arbitration proceedings have reached. They refer to such considerations as the nature of the subject-matter of the dispute or even the conduct or capacity of a nominated arbitrator. *Freeman* v. *Chester Rural Council* (13). Our conclusion, therefore, is that an order under section 19 can be made both before and after reference or award.

The last objection raised is that the stay order under section 19 of the Indian Arbitration Act can only be made by the District Court. In *Lucas Ralli* v. *Noor Mahomed* (14) the High Court of Bombay stayed a suit pending in the Court of Small Causes. It was assumed that the Court referred to in section 19, was the Court as defined in section 4 (*a*), *i.e.*, the High Court in the presidency town and the District Court elsewhere. It was also said that jurisdiction to stay a suit in another Court was impliedly confirmed by the section. I think that if the section is intended to confer such a power and to override section 56 (*b*) of the Specific Relief Act, it would have done so by express and affirmative words. Again the assumption that the Court is the Court as defined in section 4 (*a*) overlooks, I think, the fact that the definition is subject to a proviso of repugnancy in the context. As the section gives no power to the High Court and District Court to stay suits in other Courts, the definition is repugnant to the context of the section. There is no possibility of a repugnancy in any other section and the definition seems to have been made subject to repugnancy of context in view of section 19. The Act sets up a machinery for enforcing arbitration in cases which can be filed [*Lucas Ralli* v. *Noor Mahomed* (14)] in a presidency town or [*Morriston Tinplate Co.* v. *Brooker* (15)] in a local area to which the Act is applied. It applies to cases within these areas only but it extends to the whole of British India. Not only because the general law as to specific relief is altered but also because arbitration within these areas may (as in the present case) affect suits outside those areas. The definition in section 4 is of the Courts which control and enforce the arbitration in these places, *i. e.*, a High Court in a presidency town and a District Court in a local area to which the act is extended. I think the words "elsewhere the Court of the District Judge" mean the Court of the District Judge in any other local area and have no reference to Courts outside that area. The construction put upon the section in *Lucas Ralli* v. *Noor Mahomed* (14) would leave it in doubt which District Court should make the stay order—the Court of the local area where the arbitration proceedings are being held or the Court outside that area where the suit has been filed. The expression "stay the proceedings" and the absence of any

(13) (1911) 1 K. B. 783; 80 L. J. K. B. 695; 104 L. T. 368; 75 J. P. 132.
(14) 31 B. 236; 8 Bom. L. R. 955.
(15) (1908) 1 K. B. 403; 77 L. J. K. B. 197; 98 L. T. 219; 24 T. L. R. 224.

provision as to notice to the other party indicate that the phrase is used in the same sense as in section 20 of the Civil Procedure Code of 1882 and that the Court is the Court in which the proceedings are held.

Lastly the Legislature could not have intended that a Court that had not seizin of the dispute should intervene and decide whether the Court of trial should or should not give way to the arbitrator. The Court of trial has cognizance of the subject-matter of the dispute and is in a better position to decide whether there should or should not be arbitration. This is also the rule in England. *Morriston Tinplate Co.* v. *Brooker* (15).

The stay order made by the Sub Judge of Multan in the suit pending before him was an order that he was competent to make. He could make it either before or after reference and award. By so doing he has declined jurisdiction in favour of the arbitrators. The award, therefore, is a valid award and the Court has jurisdiction to allow it to be filed.

I would reject this application with costs.

HAYWARD, A. J. C.—I concur that the applicant Khillooram could have instituted his suit in Karachi, as the subject-matter was the recovery of an advance from the opponents Louis Dreyfus & Co. of Karachi. The dispute, therefore, fell by reason of section 2 within the provision of the Arbitration Act.

I also concur that the suit subsequently filed by the applicant in the Court of the Sub-Judge, Multan, did not invalidate the arbitration proceedings promoted by the opponents under the Arbitration Act. The applicant claimed recovery of the advance from the opponents under a contract between the parties, which contained the usual arbitration clause providing for the reference of any dispute, which might arise, to arbitrators, thereupon to be appointed. The applicant's claim was disputed by the opponents, but he did not file his suit to recover the amount in the Court of the Sub-Judge of Multan, until he had heard that the opponents had appointed arbitrators in the manner provided by the arbitration clause for settlement of the matter by arbitration. The object of filing the suit obviously was to prevent arbitration proceedings under the Arbitration Act. It has been contended on the authority of *Doleman & Sons* v. *Ossett Corporation* (5) that that object was attained and that the suit filed in the Court of the Sub-Judge of Multan invalidated the arbitration proceedings and eventual award under the Arbitration Act.

Now the applicant would, it is true, have been liable merely for damages for breach of his contract to refer to arbitration under the common law. He would even have been entitled to revoke the authority of duly appointed arbitrators before their award and there would have been no means of preventing the prosecution of his regular suit in Court under the common law. But that position has been materially modified by the Arbitration Act. Parties have no longer the liberty to break their contracts to refer to arbitration. They can be compelled to fulfil them by regular process under the Arbitration Act. They have no longer the unrestricted right to revoke the authority of duly appointed arbitrators. They can only do so with leave duly obtained from the Court under section 5 of the Arbitration Act. They have no longer the unrestricted right to prosecute regular suits in Court. They can be prevented by stay order under section 19 of the Arbitration Act. It would appear, therefore, that the authority of the arbitrators would remain unaffected by the subsequent suit, as pointed out in the case of *Sawyer* v. *Louis Dreyfus & Co.* (10) and of *Dhanpatmal Diwanchand* v. *Kishinlal Indraj* (6), in default of revocation with leave of the Court under section 5 of the Arbitration Act. Nor would that authority apparently be affected by mere omission to seek stay of such subsequent suit under section 19 of the Arbitration Act. The actual submission to such suits or refusal of stay orders might well be regarded as implied revocation with the leave of the Court. It should be observed that the case of *Doleman & Sons* v. *Ossett Corporation* (5) was not a subsequent but a prior suit and that the parties had both submitted to the jurisdiction and disentitled themselves from seeking stay of the proceedings of

the Court. It would be mere 'obiter' to consider here the effect of prior suits but it should be observed that caution should be necessary in applying to Subordinate Courts in India the 'dicta' in that case as to the effect of such suits, particularly as there was a difference of opinion among the Judges based on the dignity of the High Court in England.

It does not appear to me to be strictly necessary to consider the consequence of omission to seek stay of the suit, because stay was as a matter of fact sought and granted by the Court of the Sub-Judge of Multan and that order does not appear to have been challenged except in argument in this Court. But it seems desirable in view of the detailed discussion before us to express my dissent from the distinction drawn in the cases of *Sawyer* v. *Louis Dreyfus & Co.* (10) and *Dhanpatmal Diwanchand* v. *Kishinlal Indraj* (6) between the usual arbitration clauses and the references to arbitrators thereafter appointed. Both appear to me to be included in the definition of "submission" in section 4 (*b*) of the Arbitration Act and to be good grounds to support stay orders, whether of subsequent or prior suits under section 19 of the Arbitration Act. There would appear to be no necessity to have recourse to the provisions of section 151, Civil Procedure Code.

It does not appear to me strictly necessary for the same reasons to consider whether the stay order was within the jurisdiction of the Court of the Sub Judge of Multan or whether it should have been sought and passed by the District Court of Multan or by this Court. But it would again appear desirable in view of detailed discussion before us to observe that the jurisdiction could not properly be exercised by the Court of the Sub Judge of Multan according to the practice of this Court, which would appear to be in accordance with that of the Bombay High Court as reported in the case of *Lucas Ralli* v. *Noor Mahomad* (14). It would according to that practice be not the trial Court but the Arbitration Court as defined in section 4 (*a*) which would be vested with the jurisdiction to stay suits under section 19 of the Arbitration Act. The definition must be applied unless there should be anything repugnant in the context. It would be difficult to contend that the result of vesting the jurisdiction to stay suits in the Arbitration Court would be repugnant either to the spirit or the letter of section 19 of the Arbitration Act. The authority in the best position to decide whether suits should or should not be stayed might well be considered to be the authority vested with the control of the arbitration proceedings. It would indeed involve certain interference with Courts outside the ordinary jurisdiction of the Arbitration Courts. But that would be more apparent than real. The stay order might well be considered to be rather an injunction to the parties than an act of control of the Courts outside the jurisdiction of the Arbitration Court. The stay orders in any case have legal effect throughout British India, because the Act has in the preliminary section been declared to extend to the whole of British India. The words used "the Court" would grammatically cover the Arbitration Court and there might well be cogent considerations for vesting the jurisdiction in the Arbitration Court in India. It would have been simple to have used the definite words 'that Court' if it had been intended to vest the jurisdiction in the trial Court and not in the Arbitration Court, as usual in the English Statutes (Halsbury's Laws of England, Volume I, paragraph 953, and note at page 451). It might well be argued from this change of words that it was not intended to adopt in this matter in India the precise rule in force in England.

These views, if correct, would, of course, also exclude the jurisdiction in this matter of the District Court of Multan. It would have no particular cognizance of the matter and would not be "in any other local area" mentioned in the proviso to section 2, which would appear to be the "elsewhere" contemplated in section 4 (*a*) of the Arbitration Act. There would be no particular reason for vesting the jurisdiction in the District Court of Multan and it would not be covered by the words "the Court" used in section 19 of the Arbitration Act. These views would, therefore, lead to the conclusion that the Arbitra-

tion Court is "the Court" contemplated by section 19 of the Arbitration Act and that a deliberate departure has been made in this matter from the rule in force in the Courts in England.

Application rejected.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION NO. 76 OF 1918-19.

March 11, 1919.

Present:—Mr. Ferard, S. M., and Mr. Hopkins, J. M.

NARSINGH BAHADUR SINGH—APPELLANT

versus

SURAJ DIN—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 29, 30—Transfer, voidable, by guardian—Suit to set aside transfer, whether necessary.

A suit is not necessary to set aside a disposal of property voidable under section 30 of the Guardians and Wards Act. In a suit to enforce such a transfer, it is open to the person seeking to avoid it to exercise the option given to him by that section by resisting the suit on the ground that the transfer is not binding upon him.

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 18th August 1918, in the case of ejectment.

JUDGMENT.

HOPKINS, J. M.—The respondent contested a notice of ejectment on the ground that he held the land in dispute under a perpetual lease. It is admitted that the lease in question, which was granted by the appellant's guardian at a time when the appellant was a minor, was one which it was not within the power of the guardian to grant, and which was voidable at the instance of the appellant under sections 29 and 30 respectively of the Guardians and Wards Act, 1890. The Commissioner has upheld the lease on the ground that the appellant did not bring a suit to avoid it within the period prescribed by Article 44, Schedule I of the Limitation Act.

The appellant came of age in July 1915. He issued the notice of ejectment on 13th

November 1917. The respondent filed his suit to contest the notice on 29th November 1917. The appellant filed his written statement on January 5th, 1918, in which he pleaded that the lease executed in his minority was not binding upon him.

Section 30 of the Guardians and Wards Act does not lay down that the avoidance of a disposal of property made in contravention of section 29 shall be by a suit brought by the person seeking to avoid it. When, as in the present case, a suit is brought which is practically one to enforce an avoidable lease, it seems to me that it is open to the defendant to exercise the option given to him by section 30 by resisting the suit on the ground that the lease is not binding upon him. In his written statement of 5th January 1918 the appellant did substantially repudiate the lease and give notice of his intention to avoid it within the period of limitation prescribed by law. The question of the validity of the lease was raised in a Court competent to decide the issue and the Court would have been acting in contravention of the provisions of Order II, rule 1 of the Civil Procedure Code, if it had refused to decide the issue and had referred the appellant to a separate suit.

I would set aside the orders of the Courts below and would dismiss the respondent's suit subject to the payment of Rs. 350 in compensation, which is the amount agreed upon by the parties before this Court.

FERARD, S. M.—I agree.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISION NO. 235 OF 1918.

July 7, 1919.

Present:—Mr. Justice Das.

MAHABIR SINGH AND OTHERS—PETITIONERS

versus

DEOKI RAI—DEFENDANT, JUDGMENT-DEBTOR—OPPOSITE PARTY.

Bengal Tenancy Act (VIII B. C. of 1885), s. 155—Landlord and tenant—Decree directing tenant to pay a sum of money to landlord—Extension of time, power of Court to grant—Possession taken by landlord, effect of.

MAHABIR SINGH v. DEOKI RAI.

A Court has power to entertain an application by a tenant judgment-debtor for enlargement of time to pay a sum of money awarded to the landlord decree-holder in a decree under section 155 of the Bengal Tenancy Act, even if the decree-holder has applied for execution of the decree and, as a matter of fact, has obtained possession of the property in execution.[p. 138, col. 2.]

Appeal from a decision of the Subordinate Judge, Muzaffarpur.

Mr. *Rajendra Prasad*, for the Petitioners.

Mr. *Harnarayan Prasad*, for the Opposite Party.

JUDGMENT.—The petitioner challenges the validity or the legality of an order passed by the Subordinate Judge of Muzaffarpur granting an extension of time to the opposite party to comply with an order passed under section 155 of the Bengal Tenancy Act and directing that the opposite party be restored to possession. It will be convenient to give certain dates.

It appears that on the 15th March 1915 the petitioner obtained a conditional decree for ejectment against the opposite party under section 155 of the Bengal Tenancy Act. The decree provided that Rs. 20 should be paid as compensation to the plaintiff, and it directed the defendant to remove the disputed huts from the land in dispute within one month from the date of the decree. There was an appeal against this decree, which was dismissed on the 7th January 1916. It appears that on the 22nd January 1916 the opposite party deposited the money in Court but did not remove the huts as directed by the decree of the Munsif. On the 18th August 1916 the petitioner applied for execution of the decree and on the 29th August 1916 the opposite party applied for extension of time, to enable him to remove the huts, before the learned Munsif. On the 31st August 1916 the learned Munsif did grant an extension of time to enable the opposite party to remove the huts. There was an appeal from the order passed by the learned Munsif, which appeal succeeded. There was a second appeal to this Court which was dismissed on the 28th February 1917, but the High Court dismissing the second appeal expressly gave the opposite party power to apply for extension of time before the District Judge, but on the 2nd April 1917 the petitioner was put in possession of the property. On the 5th August 1918 the District Judge dealt with the application presented before him on the 24th March 1917 and by his order he extended the time to enable the opposite party to comply with the decree of the Munsif passed on the 15th March 1915 and further directed that the opposite party should be put in possession of the property. The petitioner before me complains against this order passed on the 5th August 1918 and urges that the learned District Judge had no jurisdiction to pass an order extending the time after he had been put in possession of the property by the order of the Court executing the decree.

In the case of *Syam Mandal* v. *Sati Nath Banerjee* (1) Mr. Justice Mookerjee held that it is competent to the Court to entertain an application for enlargement of time after the expiry of the period described in the decree and even after the decree-holder has applied for execution. The learned Vakil appearing on behalf of the petitioner concedes this proposition, but he argues that there is no power in a Court to enlarge the time after possession has been taken by a party in terms of the original decree. It appears that in the case just cited possession had, as a matter of fact, been taken by the decree-holder, for at page 533* the learned Judge says: "an order will also be made that the petitioner be forthwith restored to possession, and such order will be executed by the Court below as a decree of this Court." The true view seems to me to be what Mr. Justice Mookerjee states at page 532* that is to say: "A remedial provision of this character should be construed liberally so as not to restrict the remedy and fetter the discretion of the Court." It seems to me that taking possession of the property is a part of the execution proceeding and if it is held that a Court has power to entertain an application for enlargement of time even if the decree holder has applied for execution, it seems to me that the Court is equally competent to entertain an application for enlargement of time even if the decree-holder has obtained possession of the property. Of course the matter is one of

(1) 38 Ind. Cas. 493; 24 C. L. J. 523; 21 C. W. N. 776; 44 C. 954.

* Pages of 24 C. L. J.—*Ed.*

discretion and the Court will exercise that discretion on all the materials before that Court. But, in my opinion, there is no question of jurisdiction involved in this matter. That being my view, I would refuse this application with costs, which I assess at two gold *mohurs*.

Application rejected.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REFERENCE No. 54 OF 1918-19.

March 15, 1919.

Present:—Mr. Ferard, S. M.

THAKUR DIN—APPLICANT

versus

DAYALI—RESPONDENT.

Agra Tenancy Act (II of 1901*)*, *s.* 198—*Imperfect partition*—Lambardar, *second, not appointed—Payment of rent to existing* lambardar, *effect of.*

Where a village is imperfectly partitioned but a second *lambardar* is not appointed, the existing *lambardar* remains the *lambardar*, and if rent is paid to him in good faith, the tenant is protected by section 198 of the Agra Tenancy Act.

Reference made by the Commissioner, Allahabad Division.

JUDGMENT.—The case is not one for exercise for the Board's power of revision under section 185, Tenancy Act. The village has been imperfectly partitioned but unless or until the Collector in exercise of his powers under section 45 (1), Land Revenue Act, appoints a second Lambardar for the applicant's portion of the Mahal, in which it seems the hitherto and existing Lambardar has not a share, he remains Lambardar. It is only imperfect partition—joint responsibility of all the co-sharers remains—and I fail to see how the present Lambardar's duties under rule 18 (*a*) and 18 (*aa*) of Lambardar Rules are affected. There is a concurrent finding of the two first Courts that the respondent paid his rent to the Lambardar in good faith and I do not follow the Commissioner's argument that section 198, Tenancy Act, was not relevant. The word used in that section is landholder, not proprietor. The village custom, and it has not apparently been altered by anything contained in the terms of the imperfect partition, is that the Lambardar is the person to whom tenants have to pay their rents, *i.e.*, their landholder. Rulings* referred in the note on plea of *jus tertii*, bottom of page 417, Agarwala's Tenancy Act, 5th Edition (section 198), show that section 198 covers the case of tenants pleading payment in good faith to the Lambardar.

I am not prepared to interfere. Let the record be returned.

Record returned.

**Chatri* v. *Bahadur*, A. W. N. (1888) 45, *Narpat* v. *Tika*, 33 Ind. Cas. 69 and *Ali Bux* v. *Parkash*, 31 Ind. Cas. 464.

SIND JUDICIAL COMMISSIONER'S COURT.

FULL BENCH.

MISCELLANEOUS APPLICATION No. 64 OF 1917.

October 10, 1917.

Present:—Mr. Pratt, J. C., Mr. Crouch, A. J. C., and Mr. Hayward, A. J. C.

THE FIRM OF RATANCHAND-RAMKISHANDAS—APPLICANT

versus

SAHIRAM-DUNICHAND AND ANOTHER—RESPONDENTS.

Arbitration Act (IX of 1899*)*, *ss.* 4 (a), 19—*Reference to arbitration—Suit filed by party to reference—Stay of suit, order for—Jurisdiction—Application for stay—Court, proper—Interpretation of Statutes—Legislative Council, proceedings of, whether can be referred to.*

Per *Pratt, J. C.*—An application under section 19 of the Arbitration Act for stay of a suit should be made to the Court trying the suit. [p. 140, col. 1.]

Proceedings of the Legislative Council cannot be referred to as an aid to the construction of a particular section or sections of a Statute, but they may be referred to for the purpose of ascertaining the object of a Statute. [p. 140, cols. 1 & 2.]

Per *Crouch, A. J. C.*—An application under section 19 of the Arbitration Act to stay a suit pending in a subordinate Court must be made to the District Court to which such Court is subordinate. [p. 141, col. 2.]

Per *Hayward, A. J. C.*—The jurisdiction to grant or refuse stay of a suit under section 19 of the Arbitration Act is vested not in the Court before which the suit is pending but in the District Court specially designated to be the Arbitration Court under the Arbitration Act. [p. 144, cols. 1 & 2.]

Mr. *E. A. Castellino*, for the Applicant.

Mr. *Dharamdas Thawerdas*, for Opponent No. 1.

Mr. *T. G. Elphinston*, for Opponent No. 2.

JUDGMENT.

PRATT, J. C.—On the question of jurisdiction I have given reasons in my judgment

in *Khilooram* v. *Louis Dreyfus & Co.* (1) for holding that the applica ion for stay should be made to the Court trying the suit.

I regret I am unable to concur in the views expressed by either of my learned colleagues. In the case of an arbitration in the District Court of Karachi and a concurrent suit in a Subordinate Court in the Punjab, according to their view, the defendant should go to the Punjab Subor dinate Court, put in an appearance there and then proceed to the District Court to which that Court is subordinate and apply for a stay order. According to the other view he should go to the Punjab Subordinate Court, put in an appearance there and then return to Karachi and apply to the District Court here for a stay order. Whether in the latter event the Punjab Subordinate Court would recognize the jurisdiction of a Karachi Court to stay a suit pending before it, is a matter on which a doubt is perhaps permissible. But in either view the defendant has to apply to the trial Court for an adjournment. This, I venture to think is contrary to the principle of section 19 that there should be no sub mission to the jurisdiction of the Court where the suit is pending, and to the principle of the English cases that a per son who makes any application whatsoever to the Court, even though it be merely an application for time, takes a step in the proceedings: Halsbury, Volume I, paragraph 956. The judgment of Crouch, A. J. C., and the judgment of Hayward, A. J. C., in *Khillooram* v. *Louis Dreyfus & Co.* (1) seem to treat an adjournment as equivalent to a stay order. I venture to think this overlooks the cardinal distinction that an adjournment is an exercise of jurisdiction in the suit, while a stay order is an order declining to exercise jurisdiction. I also think it offends against the principle of *Doleman & Sons* v. *Ossett Corporation* (2) that when a suit is pending, the Court alone has sole seizin of the dispute.

As to proceedings of the Legislative Council, the rule declared by the Privy Council is that they may not be referred to as an aid to the construction of a particular section or sections of the Act: *Administrator-General of Bengal* v. *Premlal Mullick* (3). But in some cases they have been referred to for the purpose of ascertaining the object of the Act to show the intention of the Legislature when the Act is ambiguous: *Shaik Moosa* v. *Shaik Essa* (4), *Parbati Charan, In the matter of* (5) and *Krishnaji Tamaji* v. *Tarawa* (6). If it be permissible to refer to the proceed ings of the Legislative Council under these cases, then it is clear that the avowed object of the Legislature was to substitute for section 21 of the Specific Relief Act the bar of a stay order and to bring the Indian procedure into conformity with the English. The English section requires the application to be made to the Court where the suit is pending. The section was said to be "perfectly clear" in *Morriston Tinplate Co.* v. *Brooker* (7) and the doubt raised in 1904 by the *obiter dictum* in *Runciman* v. *Smith* (8) could not have affected the Indian Legislature in 1899.

In *Lucas Ralli* v. *Noor Mahomed* (9) Davar, J., did not consider the case of a concurrent suit in another province. If he had, I venture to think his conclusion would have been different. For on the face of the proviso against repugnancy in the definition of section 4, it is impossible to construe section 19 as an implied repeal of section 56 (*b*) of the Specific Relief Act or of Act V of 1872 or as an implied grant of extraterritorial jurisdiction not only to High Courts but to District Courts.

I would, therefore, return the application for presentation to the Small Causes Court, Karachi, but according to the majority of the Bench the application will be rejected. Costs to be costs in the cause.

CROUCH, A. J. C.—This is an application under section 19 of the Indian Arbitration

(1) 52 Ind. Cas. 130; 18 S. L. R. 8.
(2) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.
(3) 22 C. 788 (P. C.); 22 I. A. 107; 6 Sar. P. C. J. 603; 11 Ind. Dec. (N. S.) 522.
(4) 8 B. 241; 8 Ind. Jur. 571; 4 Ind. Dec. (N. S.) 534.
(5) 17 A. 498 (P. C.), 22 I. A. 193; 6 Sar. P. C. J. 635; 8 Ind. Dec. (N. S.) 644.
(6) 24 B. 484; 2 Bom. L. R. 276; 12 Ind. Dec. (N. S.) 854.
(7) (1908) 1 K. B. 403; 77 L. J. K. B. 197; 98 L. T. 219; 24 T. L. R. 224
(8) (1904) 20 T. L. R. 625.
(9) 31 B. 236; 8 Bom. L. R. 955.

Act. On the 4th March 1915, by a written contract, the firm of Ratanchand-Ramkishandas sold to Sahiram-Dunichand 25 tons of Sarsi for May delivery on certain terms and conditions. The contract contained an arbitration clause in the following special form:—

"In case of any dispute arising with respect to this contract each party shall appoint his own arbitrator for the purpose of surveying the goods. In case of difference of opinion the arbitrators shall appoint an umpire. The umpire's award shall be considered final. The surveyor or the arbitrator shall be either a European or native merchant according to the terms of the contract. If any party fails to appoint an arbitrator, the other party after giving him 3 days' notice shall appoint an arbitrator on his behalf. If both the arbitrators fail to appoint an umpire, the Managing Committee of the Association shall appoint an umpire."

Delivery was not given under the contract, and, early in 1917, the purchasers, Sahiram-Dunichand, filed a suit in the Small Causes Court, Karachi, for recovery of damages for breach of contract. In this suit, defendants No. 1, Kaliandas-Rughnath, who were the purchasers of the goods from Sahiram Dunichand, were impleaded as defendants. Rattanchand-Ramkishandas now apply to this Court praying that the proceedings may be stayed in order that they may refer the dispute to arbitration.

At the hearing before the learned Judicial Commissioner the question of law was raised whether, when the suit sought to be stayed has been filed in a Subordinate Court, not under the jurisdiction of a High Court, the application under section 19, Indian Arbitration Act, lies to such Subordinate Court or to the District Court. In their judgments in *Khillooram* v. *Louis Dreyfus & Co.*, (1), Pratt, J. C., and Hayward, A. J. C., expressed difference of opinion on the point: the case has accordingly been referred to the Full Bench for disposal.

The question resolves itself into one of construction of the words "the Court" in section 19, and we must apply the ordinary rules for the construction of Statutes. If the doubtful words have a technical meaning, they must be given that meaning and the language of the section must, as far as possible, be so construed as to be consistent with every other enactment which it does not, in express terms, modify or repeal. The technical meaning of "the Court" is found in section 4 to be the Court of the District Judge. Assuming that the section is consistent with section 2, Civil Procedure Code, 1882, which declares the limits of the jurisdiction of the District Court, and section 56 (*b*), Specific Relief Act, it must be taken to declare that an application to stay proceedings pending in a Subordinate Court must be made to the District Court to which such Court is subordinate. We cannot, in the absence of any clear indication of such an intention, assume that the Legislature intended that a District Court should exercise jurisdiction beyond its prescribed local limits.

If it was the intention of the Legislature that the powers conferred by the Act should be exercised by the Court of the District Judge only in those special local areas to which the Act was made applicable, that intention has not, in my opinion, been expressed. Section 1 declares that the Act extends to the whole of British India, and "elsewhere" in section 4 (*a*) must mean in all other places than the Presidency towns, unless the jurisdiction of all District Courts other than those in the notified local areas be excluded by section 2.

Section 2 limits the application of the Act to those cases only where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, with leave or otherwise, be instituted in a presidency town. But the section does not restrict the local extent of the Act as declared by section 1; nor does it, except possibly by implication, limit the jurisdiction to certain Courts. It is not unusual, in Indian Statutes, to define not only the local extent but also the classes of persons or of cases to which it is applicable. Other examples of Acts extending to the whole of British India, but having application only to particular cases, are the Indian Succession Act, the Succession Certificate Act, and the Probate and Administration Act. Where the Legislature intends to limit the extent of an Act to special local areas it states so in clear terms, as in the Suits Valuation Act, VII of 1887, section 2.

The combined effect of sections 1, 2 and 4 is that the provisions of the Act can be enforced, through the appropriate Courts,

and within the prescribed limits of their application, throughout British India. Neither the operation of the Act, nor the right to enforce it, is limited to certain areas. We cannot, I think, read into section 2 an implied intention to deprive all other principal Civil Courts of original jurisdiction of power to deal with cases to which the Act is applicable from the bare fact that such cases must be such as could be litigated in a Presidency town or one of the notified areas.

For these reasons, I am unable to accept the view that power to make stay orders under section 19 is limited to the High Courts and certain District Courts.

Nor am I able to concur with the learned Judicial Commissioner in the view expressed in *Khillooram* v. *Louis Dreyfus & Co.* (1) that "the Court" in section 19 refers to the Court in which the suit is pending.

The expression "the Court" occurs 18 times in the Indian Arbitration Act, and it is suggested that the draftsman would not have inserted into the definition section the provision "unless there is anything repugnant in the context" unless he contemplated at least one instance of repugnancy. But the proviso is inserted, as a matter of course, into every definition clause of a modern Indian Act; there are over 20 instances in one volume of Naicker & Co.'s Bombay Civil Court Manual.] And it is inconceivable that the draftsman should have deliberately added the proviso in order that he might introduce confusion into one of the sections, without furnishing the public with any clue to the discovery of the particular section, or of the meaning which he intended to attach to the expression as used therein.

Section 19 of the Indian Act was adopted with slight verbal alterations from section 4 of the English Arbitration Act of 1889, and it may be inferred, and the inference is supported by the speech of Sir Griffiths Evans, when introducing the section, that the intention was to adopt the English procedure. What, then, was the procedure in force in England in March 1889, and what was the effect of the "slight verbal alterations"?

Section 4 of the English Act runs as follows: "4 If any party to a submission, or any person claiming through or under him, commence any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

The alterations consisted in the omission of the words 'in any Court,' in the early part of the section and the substitution of 'the Court' for "that Court" and for "that Court or a Judge thereof" in the middle of it.

The corresponding section in the C. L. P. Act, 1854, ran: "It shall be lawful for the Court in which such action or suit is brought, or a Judge thereof"....."on application by the defendant"....."to make a rule or order staying all proceedings."

By section 27 of the English Arbitration Act "Court" is declared to mean "Her Majesty's High Court of Justice", unless the contrary intention appears, and up to 1903, at any rate, the practice appears to have been in accordance with the view that the definition in section 27 prevailed; for both in the 8th Edition of Russell (1900) and in the 4th Edition of Redman (1903) it is stated that the application should be to a Master of the Supreme Court or a District Registrar. A District Registrar is an Officer of the Supreme Court, who has all the authority and jurisdiction of a Master of the Supreme Court within the limits of his District. But the wording of section 4 was undoubtedly open to the construction that an application for stay might be made to any Court in which a suit was pending, and the writer of the articles on Arbitration in Halsbury's Laws of England (1907) states: "The power to stay legal proceedings commenced in respect of a matter agreed to be referred to arbitration can, it would seem, be exercised by any

Court in which such proceedings are commenced." To this there is a note. "See, however, *Runciman* v. *Smith* (8)."

At the time, then, of framing section 19 of the Indian Act, the practice in England was to make an application for stay to the High Court or a District Registrar; and, if the intention was to follow the English practice as closely as possible, it could not have been done more effectually than by declaring that the application should be to "the Court", that is to the High Court in Presidency towns and elsewhere to the Court of the District Judge. The slight verbal alterations not only carried out this intention, but relieved the Indian Act of any doubt which attached to the English Act. For the words which gave rise to the doubt were not reproduced.

Attention has been drawn to the similarity of some of the essential phrases used in section 19 to those used in section 20, Civil Procedure Code, 1882, and it is suggested that they indicate that the power of staying proceedings was to be exercised in each case by the trying Court. But stay orders can certainly be passed by a superior Court; by the Judicature Act, 1873, in cases in which an injunction would formerly have issued, power was given to order stay of proceedings. It is doubtful whether the Court could, under section 19 of the Act, issue an injunction.

It has been urged that it would be far more convenient if the power to stay proceedings under the section were vested in the trying Court; but section 4 seems to indicate that the Legislature considered it wiser to limit the powers to Courts of a grade not lower than that of a District Judge.

Though a Subordinate Court has, in my opinion, no power to stay proceedings under section 19, it has power to grant an adjournment; and where an adjournment has been granted for the express purpose of enabling the defendant to resort to arbitration, an award so obtained could not, in my opinion, be set aside as having been obtained merely because a suit was pending. The award or the order of the Court passed thereon could be put in as conclusive evidence.

I would hold, therefore, that the application has been properly filed in this Court.

On the merits I am of opinion that the stay should not be granted. The arbitration clause is in a special form and gives to each party the power to appoint an arbitrator for the purpose only of surveying the goods. Arbitrators appointed under this clause would not have the power to award damages for breach of contract or to decide all the questions in dispute. Further Kaliandas-Rughnath were not parties to the submission and it is not desirable to stay a suit when only some of the matters in litigation can be settled by the award. As applicants allowed nearly two years to elapse without making any attempt to proceed with a reference, they cannot be believed when they assert that they were always willing and ready to do so.

I would dismiss the application with costs.

HAYWARD, A. J. C.—The plaintiff Sahiram in 1915 sold to defendant No. 1 Kaliandas goods bought from defendant No. 2 Ratanchand. The plaintiff Sahiram in 1917 and defendants Nos. 1 and 2 jointly sued for damages for breach of contract, as disputes arose owing to Kaliandas having been unable to get or having been unwilling to take delivery from Ratanchand. The suit was filed in the Small Causes Court, Karachi. The defendant No. 1, Kaliandas, would be content to have the disputes decided there, but defendant No. 2 Ratanchand would prefer to have them settled by arbitration in accordance with the arbitration clause in the contract. He has accordingly applied to have the proceedings in the Small Causes Court, Karachi, stayed under section 19 of the Arbitration Act and has made his application to this Court as the District Court, Karachi.

It has been urged in opposition on the merits that stay ought not to be granted and further on the law that the jurisdiction to grant or refuse stay is vested in the Small Causes Court, Karachi, as the trial Court and not in this Court as the District Court, Karachi, under section 19 of the Arbitration Act.

It seems to me on the merits, concurring with the conclusions and reasons of my brother Crouch, that stay ought not to be granted. It seems to me further on the law, concurring with the conclusions of my brother Crouch, that the jurisdiction to grant or refuse stay is vested not in the Small Cause Court, Karachi, as the trial Court, but in this Court as the District Court, Karachi, under section 19 of the Arbitration Act. But it seems to me further on the law, concurring in the reasons urged by the learned Judicial Commissioner, that the jurisdiction is vested in this Court not simply as the District Court, Karachi, but as the District Court, Karachi, specially designated to be the Arbitration Court under the Arbitration Act.

With regard to the merits the defendant No. 1 Kaliandas is not bound by the arbitration clause in the contract of defendant No. 2 Ratanchand, and it is doubtful in any case whether that clause which could appear to be limited to survey of the goods would be sufficient to cover all the disputes between the parties. There has, moreover, been so much delay in bringing the disputes within sight of settlement that there are good reasons for suspecting the *bona fides* of the objections of defendant No. 2 Ratanchand to the proceedings in the Small Causes Court, Karachi. We ought, in my opinion, on these grounds to refuse stay under section 19 of the Arbitration Act.

With regard to the law the Act extends according to section 1 to the whole of the British India, but its application is limited by section 2 to cases where the suits would be instituted in a Presidency town or according to the proviso in local areas declared by notification to be deemed to be Presidency towns. The language of the proviso is elliptical, and the phrase "applicable in any other local area as if it were a Presidency town" no doubt means "applicable in cases where the suits could be instituted in any other local area thereby declared to be deemed to be a Presidency town." The meaning was no doubt intended to be similar to that more fully expressed in section 23 in respect of the particular local area of Rangoon. The Courts to deal with such cases have next been prescribed by section 4 (*a*) to be the High Courts in Presidency towns and the Courts of the District Judges elsewhere, that is, in other local areas declared by notification to be deemed to be Presidency towns. The language of the section is again elliptical and the phrase "in the Presidency towns, the High Court and elsewhere, the Court of the District Judge," no doubt means "in cases where the suits could be instituted in a Presidency town, the High Court of that Presidency town and in cases where the suits could be instituted in other local areas declared by notification to be deemed to be Presidency towns, the Courts of the District Judges of such local areas thereby declared to be deemed to be Presidency towns." The word "elsewhere" must refer to the "other local areas, declared by notification to be deemed to be Presidency towns, for there could be no practical purpose in conferring jurisdiction under sections 5 and 8 to 17 on Courts outside the local areas thereby declared to be deemed to be Presidency towns. The meaning was no doubt again intended to be similar to that more fully expressed in section 23 in respect of the particular local area of Rangoon. We ought, in my opinion, on these grounds to hold that this Court as the District Court of Karachi has been specially designated for the particular local area of Karachi to be the Arbitration Court under the Arbitration Act.

It has been conceded that unless there is anything repugnant in the context or subject, the Courts prescribed by section 4 (*a*) must further be held to be the Courts vested with jurisdiction under section 19 to grant or to refuse stay of suits instituted contrary to agreements to refer to arbitration. But it has been contended that there is something repugnant both in the context and the subject. It has been urged that there is something repugnant in the context, inasmuch as the phrase "at any time after appearance and before filing a written statement" limiting the time for demanding stay has reference to the trial Courts and would be repugnant to a subsequent direction requiring the demands to be made to the arbitration Courts. It has been sought to fortify this argument by the reflection that if there is nothing

repugnant in section 19, then there would be nothing repugnant anywhere in the Act and that it was clearly contemplated that there would be something repugnant somewhere in the Act. There is, however, really nothing repugnant in the context between limiting the time for demanding stay by referance to the particular stage of the proceedings in the trial Courts and subsequently directing that demands for stay should be made to the Arbitration Courts. It is nothing more than enforcing the wholesome rule that where the parties have submitted their disputes to the jurisdiction of the trial Courts, they should not be permitted to render the proceedings there infructuous by transfer of their disputes to the jurisdiction of the Arbitration Courts. There is, again, no force in the reflection that there must be something repugnant in section 19, because that section was not inserted in the Bill until the final reading as appears from the remarks of Sir Griffiths Evans in the proceedings in Council printed at page 63 of part 6 of the Gazette of India of the 4th March 1899. Moreover, there would be no difficulty in detecting something sufficiently repugnant in sections 20 and 23. There is, however, really no need to detect, anything repugnant in the Act. The clause "unless there is anything repugnant" is the usual clause adopted by a careful draftsman as in sections 3 and 4 of the General Clauses Act, 1897, and was no doubt inserted merely "*ex majori cautela*" in the Arbitration Act, 1899.

It has been urged that there is something repugnant in the subject, inasmuch as the parties would be put to inconvenience if they had to refer the stay of their proceedings in the trial Courts for the decision of the Arbitration Courts and inasmuch as decisions would be liable to involve injunctions staying proceedings in trial Courts not subordinate to the Arbitration Courts contrary to the provisions of section 56 (*b*) of the Specific Relief Act, 1877. There is, however, really nothing repugnant in the subject. There would be no practical inconvenience to the parties in having to appear and protest against the jurisdiction of the trial Courts and then having to refer the stay of the proceedings to the Arbitration Courts. Their protests would, no doubt, secure adjournments for their references to the Arbitration Courts, and if not, further steps under compulsion would not be the voluntary taking steps in the proceedings contemplated as barring their references to the Arbitration Courts. No practical inconvenience has hitherto been brought to notice in the numerous cases in which proceedings in the Small Causes Court, Karachi, have been stayed by this Court as the Arbitration Court; nor was practical inconvenience represented to the Judges of the Small Causes Court, Bombay, or to the High Court in the case of *Lucas Ralli* v. *Noor Mahomed* (9), in which it was held that proceedings in the Small Causes Court, Bombay, could be stayed by the High Court as the Arbitration Court. Nor would the decisions staying proceedings amount to more than stay orders of the nature contemplated by section 10, Civil Procedure Code, akin to temporary injunctions specified in the first clause of section 53 of the Specific Relief Act. They would not amount to perpetual injunctions by decrees contemplated by the second clause of section 53 and clause (*b*) of section 56 of the Specific Relief Act, 1877. They would in any case be valid under the special authority of the subsequent Arbitration Act, 1899.

We ought, therefore, in my opinion, to hold upon the strict construction of sections 4 (*a*) and 19 that the jurisdiction to grant or refuse to stay is not vested in the Small Causes Court, Karachi, as the trial Court but in this Court as the District Court, Karachi, specially designated to be the Arbitration Court under the Arbitration Act.

There remain for consideration some general contentions advanced against the strict construction of the sections. It has been contended that it would be generally more appropriate to vest the jurisdiction to grant or refuse stay of suits in the trial Courts, because they would be in a better position to decide whether the disputes should be referred to arbitration. But that would not necessarily or even probably be so. It would, in my opinion, generally be more appropriate to vest the jurisdiction in the Courts having special experience in arbitration and to leave the decision not only of revocation of agreements to refer to arbitration but also of staying suits instituted contrary to such agreements to the Courts specially designated to be Arbi-

tration Courts under the Act. It had also been contended that the strict construction would conflict with the Sindh Jurisdiction Act, V of 1872, limiting the jurisdiction of the Bombay High Court and would generally extend beyond their Charters the jurisdictions of other High Courts. But the Sindh Jurisdiction Act, V of 1872, did no more than remove doubts as to the jurisdiction conferred by its Charter on the Bombay High Court. It did not place the Bombay High Court in a different position from other Chartered High Courts. The extension of these jurisdictions by the subsequent Arbitration Act, 1899, was within the powers of the Legislature and had been effected in other cases such as by section 50 of the Provincial Insolvency Act, 1907. No conflict need arise in the rare cases of the exercise of these extended jurisdictions between the High Courts, if due regard be had to the courtesies usual between Courts, as in the case of *Charu Chandra Mazumdar* v. *Emperor* (10), in which jurisdiction was exercised within the territories under the Bombay High Court by the Calcutta High Court under the Criminal Procedure Code. It has finally been contended that the strict construction would be contrary to the practice in England. But the words "apply to that Court" in section 4 of the English Act of 1889 have been altered to "apply to the Court" in the Indian Act of 1899. The former words would refer to the trial Courts, though the matter would appear to have been free from doubt at the time of the Indian Arbitration Act, 1899. The doubts expressed in the case of *Runciman* v. *Smith* (8) would not appear to have been settled until the case of *Morriston Tinplate Co.* v. *Brooker* (7). It must, therefore, be presumed that the latter words, which would refer strictly to the Arbitration Courts, were purposely adopted by the Indian Legislature to remove all doubts and vest the jurisdiction in the Arbitration Courts. This conclusion would appear to be confirmed by the remarks of Sir Griffiths Evans and the Hon'ble Mr. Chalmers, if it is permissible to look at them in the proceedings in the Indian Legislative Council reported at page 63 of part 6 of the Gazette of India of the 4th March 1899.

Application rejected with costs.

Application rejected.

(10) 37 Ind. Cas. 145; 44 C. 595; 21 C. W. N. 320; 25 C. L. J. 165; 18 Cr. L. J. 81.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 5 OF 1918-19.

March 22, 1919.

Present:—Mr. Hopkins, J. M.

PIRTHI SINGH—APPELLANT

versus

BEDA—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 194—Lease by some of several co-sharers—Tenancy, whether constituted.

To constitute a tenancy under a lease, the lease must be granted by all the co-sharers. A lease by any number of co-sharers short of the total number would not operate to constitute a tenancy.

Second appeal from the order of the Commissioner, Agra Division, dated the 13th September 1918, in the case of declaration of tenure.

JUDGMENT.—The Commissioner has found as a fact that the appellant's sub-tenancy commenced from 1324 F. after Beda respondent had obtained possession of his share in the occupancy holding. The question then is whether the appellant became a tenant under a term which was granted to him by Girdhari and Khumani only and not by Beda. Section 194 of the Tenancy Act seems to supply the answer to the question. The tenant-in-chief was the whole body of co-sharers in the occupancy holding. A lease by any number of co-sharers short of the total number would not operate to constitute a tenancy. I agree with the finding of the Commissioner and dismiss the appeal with costs.

Appeal dismissed.

LACHMI NARAYAN LAL *v.* KESHO PRASAD SINGH.

PATNA HIGH COURT.

APPEALS EROM ORIGINAL DECREES NOS. 542, 543 AND 445 OF 1914.

June 26, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Lala LACHMI NARAYAN LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Maharaja Bahadur KESHO PRASAD SINGH—PLAINTIFF—RESPONDENT.

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4—Accretion, what is—Riparian rights—Custom—Boundary between estates—Deep stream, whether boundary—Shahabad District.

After recession and encroachment by the river Ganges, the land washed away and afterwards reformed on the old ascertained site is not land gained by increment, within the meaning of section 4 of Regulation XI of 1825. [p 148, col. 1.]

In the Shahabad District, in the locality on the south bank of the river Ganges, where the Maharaja of Dumraon owns a large tract of land, there is no custom by which the deep stream of the river is recognised as the boundary between estates on each side of the river. [p 151, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Mr. *Kulwant Sahai*, for the Appellants.

Mr. *Fakhruddin*, for the Respondent.

JUDGMENT.

COUTTS, J.—These appeals arise out of three suits brought in respect of 1650, *bighas* of land situated in the District of Shahabad. The plaintiff, who is the Maharaja of Dumraon, is the proprietor of a large tract of land lying on the south bank of the Ganges, and his case, as made in the plaint, is that the land in suit has gradually accreted to three of his Mouzahs Sonbarsa, Issurpura and Ojhawallia and that by virtue of a custom obtaining in that locality the deep stream of the river Ganges is the boundary between the districts of Balliah and Shahabad and between the lands of the proprietors on both sides of the river. The defendants in the suits are the proprietors of two Mouzahs, Pandepur and Bans Gopal Chapra, which were originally situated in the District of Balliah on the north side of the river, and their contentions shortly are that the land in suit is not a gradual accretion to the Mouzahs Sanbarsa, Issurpura and Ojhawallia, but that it is a re formation *in situ* of their Mouzahs Pandepur and Bans Gopal Chapra, which were suddenly diluviated and as suddenly re-formed on the south of the river.

The suit was in the first instance decreed *ex parte* in favour of the plaintiff, but on appeal this decree was set aside and the suit was remanded for decision of the issues which were involved in the suit. The findings on these issues have now been returned and are in favour of the defendants. The result is that the plaintiff is now in the position of an appellant. I may note that the proprietors of Bans Gopal Chapra have not appealed as this Mouzah, we are informed, has been purchased by Government. We are concerned in these appeals, therefore, with the land which is alleged by the defendants to be a re-formation *in situ* of the Mouzah Pandepur only.

In the suit there were three main questions for decision and these are also the main questions for decision in these appeals:—

1. Whether the land in suit is a gradual accretion to the plaintiff's Mouzahs caused by the Ganges gradually receding northward?

2. Whether the land in suit is a re-formation *in situ* of the defendants' Mouzahs Pandepur and Bans Gopal Chapra; and

3. Whether there is a custom that the deep stream of the river Ganges is the boundary between the estates on each bank of the Ganges?

With regard to the first point a mass of evidence, both oral and documentary, has been adduced to show that the Ganges has been receding northward in this locality for the last 20 years and that the lands on the north bank have been diluviated while there has been a considerable accession of land to the estate of the Maharaja of Dumraon on the south bank of the river. The formation of the land in suit is said to have begun in the year 1894 and to have been completed in the year 1901. It is impossible to say exactly how much land diluviated on the north bank of the river and how much new land was formed on the south bank of the river during the period, but it appears that Pandepur was completely diluviated between the years 1892 and 1900 and during this period the plaintiff's Khasras show accretions of about 1780 *bighas* to Issurpura, between 600 and 700 *bighas* to Sonbarsa and between 700

and 900 *bighas* to Ojhawalia. The river frontages of Issurpura, Sonbarsa and Ojhawallia were apparently about $1\frac{1}{2}$ miles, $\frac{1}{2}$ mile and $\frac{1}{2}$ mile respectively and the first question is whether new formations of this magnitude can be treated as gradual accretions within the meaning of Regulation XI of 1825 or not. It is settled law in England that in order to be an accretion, land must be formed by gradual, slow and imperceptible degrees. The leading case on the point is *Rex* v. *Yarborough* (1), and "imperceptible" in that case was explained as meaning imperceptible in progress, *i.e.*, step by step as the accretion is formed and not imperceptible in the result after a long lapse of time. It would appear, therefore, that it is not the extent of the land formed which would decide whether newly formed land is an accretion or not, but the manner in which the formation takes place. The question of accretion in India has been the subject of many decisions by the Privy Council, but in none of them has the question of what extent of newly formed land can be called an accretion been considered. In *Lopez* v. *Muddun Mohun Thakoor* (2) the language of the English Law, that accretion should be gradual, slow and imperceptible, was apparently adopted but that was a case in which the land, which formed part of a Mouzah on the bank of the Ganges was wholly diluviated, after diluvion there was a subsequent diluvion and finally a recession of the river which left the land originally diluviated re formed on its original site. The decision of their Lordships of the Privy Council was that the land diluviated and subsequently re formed *in situ* was not an accretion. The question, therefore, of whether accretion should be "slow and imperceptible" did not arise in that case, nor did it arise in *Nogender Chunder Ghose* v. *Mahomed Esoff, the Collector of Chittagong* (3) in which the language used is the same. This language has also been used in other cases in India, but in none of them do we find that the question has really arisen. It is by no means clear, therefore, that it has ever been the law in India that accretion must be "slow and imperceptible." In the Regulation the expression used is "gradual" and if indeed it was the law in this country that it must also be "slow and imperceptible," this view has been materially modified by the latest decision of the Privy Council, *Srinath Roy* v. *Dinabandhu Sen* (4). This was a case regarding a fishery and although the question of accretion did not directly arise, *Lopez* v. *Muddun Mohun Thakoor* (2) and the other leading cases on the subject of accretion were discussed before their Lordships and Lord Sumner in his judgment, after pointing out that under the different conditions prevailing in the case of the English and Indian rivers what would be almost miraculous in the case of the former is normal and commonplace in the case of the latter, remarked:—"It is to be observed that here too Indian law, doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule established in this country. Where under English conditions the rule applies to 'Imperceptible' alterations, Regulation XI of 1825, Articles 1 and 4, speak of 'Gradual accession.' The analogy of the English rule can hardly be prayed in aid when Indian Legislation has thus an established and different rule on the same subject." It would thus appear that a distinct difference between the law in England and the law in India has been recognized by their Lordships of the Privy Council. The reason for the difference is ascribed to local physical conditions, and in interpreting the law of alluvion in India we should be guided by these local physical conditions. The question of the extent of newly formed land which can be held to be an accretion was discussed in the case of *Secretary of State* v. *Rajah of Vizayanagaram* (5). In that case, Ayling, J., remarked: "I do not think we should be justified in refusing to recognize plaintiff's title to the land thus formed on the ground of the comparative rapidity with which the formation took place. No doubt the reported decisions of the English Courts would seem to indicate that they would

(1) (1824) 3 B. & C. 91; 4 D. & R. 790; 107 E. R. 668; 27 R. R. 292.

(2) 13 M. I. A. 467; 14 W. R. (P. C.); 11 5 B. L. R. 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

(3) 18 W. R. 113; 12 B. L. R. 406; 3 Sar. P. C. J. 151.

(4) 25 Ind. Cas. 467; 42 C. 489; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901; 41 I. A. 221 (P. C.).

(5) 40 Ind. Cas. 896; 40 M. 1083; 22 M. L. T. 57.

refuse to treat such a formation as an accretion, if it occurred in an English river. An addition of over 600 acres in the course of a single flood season could not be described as slow and gradual according to the standard of additions by alluvion in English rivers. But there is nothing abnormal in such a phenomenon in Indian rivers: and although several cases have been quoted in which the Privy Council has dealt with claims to accretions by alluvion in Indian rivers, I find none in which this claim has been rejected merely on the ground of the extent of land thus newly formed and the shortness of the period occupied in formation." The mere fact then that land is formed in a period which would be impossible in England, would appear to be no reason why it should not be treated as a gradual accretion. In the present case the land which has been newly formed has varied from a very narrow strip to a strip which would extend to about three-quarters of a mile from the original bank of the river in one year. The evidence, however, is that this has been caused by the natural silting up of the river bed and not by any sudden change in the course of the river. I am, therefore, of opinion that if this had been the only point in the case, it would have been a case of gradual accretion and the plaintiff would have been entitled to succeed. The case, however, does not rest on the decision of this point.

The next question is the question of re formation *in situ*. Unfortunately we have not been supplied in this case with a map shewing the position of the land in suit on the revenue survey map. The result is that we have had to hear a lengthy discussion as to the position of the land in suit relative to Mouzah Pandepur and have ourselves had to compare a large number of maps; and although I am satisfied as to the result, I consider it was the duty of the parties to have had such a map prepared and of the Court to see that this was done. Although, as I have said, we have had to compare a large number of maps, I shall refer only to those on which I rely. These are Exhibits B, 267, 371 and 117. Exhibit B is a map prepared in the year 1903 by two Deputy Collectors—one from the district of Balliah and the other from the district of Shahabad. In this map is shown the course of the river, the position of the Mouzahs on the north side of the river, which had not then been diluviated, and the position of the Mouzahs which had been diluviated, and which had re-formed on the south side of the river, and from it we find Pandepur had in 1903 been completely diluviated and re-formed on the south of the river. There is no reason to doubt the correctness of this map and that the position of Pandepur has been correctly laid down, can be verified from a comparative examination of Exhibit 267, a *dhur dhura* map, which has been filed by the plaintiff himself. In this map Pandepur has not been relaid but the adjoining village of Nauranga has been relaid. Nauranga is shown on Exhibit B and if we superimpose one on the other, we find that Pandepur has been correctly relaid in Exhibit B. There is thus no doubt that Pandepur has been diluviated and re-formed south of the river in the position indicated in Exhibit B. The question, however, remains whether the land in suit is identifiable with the re-formed site of Pandepur. In order to discover whether this is so, it is necessary to examine the other two maps. I have referred to Exhibit 117 and Exhibit 371. Exhibit 117 is a map of the land in dispute prepared by the plaintiff and Exhibit 371 is also a map prepared for the purposes of this case, showing the position of the river Ganges in the years 1844, 1863, 1882 and at present, and also the positions of the Mouzahs of both sides of the river. This map shows the position of Pandepur on the south side of the river, and if we superimpose the map Exhibit B on this, we find that the position of Pandepur in Exhibit B is the same as the position of Pandepur in Exhibit 371. If we then take the permanent line of stations as shown in Exhibit 371 and superimpose on this the permanent line of stations as shown in Exhibit 117, we find that the land in dispute, as shown in this map (Exhibit 117), exactly corresponds with Pandepur as re-formed. There can thus be absolutely no doubt that the land in dispute in this suit is a re-formation *in situ* of Mouzah Pandepur on the south side of the river.

I have already referred to *Lopez* v.

Muddun Mohun Thakoor (2) and this decision has been invariably followed in cases of re-formation *in situ*. In this case, therefore, the land in suit being a re-formation *in situ* of Mouzah Pandepur, the plaintiff cannot succeed unless he can establish that by custom the deep stream of the Ganges is the boundary between estates on each side of the river.

In order to establish this plea of custom the onus is strongly on the plaintiff, and first it is necessary to consider what the custom alleged really is. In the plaint the custom pleaded seems to have been simply that the deep stream was the boundary between the districts of Balliah and Shahabad and of the Zemindaries and villages on either side of the river, and throughout the oral evidence it is this custom which has been deposed to. It is not now contended, however, that that is the invariable custom. It is said that it does not apply in the case of a sudden change in the course of the river and two other exceptions are admitted, *viz.*, in cases between Parganas Bihia on the south and Doaba on the north and in the case of Mouza Shibpur which lies on both banks of the river. The custom then, which was originally set up, has now been considerably modified. The plaintiff himself does not seem to have been very clear as to what custom he wished to allege and even now there appears to be considerable doubt because, as will presently appear, the exception in cases between Doaba and Bihia appears to be itself subject to exceptions. It is difficult, therefore, to understand what the custom alleged really is. The oral evidence is of the kind usual in cases of this sort. A number of witnesses have been examined, who state that the boundary between estates on either side of the river is the deep stream and they are contradicted by an almost equal number of witnesses who state that when lands are re-formed *in situ*, they are taken possession of by the original owners. This evidence is of little value and it is impossible to rely on it, particularly as the custom deposed to is not the custom now alleged. What is most relied on by the plaintiff is Mr. Roberts' Settlement Report. Mr. Roberts was a Settlement Officer in the North-West Provinces and in the year 1882 he made a settlement of Ballia district in the course of which he made enquiries into the question of alluvion and diluvion throughout that portion of the Ganges flowing between Ballia and Shahabad, and in his Settlement Report he has embodied an interesting chapter on the subject. He made certain suggestions for an amendment of the law, which Government did not think it was possible to take action upon, but the report in so far as it relates to custom is evidence. The report states generally that with the exception of Pargana Doaba the deep stream custom applies throughout the whole course of the river between Balliah and Shahabad. This seems a clear enough statement, but when we come to look into details the matter is not as clear as it would at first sight appear. In the first place, there is an exception in the Mouzah Shibpur which is on both sides of the river. This Mr. Roberts explains by saying that Shibpur which was originally north of the river was diluviated, there was re-formation of the land on the south of the river and the Maharaja of Dumraon took as much of it as he could. He was unable, however, to take all and the Zemindar of Shibpur remained in possession of some two-thirds. With regard to Doaba he says that originally Doaba was a portion of the Pargana Bihia which was cut off by the river and the land on both sides of the river was in possession of the Maharaja of Dumraon. Consequently it did not matter whether the lands were treated as accretions or as re formations and the rule of re-formation was made to apply. The Pargana next to Bihia and east of it on the south side of the river is Pargana Arrah; here he says the deep stream custom prevails, but he further says that at the junction of Parganas Doaba, Bihia and Arrah, there is debatable land where it is impossible to say whether the law of re-formation *in situ* or the deep stream custom applies, the reason apparently being that in this debatable area the Maharaja of Dumraon insisted on the rule or the alleged custom as suited him best. On a reference to Appendix XII of the report, however, we find cases where Mouzahs of Parganna Doaba have been diluviated and have re-formed on the other side in Parganna Bihia, where they

have been treated as accretions. These are exceptions to the exception to the alleged deep stream custom, and in this locality at all events it is clear that there is no certainty as to what the custom is or whether there is a custom at all. It is with this portion of the river that we are concerned in this case. The Mouzahs on the south side of the river to which Pandepur is said to have accreted are the three Mouzahs Issarpura, Sonbarsa and Ojhawallia. Pandepur was in Durjanpur but the Mouzah adjoining it on the south and east was Nauranga which was in Perganna Doaba and before Pandepur was diluviated, Nauranga had been diluviated. Now Issarpura, Sonbarsa and Ojhawallia are in Pargana Bihia and according to Mr. Roberts' report, therefore, Nauranga should have been treated as a re-formation *in situ* when it re-formed south of the river. It was, however, treated as an accretion. It was possibly not a matter of much consequence because Nauranga also belonged to the Maharaja of Dumraon, but it shows that there was very little certainty as to whether law or custom should prevail. The next Mouzah after Nauranga to be diluviated was Pandepur and it has been re-formed, as I have already said, on the south side of the river. If it is an accretion, therefore, it is not to the Mouzahs Sonbarsa, Issarpura and Ojhawallia, but to Nauranga, a Mouzah appertaining to Doaba. The case then becomes one between Doaba and Durjanpur, and in such a case it seems impossible to say that there is any custom. The fact is that at this point of the river, owing to the action of the plaintiff himself, the position is such that it is impossible to say whether there is a custom or not; certainly no custom has been established and under the circumstances the law as laid down in *Lopez* v. *Muddun Mohun Thakoor* (2) must apply.

Two other minor points have been argued by Mr. Fakhruddin on behalf of the plaintiff. The first is that he is entitled to succeed by right of adverse possession. This plea is obviously untenable, however, because the land is not alleged to have completely re-formed until the year 1901, and this suit was instituted in December 1911. The other point is in regard to abandonment. It is contended that when Pandepur was diluviated, the proprietors were granted a remission of revenue on account of diluvion and this being so, it should be held that the Mouzah reverted to the public domain and consequently the defendants are not entitled to contest the suit. Now in the first place, if this contention were a good one, it is obvious that the plaintiff should have made the Secretary of State for India a party to the suit, as has been from the first contended by the defendants, and the suit would be bad for non-joinder of parties. There is, however, no force in the contention. Under the Board of Revenue Rules of the North-West Provinces, a proprietor, whose land is diluviated, may either have the name of the diluviated Mouzah struck off from the Collectorate Register of Mouzahs held by him, or he may have the name kept on the Register and retain his title by the payment of one Rupee a year. It appears from the evidence of one of the defendants, the only evidence on the point, that he adopted the latter alternative. No reason has been shown to us why this evidence should not be accepted and this being so, this contention of the plaintiff fails.

In the result then I would set aside the *ex parte* decrees and would decree these appeals with costs including costs of the remand, in so far as the disputed land is a re-formation *in situ* of Mouzah Pandepur.

DAS, J.—I agree.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION PETITION No. 106 OF 1917-18.

March 2, 1919.

Present:—Mr. Ferard, S. M.

JANKI PRASAD—APPLICANT

versus

LILA—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 185—Revision—Board of Revenue, power of interference of—Gross and palpable error of law—Mistake of law, whether sufficient ground for interference.

ISHRI *v.* BHOLA SINGH.

It is only in cases of gross and palpable errors of law involving substantial injustice that the Board of Revenue will interfere in revision beyond the strict wording of section 185 of the Agra Tenancy Act. Mere mistakes in law do not warrant revisional action.

Application for revision of the order of the Commissioner, Rohilkhand Division, dated the 20th April 1918, in the case of ejectment.

JUDGMENT.—I have heard Pleaders and perused the evidence. The respondent Lila is the grandson of Kundan and grand nephew of Sewa, and there is no doubt that he has been cultivating along with their widows for more than 12 years. The family was originally joint. The applicant's case is that when Kundan predeceased Sewa, the whole interest in the holding passed to Sewa by *survivorship*. Act XII of 1881 was then in force, and Lila has no right to succeed Sewa, who died after Act II of 1901 had come into force. This might hold if the case before me were an appeal, but it is not and there has been no flaw in jurisdiction within the strict wording of section 185, Tenancy Act. The lower Courts may have made a mistake in law, but this alone does not warrant revisional action. The case is one in which more hardship would be caused by straining the wording of section 185 and accepting the application for revision than the reverse. It is only in cases of gross and palpable errors of law involving substantial injustice that the Board goes beyond the strict wording of section 185, and this is not one of those cases.

I reject the application, parties paying their own costs.

Application rejected.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 430 OF 1916.

May 29, 1919.

Present:—Mr. Justice Sladi Lal and
Mr. Justice Martineau.

Musammat ISHRI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHOLA SINGH AND OTHERS—PLAINTIFFS AND DITTU—DEFENDANT—RESPONDENTS.

Custom—Succession—Jats *of Jullundur District—Daughters* versus *Collaterals of 5th degree—Gift to daughter, validity of.*

Among Jats of the Jullundur District a daughter is not entitled to succeed as against collaterals of the 5th degree, and a gift of ancestral property by the widow of the last male owner to her daughter in the presence of such collaterals is invalid.

Second appeal from the decree of the District Judge, Jullundur, dated the 15th December 1915, affirming that of the Munsif, First Class, Jullundur, dated the 26th March 1915, decreeing the claim.

Lala *Mehr Chand Mahajan*, for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The plaintiffs, who are Jats of the Jullundur District, sue in this case for a declaration that a gift of land and a house made by Ishri, widow of their collateral Gurmukh Singh, to Achhro, her daughter by her first husband Sarmukh Singh, shall not affect their reversionary rights. Sarmukh Singh and Gurmukh Singh were brothers, and the plaintiffs are their collaterals in the fifth degree. The lower Courts have concurred in giving the plaintiffs a decree, holding the gift to be invalid. The defendants have appealed to this Court, having obtained a certificate from the District Judge.

It is contended on their behalf that the land is not shown to be ancestral, being entered in the name of Gurmukh Singh's father Kharku in the earliest settlement. But both the Courts below have agreed in finding that the land is ancestral, and the finding is justified by the entries in the settlement record. In the pedigree-table the names of the common ancestor and his ancestors as far back as Garab appear, and in the history of the village it is stated that Garab was the founder of the village. The presumption in these circumstances is that the land is ancestral.

As niece of the last male owner Achhro would clearly have no case at all, and even as the daughter of the former Sarmukh Singh, she has to show that she is entitled to succeed to ancestral property in the presence of collaterals of the 5th degree (the provisions of the *riwaj-i-am* being against the daughter) or that a gift of property to her by her mother is valid. The evidence, however, does not contain a single instance in her favour, and we agree, therefore, with the findings of the lower Courts that the gift is invalid, and dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 91 OF 1917-18.

March 11, 1919.

Present:—Mr. Hopkins, J. M.

Musammat HUSAIN ARA BEGUM—APPELLANT

versus

Musammat RUQAIYA BEGUM—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 150, scope of—Attachment—Release of property in favour of particular person, whether authorised.

Property attached under section 150 of the U. P. Land Revenue Act cannot be released in any particular person's favour. The section contemplates the removal of an attachment, but provides for no inquiry or decision as to who is entitled to hold the property after release.

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 20th May 1918, in the case of release of property.

JUDGMENT.—The Mahal was taken under attachment under section 150 of the Land Revenue Act and the attachment was maintained pending the decision of a civil suit between appellant and the respondent. The appellant had stated, *vide* Deputy Commissioner's order of 12th February 1918, that if the civil suit was decided against her she would no longer oppose the claims of the respondent.

The civil suit was decided against her and the Deputy Commissioner ordered the release of the property in favour of the respondent, though he (wrongly apparently) described her as the person from whose possession the property had been attached.

Section 150 of the Land Revenue Act does not provide for the release of property after attachment in any one's favour. It merely contemplates the removal of the attachment and provides for no enquiry and decision as to who is entitled to hold the property after its release.

The appellant is not entitled to object to the Deputy Commissioner's order, as it was made in pursuance of her own undertaking and in any case is not prejudiced by it. The appeal is dismissed summarily.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 366 OF 1918.

April 10, 1919.

Present:—Mr. Firdlay, A. J. C.

Seth BALKISSEN - APPELLANT

versus

DEBI SINGH AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Public policy—Benami *purchase by Police Officer while in service, validity of.*

The *benami* purchase of a village by a Police Officer while in the service, though effected in contravention of the rules of the service, both under the Police Manual and the Government Servants' Conduct Rules, by which the purchaser is bound, is not void as being opposed to public policy under section 23 of the Contract Act, nor is it illegal inasmuch as such purchase is not prohibited by any Statute which imposes a penalty for doing or omitting to do an act for the protection of the public. The Government Servants' Conduct Rules are not statutory rules in this sense that they do not provide a penalty for a breach of them. [p. 154, cols. 1 & 2.]

Bhagwan Dei v. *Murari Lal*, 36 Ind. Cas. 259; 39 A. 51; 14 A. L. J. 962, followed.

Vithal v. *Siwa*, 15 Ind Cas. 933; 8 N. L R. 82, distinguished.

Shiam Lal v. *Chhaki Lal*, 22 A. 220; A. W. N. (1900) 30; 9 Ind. Dec. (N. S.) 1177, discussed.

Second appeal against the decree of the District Judge, Raipur, in Civil Appeal No. 39 of 1916, dated the 11th April 1918, arising out of Civil Suit No. 89 of 1913, of the Court of the Subordinate Judge, Raipur, decided on 31st July 1916.

Dr. *H. S. Gour*, for the Appellant.

Mr. *P. S. Kotual*, for Respondent No. 1.

JUDGMENT.—The facts of the case leading to this second appeal are sufficiently clear from the judgment of the two lower Courts, and I proceed at once to deal with the points which arise for decision in second appeal. In the first place, it has been pressed very strongly on behalf of the present appellants that the defendant-respondent No. 1 Debi Singh having been a Police Officer at the time of the *benami* purchase of the village, the said purchase by him was void under section 23 of the Indian Contract Act as being opposed to public policy. The Subordinate Judge dealt with this matter in paragraph 9 of his judgment, while the lower Appellate Court has discussed the point fully in paragraph 6 of its appellate judgment. The learned District Judge has in the present case followed the decisions of the Allahabad

High Court in *Bhagwan Dei* v. *Murari Lal* (1) and the other case decided on the same day of *Kamala Devi* v. *Gur Dial* (2). The argument advanced on behalf of the present appellants is that the *benami* purchase by Debi Singh having been effected in contravention of the rules of service both under the Police Manual and the Government Servants' Conduct Rules by which he was bound, that purchase was opposed to public policy. In these provinces the law applicable on the matter in point was discussed by Drake-Brockman, J. C., in *Vithal* v. *Siwa* (3). It seems to me that that case was clearly distinguishable from the present one. The *ratio decidendi* of the decision just quoted was that where by a Statute a penalty for doing or omitting to do any act is imposed solely or partly for the protection of the public, such act or omission is impliedly prohibited by the Statute and is illegal. I fully accept the position laid down by the learned Judicial Commissioner in the decision just quoted, but it is pertinent to point out that he was there dealing with the breach of the statutory rule made under a Statute, *viz.*, the Central Provinces Land Revenue Act of 1881. In the present case the position is entirely different. Even if it be assumed that Debi Singh was bound by the Government Servants' Conduct Rules, these rules are not statutory rules in the sense that any penalty is expressly provided therein for a breach of them. No doubt in a case like the present the 1st defendant-respondent was liable to disciplinary action for his conduct in this connection; dismissal, reduction or some such punishment might have been awarded on him, but no statutory penalty is provided in the rules in question.

My attention has also been called on behalf of the appellants to section 10 of the Police Act: that provision lays down that no Police Officer shall engage in any employment or office without the consent in writing of the Inspector-General, but it is prefectly obvious that this provision has no application whatever in the present instance. An attempt wat made to develop an argument that the fact of Debi Singh having acquired the village would under the Land Revenue Act necessitate his being appointed Lambardar, but this contention can hardly be taken seriously—the contingency was a remote one. On the face of it, it is obvious that section 10 of the Police Act has no application to the present case. It has again been urged in this connection that a penalty is provided by law under section 169 of the Indian Penal Code for the case of a public servant who purchases or bids for property. Such an argument overlooks the facts that for the purposes of a conviction under that section the public servant must be legally bound not to purchase or bid for property, and a reference to the definition of the word "illegal" in section 43 of the Code will show that it could have no application in the present instance. The utmost that has been proved against Debi Singh in this connection is that he was bound by departmental rules not to purchase immoveable property without the sanction of his official superiors, but a breach of such rules has had no explicit penalty attached thereto in the rules in question, nor does a breach of them bring the delinquent under provisions like sections 168 and 169 of the Indian Penal Code. As I have said before, it is obvious that he was liable to departmental action but this is a wholly different matter. A very wide gulf has to be bridged before one could hold that any act by which a Government servant renders himself liable to departmental action is illegal or contrary to public policy.

It seems to me that the decision in *Shiam Lal* v. *Ohhaki Lal* (4) cannot now be considered as good law in the face of the later Allahabad decisions which I have quoted above.

Sir William Anson has classified the cases of contracts falling under the heads of those opposed to the public service as follows:—

(1) Agreements tending to injure the public service.

(2) Agreements which injure the state in its relation with other states.

(3) Agreements which pervert the course of justice.

(4) Agreements which tend to abuse of legal process.

(1) 36 Ind. Cas. 259; 39 A. 51; 14 A. L. J. 962.
(2) 36 Ind. Cas. 319; 39 A. 58; 14 A. L. J. 969.
(3) 15 Ind. Cas. 933; 8 N. L. R. 82.
(4) 22 A. 220; A. W. N. (1900) 30; 9 Ind. Dec. (N. S.) 1177.

(5) Agreements which affect the freedom or security of marriage.

(6) Agreements in restraint of trade.

(7) Agreements which are *contra bonos mores*.

It might conceivably be contended that a case, like the present, of a Police Officer buying land in defiance of departmental orders would fall under the first of these heads. It has, indeed, been urged on behalf of the appellants that the presumption must be that a Police Officer is supposed to devote his whole time to his duties, and that the acquisition of landed property must inevitably interfere with the efficient discharge of his duties. Just as the learned Judge in the 39 Allahabad case quoted above (2) decided that an assignment of a mortgage a Patwari could not be brought under any of the heads I have mentioned, so also I think that in the case of a late Police Officer it would be impossible to hold that this *benami* purchase by him could be held to be an agreement tending to injure the state. So far as the argument that a Police Officer must devote his whole time to his duties is concerned, it may be pointed out that under the Government Servants' Conduct Rules on which Counsel for the appellants has relied in support of his case, the acquisition of immoveable property by Government servants is permitted under certain restrictions. Debi Singh no doubt acted dishonestly and in contravention of the rules of his department in making the *benami* purchase of Mauza Banjari in the way he did, but it seems to me to be impossible to hold that he acted illegally. He broke no law or rule having the force of law, and, therefore, the decision in *Vithal* v. *Siwa* (3) cannot be applied with propriety in the present case. On this point, therefcre, I concur with the learned District Judge in his decision that the *benami* purchase in question was not void under section 23 of the Indian Contract Act as being opposed to public policy.

The next contention raised on behalf of the present appellants concerns the question of estoppel. The purchase took place in 1911 and up to 1913 (see Exhibit D—20) the village remained in his name. It is urged that the defendant-respondent No. 2, Kripal Singh was a man of no standing and that the appellants made advances as debts on behalf of cloth largely on the strength of his having acquired the village. It is urged in this connection that Debi Singh, having held out to all the world that Kripal Singh was the owner of Banjari, is now estopped from asserting his own title. I find, however, that I have very little to say on this matter in view of the careful finding of the learned District Judge in paragraphs 8 to 10 of his judgment. It seems to me that the appellants have failed to establish the fact that they made the advances they did to Kripal Singh on the strength of his having acquired this village, and the evidence as a whole largely negatives any such theory. Indeed, 1st appellant as P. W. No. 1 admits that advances have been made to Kripal Singh from 1908 onwards, that is, three years before the *benami* purchase. Even on the appellant's evidence alone, considerable ground arises for believing that he had an inkling of the real state of matters. He admits, for example, that he had dunned both the defendants-respondents for the amount of advances made to Kripal Singh, and his evidence as a whole seems to me quite inconsistent with the theory that he was under an innocent belief that the defendant No. 2, Kripal Singh, was the sole and real owner of Mouza Banjari. For these reasons, as well as for reasons given by the lower Appellate Court, I do not think that any question of estoppel arises in the present case.

Lastly it has been urged that the plaintiffs-appellants should not have been saddled with costs in this appeal and these were wrongly assessed *ad valorem* in view of the fact that the suit was largely a declaratory one. I can, however, see no reason for varying the order of the lower Courts in this respect. Costs were assessed on the Court-fees as paid in the case, and there is nothing to show that the Subordinate Judge exercised wrongly the discretion which vested in him. The appeal is accordingly dismissed with costs on the appellants.

Appeal dismissed.

CHANDIKA PRASAD SINGH *v.* KALU.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 11 OF 1919.

April 7, 1919.

Present:—Pandit Kanhaiya Lal, J. C

CHANDIKA PRASAD SINGH AND ANOTHER —DECREE-HOLDERS—APPELLANTS

versus

KALU—JUDGMENT DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182 *—Pre-emption decree, execution of—Limitation, commencement of.*

A person who obtains a conditional decree for pre-emption or for redemption of a mortgage can execute his decree at any time as soon as he pays the purchase-money or the mortgage-money which the decree requires him to pay But till he makes such a payment the decree is not capable of execution in his favour. The payment of the money is, therefore, a necessary step-in-aid of execution, and an application tendering the money in order that the decree-holder may be able to apply for possession forms a fresh starting point for limitation, whether Article 181 or 182 of Schedule I to the Limitation Act applies to the case. [p 156, col 2; p. 157, col. 1.]

Appeal against the order of the Subordinate Judge, Partabgarh, dated the 4th December 1918, reversing that of the Munsif, Partabgarh, dated the 30th August 1918.

Babu *Sarju Prasad Khandelwal*, for the Appellants.

Babu *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—The question for consideration in this appeal is whether an application for execution of a decree for pre-emption can be made within 3 years from the date when payment is made in pursuance of the decree. The decree in question was passed on the 22nd January 1915. It directed the decree-holder to pay the purchase money within three months. Within the prescribed period the decree-holder tendered the purchase-money. The application tendering the money was made by him on the 15th April 1915 and the money was actually deposited on the 19th April 1915. On the next day the Court directed notice to issue to the judgment debtor to inform him of the deposit and to require him to withdraw the money from Court. The decree-holder filed the necessary *talbana* for the issue of the notice. The notice was served on the judgment-debtor and it is not disputed that he subsequently withdrew the money on the 31st May 1915.

The present application for execution was made on the 11th April 1918, which the Court of first instance allowed but the lower Appellate Court disallowed.

The learned Counsel, who appears for the decree-holder appellant, relies on the decisions in *Chhedi* v. *Lalu* (1) and *Narhar Raghunath* v. *Krishnaji Govind* (2). In the former case it was held that the right of a decree holder in such a case to apply for possession accrues when he pays the purchase-money in pursuance of the decree obtained by him and that till he makes such a payment there is no decree capable of execution. In the latter, an application to enforce the personal remedy granted by a decree, in case the sale-proceeds of the mortgaged property proved to be deficient, was held to be unaffected by section 48 of the Civil Procedure Code till the decree became ripe for execution so far as the personal remedy was concerned, and it was laid down that the limitation provided by that section could only be computed from the date when the decree became so ripe for execution in all its parts.

On behalf of the judgment-debtor-respondent reliance is placed on the decision in *Etyati Pooparambil Bava* v. *Matalakot Krishna Menon* (3) which has been followed in *Jageshar Singh* v. *Raja Bhagwan Bakhsh Singh* (4) and *Ajudhia Singh* v. *Drigpal Singh* (5).

It is obvious, however, that a person who obtains a conditional decree for pre-emption or for redemption of a mortgage can execute his decree at any time as soon as he pays the purchase-money or the mortgage money which the decree requires him to pay. But till he makes such a payment, the decree is not capable of execution in his favour. The payment of the money is, therefore, in any view of the matter a necessary step in-aid of execution, and an application tendering the money in order that the decree-holder may be able to apply for possession forms a fresh starting point for limitation, whether Article 181 or 182 of the Indian

(1) 24 A. 300; A. W. N. (1902), 60.
(2) 15 Ind. Cas. 822; 36 B. 368; 14 Bom. L. R. 381.
(3) 28 M. 211.
(4) 9 Ind. Cas 337: 14 O.C. 10.
(5) 10 Ind. Cas. 187; 14 O. C. 100.

Limitation Act (IX of 1908) is applied to the case.

Order XX, rule 14, of the Code of Civil Procedure, which prescribes the form in which decrees for redemption should be prepared, specifically lays down that the title of a person who obtains a decree for pre-emption to the property which he seeks to pre-empt does not accrue before the date on which he makes the payment which the decree requires him to make, and in that view of the matter an application tendering the requisite money, the payment of which would enable him to take the necessary step in enforcement of the decree, must be treated as an application to take a necessary step in aid of execution and the present application for execution which is within three years from the date of that payment is not barred by time.

The appeal is, therefore, allowed, the order passed by the lower Appellate Court is set aside, and that of the Court of first instance restored with costs throughout.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2098 OF 1918.

May 17, 1919.

Present:—Mr. Justice Bevan-Petman.

WARYAM SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NARAIN DAS—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 61, 63—Attachment in execution of decree, effect of—Ancestral property—Reversioners, position of—Declaration that property is not liable to sale, suit for, maintainability of.

An attachment cannot be regarded as an alienation of the property attached. It may infringe the right of the judgment-debtor but does not give a cause of action to his reversioners. [p. 159, col. 1.]

Under customary law, a suit for a declaration at the instance of the reversioners does not lie when ancestral property has been merely attached in execution of a decree with a view to sale but has not been sold. [p. 159, col. 1.]

Sadhu Singh v. *Secretary of State*, 18 P. R. 1908; 19 P. W. R. 1908 (F. B.); 156 P. L. R. 1908, distinguished.

In a suit for a declaration that a certain house was not liable to attachment and sale in execution of a decree against the plaintiffs' father, it appeared that the plaintiffs had filed objections under Order XXI, rule 58, Civil Procedure Code, claiming that they were in possession as owners. The claim having been disallowed, they filed the present declaratory suit, alleging that the land was ancestral; that they had built certain of the houses, that the debts contracted by their father were without consideration and necessity, and that the houses were exempt from attachment and sale by virtue of section 60 (1) (*c*), Civil Procedure Code:

Held, (1) that the plaintiffs' suit was undoubtedly in part one under Order XXI, rule 63 of the Civil Procedure Code, but that they were not, because of an order under Order XXI, rule 61 of the Code, incompetent to institute a suit for a declaration under the provisions of section 42 of the Specific Relief Act; [p. 158, col. 2.]

(2) that the house in suit not having been sold, the plaintiffs' suit was premature. [p. 159, col. 1.]

Colvin Cowie v. *Mrs. Barbara Owen Julia Elias*, 11 W. R. 40; 2 B. L. R. A. C. J. 212; 1 Ind. Dec. (N. S.) 790, *Phul Kumari* v. *Ghanshyam Misra*, 35 C. 202 (P. C.); 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22, distinguished.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 7th May 1918, reversing that of the Munsif, 2nd Class, Hoshiarpur, dated the 9th March 1918.

Lala *Fakir Chand*, for the Appellants.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—In the present case the facts necessary to state are that certain houses of one Dewa Singh, an agriculturist and the father of the appellants, were attached in execution of a decree against him. Dewa Singh objected and claimed exemption for the houses under section 60 (1) (*c*) of Act V of 1908, but his objection was disallowed. His sons, the present appellants, also filed objections under Order XXI, rule 58, of the Code of Civil Procedure claiming that they were in possession of the property attached as owners. Their claim was disallowed, and they then instituted a declaratory suit alleging that their claim had been wrongly disallowed, that the land was ancestral, that they had built certain of the houses which, therefore, belonged to them, that the debts contracted by their father, a drunkard, were without consideration and necessity and that the houses were exempt from attachment and sale by virtue of section 60 (1) (*c*) of the Code of Civil Procedure, and a declaration to the

effect that the houses were not liable to attachment and sale was prayed for.

The Munsif, treating the case as one under the customary law, held that the houses had not been built by the plaintiffs and that the debts incurred by Dewa Singh were not immoral, but, holding the houses were those of an agriculturist, he declared that certain of the houses were not liable to attachment and sale.

The lower Appellate Court held that the question of the debts being immoral and without necessity and consideration did not arise, because the houses had not yet been sold and the suit was not one for a declaration under the customary law, that the decision in *Jagdip Singh* v. *Bawa Narain Singh* (1) was inapplicable inasmuch as Dewa Singh was alive, that the houses had not been built by the plaintiffs, that no claim of joint ownership with Dewa Singh had been made, and that the plaintiffs had no *locus standi* to claim the exemption relating to houses of agriculturists, because only a judgment-debtor was competent to do so and it, therefore, accepted the appeal.

In this Court a large number of points have been argued at length. In my view of the case it is not necessary to deal with them all, however interesting they may be. It is contended that the suit was one under Order XXI, rule 63, and it was not competent for the plaintiffs to sue on the basis of any claim other than the claim which had been disallowed under Order XXI, rule 61, and in support of this contention reference is made to *Colvin Cowie* v. *Mrs. Barbara Owen Julia Elias* (2). But this decision does not support the contention. In that case, as in this, the claim was of a two-fold nature, one based on the statutory right given to institute a suit when a claim in execution has been disallowed and the other a claim for a declaration. It was admitted and held in that case that the claim in a suit based on that statutory right must be substantially the same right as that for which the party had contended in the execution proceedings, but it was nowhere held that under such circumstances a claim to a declaration was not competent. On the contrary, the claim was considered and was dismissed merely on the ground that, in that particular case, there was no cause of action such as entitled the plaintiffs to the declaration which they sought, because the defendant had never by any act of his impugned or disturbed the title which the plaintiffs were setting up in their suit. The present case falls under the same category. The plaintiffs had, in their plaint, set out the facts relating to the disallowance of their claims, and undoubtedly their suit was in part one under Order XXI, rule 63, but that is no ground for holding that they were because of an order under Order XXI, rule 61, incompetent to institute a suit for a declaration under the provisions of section 42 of the Specific Relief Act.

Reference is also made to *Abdul Kader* v. *Ali Meah* (3) and to *Phul Kumari* v. *Ghanshyam Misra* (4). In the latter case the question related to the proper Court-fee for a suit under section 283 of Act XIV of 1882, which section relates to the same matter as Order XXI, rule 63, and their Lordships of the Privy Council found that fortunately the object and nature of that suit was not dubious, and that the suit was one "to alter or set aside a summary decision or order." Their Lordships explained that "It is true that, instead of asking the Court to alter or set aside the decree which is the cause of action, she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge, and which the Subordinate Judge had refused. But this is merely a verbal or formal difference, and section 283 of the Civil Procedure Code, under which section the action is brought, recognises such a suit as not merely an appropriate but the only mode of obtaining review in such cases." This decision is, I think, easily distinguishable. The claims in the two Courts were the same and it was expressly found, in that particular case and for the reasons stated, that the suit was one under section 283. The facts here are different. The claim disallowed was one based solely on possession by

(1) 15 Ind. Cas. 866; 4 P. R. 1913; 160 P. W. R. 1912; 173 P. L. R. 1912.

(2) 11 W. R. 40; 2 B. L. R. A. C. J. 212; 1 Ind. Dec. (N. S.) 790

(3) 14 Ind. Cas. 715; 16 C. W. N. 717; 15 C. L. J. 649.

(4) 35 C. 202 (P. C.); 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22.

virtue of ownership. The judgment in *Abdul Kader* v. *Ali Meah* (3) takes the matter no further. In that judgment reference is made to the above decision, and it is explained that the summary decision in a claim case is confined to a consideration of the possession of the judgment-debtor at the time of the attachment and that any other discussion in such a decision is material only so far as it is relevant to the determination of that essential matter. It was pointed out that in both Courts the claim related to possession.

In my opinion, the lower Appellate Court clearly erred in holding that the suit was not one under customary law. Not only does this appear from the plaint but throughout the proceedings in the first Court the suit was treated as of that nature and the issues and evidence were directed to that end.

But, in my opinion, the appeal must fail on the ground that the suit was premature, and such was the decision of the lower Appellate Court when it briefly remarked that the houses had not yet been sold. No authority has been given that under customary law a suit for a declaration will lie when ancestral property has been merely attached in execution of a decree with a view to sale but not sold. In *Sadhu Singh* v. *Secretary of State* (5) the property had been both attached and sold. An attachment cannot be regarded as an alienation. It may be argued that an attachment infringes the right of a judgment-debtor, but does this give a cause of action under customary law to the reversioners? I am not aware of any such right.

For the above reasons I dismiss the appeal with costs.

Appeal dismissed.

(5) 18 P. R. 1908; 19 P. W. R. 1908 (F. B.); 156 P. L. R. 1908.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 231 OF 1918.

March 19, 1919.

Present :—Mr. Daniels, A. J. C.

MOHAMMAD MOHSIN *alias* SYED JAN—PLAINTIFF—APPELLANT

versus

MOHAMMAD ABID *alias* BADLE MIYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 134, 148—*Mortgage—Mortgagee dealing with mortgaged property as owner, effect of—Auction-purchaser in execution of decree against mortgagee, position of—Redemption, suit for, by mortgagor—Limitation—Subrogation, doctrine of, applicability of.*

A mortgagee cannot, during the continuance of the mortgage, hold possession of the mortgaged property adversely to the mortgagor. [p. 160, col. 1.]

If, therefore, a mortgagee makes a temporary transfer of the mortgaged property by way of mortgage or lease, purporting to do so as proprietor, but recovers possession of the property before his mortgagee or lessee has acquired any adverse title, his position is just what it was before the mortgage or lease was made, and a suit for redemption of the mortgage by the original mortgagor would be governed by Article 148, Schedule I, to the Limitation Act. [p. 160, cols. 1 & 2.]

It is only when a puisne mortgagee redeems a prior mortgage that the question of subrogation arises—the doctrine of subrogation has no application where the mortgagor himself, or his successor-in-interest, redeems the mortgage. [p. 160, col. 1.]

A purchaser at an auction-sale is not entitled to the benefit of Article 134 of Schedule I to the Limitation Act, even though the sale purports to transfer not merely the mortgagee rights which the judgment-debtor really possessed but the entire proprietary rights. [p. 160, col. 2.]

Appeal against the decree of the District Judge, Hardoi, dated the 14th March 1918, confirming the decree of the Munsif, Bilgram, dated the 9th June 1917.

The Hon'ble Mr. *Wazir Hasan*, for the Appellants.

Babu *Basudev Lal*, for Respondent Nos. 3, 4 and 7.

JUDGMENT.—This is an appeal in a suit for redemption of a mortgage. The only point which has been gone into by the Court below is one of limitation, the question being whether the suit is governed by Article 148 or by Article 134. The date of the original mortgage is given in the plaint as 21st December 1856. The suit was instituted on 12th December 1916 so that if it is governed by Article 148, it is, on the allegations n the plaint, just

within time. The parties to the original mortgage were the mortgagor Husain Bakhsh now represented by the plaintiff-appellant and the mortgagee Mohammad Hadi. The mortgage was usufructuary. Mohammad Hadi's interest descended to his grandson Mohammad Abid, now represented by the respondents other than Din Dayal and Ajudhia Prasad, respondents Nos.3 and 7. Apparently the name of the mortgagee was entered in the Khewat as the proprietor and the fact that his interest was that of the mortgagee was lost sight of. At any rate it is an admitted fact that in the year 1893 Mohammad Abid, purporting to be full owner of the property, mortgaged it with possession as part of a large property in favour of one Puttu Lal. In the year 1902 the proprietary interest, subject only to the mortgage in favour of Puttu Lal, was put up to sale in execution of a simple money decree against Mohammad Abid and bought by the answering respondents Din Dayal and Ajudhia Prasad. The purchasers subsequently on 1st July 1904 redeemed Puttu Lal's mortgage and obtained actual possession of the mortgaged property. The present suit was brought more than 12 years after this transaction. If, therefore, Article 134 applies, the suit is clearly barred whether limitation is recognized from the mortgage in favour of Puttu Lal or from the redemption of that mortgage, or from the date of the respondents' purchase.

The appeal really involves two questions:—

(1) whether the respondents are entitled to the benefit of Article 134 by reason of their purchase at the auction-sale, and

(2) whether they are entitled to step into the shoes of Puttu Lal by reason of having redeemed his mortgage.

The second is the position taken by the learned Munsif. The learned Judge has taken a third view, namely, that Puttu Lal's mortgage became extinguished within twelve years of the date on which the mortgage was made. This view is, I think, untenable. A mortgagee cannot, during the continuance of the mortgage, hold possession adversely to the mortgagor. If, therefore, the original mortgagee makes a temporary transfer by way of mortgage or lease, purporting to do so as proprietor, but recovers possession before his mortgagee or lessee has acquired any adverse title, his position is just what it was before the mortgage or lease was made and the application of Article 148 is in no way affected. By their purchase at the auction sale the respondents became the successors-in-interst of Mohammad Abid and they cannot by redeeming Puttu Lal's mortgage acquire any greater rights than he would have had. It is only when a puisne mortgagee redeems a prior mortgage that the question of subrogation arises. A mortgagor who redeems a mortgage by himself cannot claim subrogation, nor can the person who succeeds to his interest. The effect, therefore, of the redemption of Puttu Lal's mortgage was to extinguish it.

The first question must also be answered against the respondents. There is considerable authority for the view that a purchaser at an auction-sale is not entitled to the benefit of Article 134, even though that sale purports to transfer not merely the mortgagee right which the judgment-debtor really possessed but full proprietary right. This was decided by a Full Bench of the Madras High Court in *Ahamed Kutti* v. *Raman Nambudri* (1) and the same view has been taken by the Allahabad High Court in *Sheo Nath Singh* v. *Mahipal Singh* (2) and by the Bombay High Court in *Pandu* v. *Vithu* (3). The view taken by this Court has been that a purchaser at such a sale cannot acquire a larger interest than was possessed by the judgment debtor whose interest he acquires.

The appeal is, therefore, allowed with costs and the case remanded to the lower Appellate Court under Order XLI, rule 23, Civil Procedure Code, for disposal of the remaining issues. Other costs will abide the result.

Appeal allowed; Case remanded.

(1) 25 M. 99; 11 M. L. J. 323.
(2) A. W. N. (1905) 56; 2 A.L. J. 234.
(3) 19 B. 140 at p. 144; 10 Ind. Dec. (N. S.) 95.

GAJADHAR DAS *v.* RAM SUMIRAN DUBE.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 52 OF 1919.
July 17, 1919.
Present:—Justice Sir P. C. Banerji, KT.
GAJADHAR DAS—PETITIONER
versus
RAM SUMIRAN DUBE—OPPOPITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Execution of decree—Sale—Application to set aside sale—Deposit made but not received by Court within thirty days—Sale, whether should be set aside.

The property of a judgment-debtor was sold by auction on 20th March. On 20th April he applied to the sale officer to set aside the sale and offered to deposit the decretal amount and the penalty mentioned in rule 89 of Order XXI of the Civil Procedure Code. The sale officer, not being competent to entertain the application, forwarded it on 22nd April to the Court which had ordered the sale. On 23rd April the judgment-debtor applied to the Court asking that the money might be received. The Court did not receive the money and ordered the matter to come before it on 30th April. The money was deposited on 1st May, but the Court refused to set aside the sale on the ground that the deposit had not been made within thirty days of the sale. This order was reversed by the Appellate Court and the High Court was moved in revision, it being contended that the Appellate Court had no jurisdiction to make the order it did as no deposit had been made within thirty days :

Held, that the actual delay in the deposit of the money was not due to any act on the part of the judgment-debtor, and that, although the deposit was actually made on 1st May, he had brought the money into Court on 20th April, and that the Appellate Court was, therefore, justified in setting aside the sale. [p. 162, col. 1.]

Civil revision from an order of the District Judge, Benares, dated the 2nd August 1918.

Mr. *Jang Bahadur Lal*, for the Petitioner.

Mr. *M. L. Agarwala*, for the Opposite Party.

JUDGMENT.—This is an application for revision and has been brought under the following circumstances. The property of the respondent-judgment-debtor was sold by auction on the 20th of March 1918. The sale was held by the Revenue Court as sale officer under the orders of the Civil Court. On the 20th of April 1918 the judgment-debtor filed an application before the sale officer offering to deposit the decretal amount and the penalty mentioned in Order XXI, rule 89, of the Code of Civil Procedure and prayed that the sale might be set aside. The sale officer was not competent to entertain the application and accordingly made an order that the application be forwarded to the Munsif's Court which had ordered the sale. As a matter of fact the application was not actually sent to the Munsif's Court until the 22nd of April 1918. On the 23rd of April 1918 the judgment-debtor filed an application in the Munsif's Court, in which he referred to the application presented by him on the 20th of April 1918 and stated that he had brought all the money that was required to be deposited and prayed that it should be received. The Munsif did not receive the money but passed an order to the effect that the case should be put up on the 30th of April 1918. He said in his order that "so far the money had not been deposited." It is clear that had the Court received the money, it would have been deposited as the judgment-debtor distinctly said in his application that he had the money ready and he asked the Court in clear terms to receive it. On the 1st of May 1918 the money was actually deposited. The Court of first instance refused to set aside the sale, on the ground that the deposit had not been made within thirty days of the sale. This order of the Court of first instance has been reversed by the lower Appellate Court. The contention in this application is that the order of the lower Appellate Court was without jurisdiction as no deposit had been made within thirty days. In my opinion the application is untenable. As has been already stated, the judgment-debtor had, on the 20th of April 1918, stated to the sale officer before whom he by an error put in his application of that date that he had the money ready for deposit and he asked that it should be deposited. Had the application been forwarded to the Munsif's Court on the same date as directed by the sale officer, the deposit would have been made on that date, the judgment-debtor having been ready to make the deposit on that date. On the 23rd of April also he stated that he had the money with him, that he was ready to deposit it and he asked the Court to receive the money. The Court, however, did not do so. Therefore, the delay in the actual deposit of the money was not due to any act on the part of the judgment-debtor. He brought the money on the 20th of April and was ready to deposit

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it if the Court had received it. Therefore, it must be held that although the deposit was actually made on the 1st of May he had brought it into Court on the 20th of April. Under these circumstances the lower Appellate Court was justified in setting aside the sale. I see no reason to interfere. Furthermore an order in revision is a matter in the discretion of the Court and having regard to the circumstances of this case and to the fact that no injustice has been done, I see no reason to exercise my discretion in favour of the applicant. I accordingly reject the application. I make no order as to costs.

Application rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 146 OF 1918.

March 3, 1919.

Present:—Mr. Daniels, Officiating 2nd A. J. C.

Musammat ZAIBUNNISSA AND OTHERS—DEFENDANTS--APPELLANTS

versus

Musammat HASARATUNNISSA AND OTHERS—PLAINTIFFS AND ZAHID HUSSAIN—DEFENDANT—RESPONDENTS.

Evidence Act (I of 1872*)*, *ss.* 35, 114, *ill.* (e)—*Death register, entry in, admissibility of—Register, entry in, value of—Presumption as to regularity of judicial acts—Evidence, contrary, effect of—U. P. Land Revenue Act (III of* 1901*)*, *s.* 233 (k)—*Partition proceeding—Civil suit, maintainability of.*

An entry made in the register of deaths, maintained under paragraph 367 of the Police Regulations, is an official entry made by a public servant in the discharge of his official duty and as such is admissible in evidence under section 35 of the Evidence Act. [p. 163, col. 2]

An entry in such register is, as a rule, reliable to within a few days, and even where the date is not absolutely exact, the entry is often most valuable evidence where the question is as to the relative order in which certain deaths took place. [p. 164, cols. 1 & 2.]

The principle that all acts of a Court should be presumed to have been regularly done is a correct principle, where there is no evidence to the contrary. Where, however, on an examination of the record itself, it appears that a party was not properly served, the principle has no application. [p. 164, col. 2.]

Section 233 (*k*) of the Land Revenue Act bars a civil suit if the plaintiffs were parties to the partition and were properly represented, but not if they were not parties or were not properly represented. [p. 164, col. 2.]

Appeal against the decree of the District Judge, Fyzabad, dated the 25th February 1918, modifying that of the Additional Munsif, Fyzabad, dated the 30th June 1917.

Mr. *H. Husain*, for the Appellants.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—This is a second appeal in a suit for the possession of certain property in certain villages in the Fyzabad district. The following pedigree will explain the position of the parties :—

ALI HUSAIN=*Musammat* SAERA BIBI.
(DIED IN 1907)—(DIED IN 1912.)

- *Musammat* Badran, | *Musammat* Bittan.
- Zahid Husain, defendant No. 6.
- Mumtaz Husain=*Musammat* Zaibunnissa, defendant No. 1
  - *Musammat* Ashrafunnissa, defendant No. 2.
  - *Musammat* Shafiqunnissa, defendant No. 3.
  - *Musammat* Shafiunnissa, defendant No. 4.
  - *Musammat* Samiunnissa, defendant No. 5.
- Ghaffar Husain died in 1912=*Musammat* Hasratunnissa, plaintiff No. 1
  - Irshad Husain, plaintiff No. 2.
  - Amjad Husain, plaintiff No. 3.

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After the death of Ali Husain his three sons were recorded as owners to the extent of one third *i. e.*, 5 annas 4 pies each. *Musammat* Saera Bibi was ignored and the share in dispute is part of that which according to Muhammadan Law devolved on her on her husband's death.

Four pleas are urged in appeal, namely :—

(1) By custom widows are excluded from inheritance in the presence of children and that, therefore, *Musammat* Saera inherited no share at all.

(2) That *Musammat* Saera Bibi survived her son, Ghaffar Husain, the predecessor-in-interest of the plaintiffs and that, therefore, they are not entitled to any part of her share.

(3) That *Musammat* Badran, the daughter of Ali Husain, was entitled to a legal share in the property of her mother, *Musammat* Saera Bibi, and

(4) That the suit is barred under section 233 (*k*) of the U. P. Land Revenue Act, 1901, by reason of a partition which took place.

It is unnecessary to go into the first and third of the above issues, as they were not raised in the Court below. In the opening sentence of the judgment of the learned District Judge it is expressly stated that the plea regarding the exclusion of *Musammat* Saera Bibi was abandoned before him.

As regards *Musammat* Badran an issue was framed by the learned Munsif in these terms :—

"Whether Badran is excluded under any custom set up by the plaintiffs, and if not, how does her presence affect this case?"

In deciding this issue the learned Munsif said :—

"I have no hesitation in holding that *Musammat* Badran was excluded from inheritance by virtue of the custom and she got no property on the death of Ali Husain."

The question whether she survived her mother or whether she was entitled to any property on the death of the latter was not considered. It is pointed out for the respondents that the expressions used in the *riwaj-i am*, "if any owner of property (*sahib jaedad*) dies...", are perfectly general and would apply as much to a mother as a father. However that may be, the question now raised as to *Musamma* Badran's right of inheritance to her mother was not taken at all either in the petition of appeal or in argument before the lower Appellate Court and as it might involve a question of fact which has not been gone into by the Courts below, it would not, in my opinion, be proper to allow it to be raised now:

The important issues are the second and fourth. The second issue looks like a pure question of fact, but the lower Courts have based their finding that *Musammat* Saera Bibi died a few days earlier than Ghaffar Husain largely on a register of deaths maintained under paragraph 367 of the Police Regulations, and the legal question raised is whether entries in that register are admissible in evidence under section 35 of the Evidence Act to prove that *Musammat* Saera Bibi predeceased her son.

The appellants rely specially on two rulings of this Court: *Sampat* v. *Gauri Shankar* (1) and *Habib Ullah* v. *Emperor* (2). The second ruling is not really an authority since the learned Judge, while stating that as at present advised he saw no reason to suppose that the ruling in *Sampat* v. *Gauri Shankar* (1) was erroneous, held that it was not necessary for him to consider the question because in the particular case before him the entry, even if admissible, proved nothing. The ruling in *Sampat* v. *Gauri Shankar* (1) passed in the year 1910 related to a Chaukidar's register and was based on the grounds

(1) That the entry in dispute was not made by the Chaukidar, and

(2) that it was not shown that it was made by any public servant in the discharge of his official duty or that it was the duty of any public servant to make it.

This ruling was doubted in *Baldei* v. *Abhey Ram* (3) and whatever the state of the law as to Chaukidars' death registers may have been in 1910, it is perfectly clear that the register of which a copy is before me is an official register made by a public servant in the discharge of his official duty and as such is admissible under section 35. The case of *Tamizuddin* v. *Taju* (4) is a recent

(1) 10 Ind. Cas. 713; 14 O. C. 68.
(2) 18 Ind. Cas. 653; 15 O. C. 351; 14 Cr. L. J. 93.
(3) 24 Ind. Cas. 540; 12 A. L. J. 945.
(4) 43 Ind. Cas. 237; 46 C. 152; 22 C. W. N. 822.

authority to the same effect. It is urged that even if this be the case, the entry is only evidence of the fact of the death and not of the date of it and further that even if it be allowed as evidence of the date, it is evidence of very little value.

As regards the former point, the form prescribed for this register contains a column for the date of death and it is, therefore, difficult to see how this entry could be excluded from evidence or held not to be made in the discharge of official duty. Rule 5 says that the report shall be made, if possible, on the day on which the death takes place, but that in rural circles they may be made at the periodical visits of the village Policeman to the Thana. The appellants' main reliance is on the second paragraph of rule 6 which runs as under:--

"When the village Policeman of a village comes to make his daily or his bi-weekly report, as the case may be, the Head Constable writer will ask him if any deaths have occurred in his beat since the date of his last report, and if any have occurred, he will enter them with details as under one or other of the prescribed heads. The writer (if there be nothing of a special nature leading him to suspect the accuracy of the report) need not require the exact day on which the man, woman or child reported as dead, died. The date on which the village Policeman's report is made will be assumed as the date of the death, this course of procedure being for all practical purposes of registration quite sufficient."

This, I take it, is not meant to excuse the Chaukidar from giving the correct date of death if he knows it. But if he does not know the exact date, the Thana Police will enter the date on which the report is made as being the date of the death, this being quite sufficiently near for practical purposes. I am quite prepared to admit the force of the appellants' argument that where the exact date of the death is of the highest importance and a difference of a day or two days is material (as for instance where there is a question of limitation), an entry in a register prepared on these lines would be an unsafe guide but the entry will as a rule be reliable to within a few days and even where the date may not be absolutely exact, the entry will often be most valuable evidence where the question is, as here, as to the *relative order* in which the deaths took place. Here the entry of *Musammat* Saera Bibi's death is dated April 1 and that of Ghaffar Husain April 5. The entries being, as appears from the Police Regulations, made bi-weekly, the probability is that the latter entry was made on a subsequent visit to the earlier one. As the learned Judge says, if Ghaffar Husain had been dead at the time when *Musammat* Saera Bibi's death was reported, it is in the highest degree unlikely that it should not have been mentioned. In any case if the entry is held admissible, the question of the amount of weight to be attached to it was one for the lower Appellate Court and would not be interfered with by this Court.

The last question is as to the effect of the partition. The case has been argued on both sides on the assumption, which I take to be a correct statement of the law, that if the plaintiffs were parties to the partition and properly represented, section 233 (*k*) of the Land Revenue Act stands in the way of the present suit but that if they were not parties or not properly represented, that section does not apply. In the present case it is admitted that the first plaintiff, *Musammat* Hasartunnissa, was not made a party in her personal capacity. The other two plaintiffs were minors and they appear to have been named as plaintiffs under her guardianship. The learned Munsif examined the partition file for himself, and he found that no order appointing her as guardian *ad litem* was ever passed, that there was no order holding that service on her as their guardian had been sufficient and that in fact it was apparent from the record itself that that service was insufficient. These findings have been accepted by the lower Appellate Court and it is not open to me to go behind them even if I were disposed to do so. The principle that all the acts of a Court should be presumed to have been regularly done is a correct principle where there is no evidence to the contrary, but where on an examination of the record itself it appears that a party was not properly served, the principle has no application.

KANSHI RAM *v.* TAGRA.

The appeal, therefore, fails and for the reasons given above I dismiss it with costs.

The respondents have filed a cross objection in regard to a point not hitherto touched on. The lower Courts have found that the first defendant, *Musammat* Zaibunnissa, is in lawful possession of a portion of the property in suit in lieu of her dower, and is entitled to hold it until that dower is paid. The respondents in their cross-objection asked that the amount of that dower should be determined and a decree for possession conditional on its payment passed in the present suit. This course was considered by the Courts below, who have pointed out that no offer was made by the plaintiffs in their replication or anywhere in the course of the proceedings to pay the amount of the dower debt, nor any request put forward in the pleadings for a conditional decree of the kind now asked for. Relying on the ruling in *Amani Begum* v. *Muhammad Karim Ullah Khan* (5) which is very much on all fours with the present case, they have declined to give such a decree and have left the question of dower to be determined in a separate suit. They are supported by the ruling on which they rely and no authority to the contrary has been shown me. I accordingly dismiss the cross-objection with costs.

Both Appeal and Cross objection dismissed.

(5) 16 A. 225; A. W. N. (1894) 52; 8 Ind. Dec. (N. S.) 146.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 504 OF 1919.

May 13, 1919.

Present:—Mr. Justice Bevan-Petman.

KANSHI RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TAGRA—DEFENDANT—RESPONDENT.

Decree, construction of—Conditional decree, what is—Decree for possession, non-execution of, effect of—Suit for possession, whether maintainable.

A conditional decree is one in which it is provided that the decree-holder will be entitled to the relief granted only on condition of his doing something. [p. 166, cols 1 & 2.]

In a suit for possession of certain property and for recovery of its rent, it appeared that a previous suit had been compromised on the condition that the defendant was to remain in possession for three years and pay rent and perform service, and that, on the defendant's failure to do so, the plaintiff would be entitled to take possession before the expiry of three years, otherwise he could obtain possession by execution of the decree. On 15th March 1910, a decree was passed in accordance with the compromise and the defendant not having paid rent and having refused to vacate, the present suit was brought, it being alleged that the cause of action arose on the 15th March 1913, the date of the expiry of the three years:

Held, (1) that the decree of 1910 was not a conditional decree, but became absolute from the date on which it was passed; [p. 166, col 1.]

(2) that the remedy of the plaintiff was by execution of the decree obtained by him and not by a suit based on that decree. [p. 166, col. 2]

Second appeal from the decree of the District Judge, Ferozepore, dated the 20th November 1918, affirming that of the Munsif, 1st Class, Fazilka, District Ferozepore, dated the 31st May 1918, dismissing the claim.

Mr. *D. C. Ralli*, for the Appellants.

JUDGMENT.—The facts of this case briefly are that in 1910 the appellants, or their predecessors, instituted a suit for the recovery of the property now in dispute, on the allegation that in 1908 they had obtained a decree conditional on the payment of Rs. 30 which sum had been paid and possession obtained but forcible possession had again been taken by the defendant. This suit was compromised on the following terms: that the defendant should remain in possession for three years, that he should pay four annas a month to the plaintiffs and perform service, that if he failed to pay or render service the plaintiffs would be entitled to take possession before the expiry of the three years, otherwise the plaintiffs could obtain possession by execution of the decree. A decree was passed on the 15th March 1910 in accordance with the compromise. On the 4th March 1918 the plaintiffs instituted the suit out of which the present appeal arises. In their plaint the plaintiffs set out the facts of the compromise and decree and allege that the three years had expired but that the defendants refuse to vacate and have not paid rent. They prayed for arrears of rent and for possession, stating that the cause of action arose on the 15th March

1913, that is, the date of the expiry of the three years.

The Munsif dismissed the suit on the ground that the decree itself provided for possession being taken by execution, that the decree became absolute on the 15th March 1913, that the remedy of the plaintiffs had been by execution of the decree within three years of that date and that no fresh suit would lie. The lower Appellate Court dismissed the appeal for similar reasons but laying emphasis on the point that as the decree expressly provided that possession was to be obtained by execution, that was the only course open.

For the appellants it is argued that the plaintiffs had the right to sue on the determination of the tenancy whether the same be regarded as created by the decree or by agreement, that the provisions in the compromise and decree relating to the recovery of possession by execution was merely explanatory and so as to make it very clear that another suit would not be necessary, that the decree was a conditional one, that both the lower Courts had misapplied the judgment in *Hafiz Baha-ud-Din* v. *Musammat Fatteh Bibi* (1) and that the appellants had a fresh cause of action on the termination of the tenancy on the 15th March 1913. In support of these arguments reliance is placed on *Ram Singh* v. *Nodh Singh* (2) and *Shamir* v. *Ladha Singh* (3).

In my opinion this appeal cannot succeed. It is clear that the suit was based on the decree of 1910, and not on the original cause of action--no other cause of action was alleged. The decree of 1910 is not a conditional one. It was absolute from the date of the decree and not from the 15th March 1913. As held by the lower Courts, the decisions relied on for the appellants do not help them and, on the contrary, are against them. The leading case on the point is the Full Bench decision *Ram Singh* v. *Nodh Singh* (2), which has been referred to and followed by the Chief Court in more recent decisions. The matter is there fully explained and dealt with. In my opinion a conditional decree is one in which it is provided that the decree-holder will be entitled to the relief granted only on the condition of his doing something. The simplest example of such a decree is one granting possession of property on payment of a certain sum of money. In *Ram Singh* v. *Nodh Singh* (2) it was held that a conditional decree which is silent as to the consequences of an omission to satisfy the condition leaves it in the option of the decree holder to fulfil the condition; that if he does so he may take the benefit of the decree and that if he omits to do so, he shall not have the benefit of it but at the same time shall not be prejudiced by the omission. and that, therefore, he was competent to institute a fresh suit.

In the present case possession was deferred and in the meantime rent was to be paid and services rendered. This does not render the decree a conditional one. Even if, for the sake of argument, the decree be regarded as conditional, the plaintiffs can sue only on the original cause of action and not on the decree [*Ram Singh* v. *Nodh Singh* (2), *Dewa Singh* v. *Harnam Singh* (4), *Hafiz Baha-ud-Din* v. *Musammat Fateh Bibi* (1) and *Shamir* v. *Ladha Singh* (3)] and this has not been done.

Finally, it is urged that the area sued for now exceeds the area which formed the subject of the decree of 1910, that such excess was not governed by the decree of 1910 and the lower Appellate Court should have allowed the appellants to amend their plaint. In my opinion, the lower Appellate Court acted rightly in refusing the application at that stage, nor, as pointed out by him, could such amendment avail, as the suit was based on the previous decree and no facts were alleged with respect to the excess area on which a decree could be given.

I hold that the suit is barred. The remedy of the plaintiffs was by execution of the decree obtained by them. I, therefore, dismiss the appeal with costs throughout.

Appeal dismissed.

(1) 16 P. R. 1893.
(2) 93 P. R. 1879 (F. B.).
(3) 4 Ind. Cas 854; 100 P. R. 1909, 152 P. L. R. 09; 148 P. W. R. 1909.
(4) 57 P. R. 1883

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REFERENCE No. 59 OF 1918 19.

March 17, 1919.

Present:—Mr. Hopkins, J. M.

MAHPAL BAHADUR—APPLICANT

versus

RAM BAHADUR SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 54, 66, 90—Execution of decree—Sale—Notice to judgment-debtor, absence of, effect of—Sale, whether can be set aside.

The mere absence of notice to a judgment-debtor of the intended sale of his property is not a material irregularity in the publication of the sale, within the meaning of Order XXI, rule 90, of the Civil Procedure Code, sufficient of itself to justify the setting aside of the sale.

Reference made by the Commissioner of Benares Division.

ORDER.—The Commissioner recommends that a sale of immoveable property be set aside on the ground that the judgment-debtor did not receive the notice required by rule 66 (2), Order XXI, Schedule I, Civil Procedure Code.

The objection taken by the applicant in revision before the Collector was that there had been serious fraud and irregularities in the sale proceedings (which he did not specify); that the judgment-debtor had no knowledge from beginning to end either of the date of the sale or other proceedings; that other people also who wished to purchase got no information, with the result that the property was sold at a low price.

The Collector dismissed this objection on the ground that the applicant had received notice [found by the Commissioner to be the order served under rule 54 (*i*)] and that the property which was valued at Rs. 71 with encumbrances to the extent of Rs. 299-14-0 was sold for Rs. 81-7-3. The application for revision to the Commissioner was based on the ground that the proclamation was not properly served and the applicant had no knowledge of its service.

Under rule 67 (1) a proclamation is required to be made in the manner prescribed by rule 54, sub rule (2), which does not require particular notice to the judgment-debtor. There is no report by the Commissioner that the proclamation was not made according to law and this was not an objection taken in terms before the Collector. There is no statement from first to last by the applicant that the valuation of the property made by the Collector was incorrect. There is no statement of what the alleged defect was in the manner of making the proclamation. The ground on which the Commissioner bases his reference was not taken by the applicant at all.

The applicant has not established any *prima facie* case of any material irregularity or fraud in the conduct of the sale: still less of any substantial injury caused in consequence. I find no grounds for revision and direct that the records be returned.

Record returned.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 55 OF 1919.

June 17, 1919.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

Kuar CHANDRA BHUKHAN SINGH—PETITIONER—APPLICANT

versus

Musammat Rani SUJAN KUAR—OPPOSITE PARTY—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 41 (3)—Death of minor—Court, power of, to direct guardian to deliver up property of minor to his widow.

A Court has no jurisdiction under section 41 (3) of the Guardians and Wards Act to make an order, on the death of a minor, directing his guardian to deliver up the property, papers and accounts in his possession to the widow of the minor. [p. 169, col. 1.]

Civil revision against the order of the District Judge, Cawnpore, dated the 28th March 1919.

The Hon'ble Mr. *Narain Prasad Asthana*, for the Applicant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Uma Shankar Bajpai*, for the Respondent.

JUDGMENT.

RYVES, J.—This is an application in civil revision to quash the order of the District Judge of Cawnpore, dated the 28th of March 1919, on the ground that it was passed without jurisdiction. It raises a question of difficulty and importance and appears not to

be covered by authority. The order purports to have been made under section 41 (3) of the Guardians and Wards Act, Act VIII of 1890.

The facts are as follows :—In 1907 the present applicant, Kuar Chandra Bhukhan Singh, was appointed under the Act guardian of the property of the minor, his nephew, who had inherited a very valuable Zemindari estate which it is admitted is impartible. On the 23rd of November 1918 the minor died. Up to that time there had been no suggestion that the guardian had failed in any way to do his duty.

No sooner had the minor died, than litigation was started to determine who should succeed him. The two claimants were:—

(1) The widow of the minor, the opposite party here; and

(2) the applicant.

Both are claiming mutation of names in the Revenue Courts and the litigation is still pending.

On the 6th of March 1919 the widow of the minor filed an application in the District Judge's Court, in which she stated that "she was the sole heir of the minor and entitled as his widow to receive the entire property of the deceased minor." She further stated that "she believed that the guardian had withdrawn a sum of about Rs. 36,000 from the Allahabad Bank, Limited, standing in the minor's name and appropriated the same to his own use. She, therefore, prayed that the said guardian be called upon to deliver all moveable property and cash and documents and render accounts of the period of his guardianship and be prohibited from using or converting the property of the deceased ward in any manner whatsoever." She asserted that the immoveable property was already in her possession. The Court thereupon issued notice to the guardian to show cause why the application should not be granted.

The guardian, the applicant here, in his reply claimed that he was the heir. He denied that he had in any way wrongfully dealt with any monies belonging to the minor and stated that he had all along submitted accounts of his stewardship to the Court, the last accounts having been filed in July 1918. At the same time he protested against the Court's jurisdiction to pass the order prayed for against him as being beyond its jurisdiction. The Court made an enquiry of a very summary character, for I find that no evidence was recorded, and passed its order in the following terms:—

"I grant the application so far as it asks for property, papers and accounts in the possession of the guardian. The latter cannot under section 41 (3) be ordered to render accounts. For this a separate suit is necessary."

It may be noted here that the widow did not assert when the so called misappropriation of the Rs. 36,000 had been made, whether before or after the death of the minor. Nor has the Court come to any finding on this point. It says:—"It appears that he has drawn out in his own name some of the minor's money. He never informed this Court of his intention to do this." I presume that this was admitted by the applicant, for, as I have said, no evidence was taken. Assuming that this is a finding that the money standing in the minor's name had been withdrawn, there is no finding as to when this was done, whether before or after the minor's death.

The learned Judge seems to me to have been influenced to some extent by taking into consideration what in his opinion were the merits of the parties before him ultimately to succeed, for he says:—

"The question whether the widow or uncle is heir depends on the fact whether the uncle was joint with the deceased minor, that is to say, would have been a coparcener with the deceased but for the estate being an impartible one, it being common ground that the deceased minor was owner of the property as the holder of an impartible estate. There is a presumption in favour of jointness and the mere fact that the uncle lived in a separate house from the minor for the sake of convenience will not of itself prove the separation which would debar him from succeeding. At the same time it appears to me clear from the order appointing the uncle guardian that there was no suggestion when he was appointed guardian that he was next heir to the property nor did he then say that his living separately was a temporary matter of convenience."

Such considerations seem to me wholly irrelevant in the present enquiry. The question as to who was the heir of the minor was one which the District Judge certainly could not determine in this enquiry.

Mr. Narain Prasad for the applicant does not contend that the guardian's liability to account for his administration of the minor's property was terminated by the death of the minor. All he contends for is that the order passed was without jurisdiction.

It is admitted that the decision of the question turns on the proper construction of section 41 of the Act, and more particularly on sub-section 3 of that section. The only question raised and the only one which I propose to deal with, therefore, is whether this particular order was one which the Court had jurisdiction to pass. In my opinion it was not.

Section 41 enumerates the circumstances under which the powers of a guardian terminate. We are only concerned here with paragraphs 2 and 3 of that section. The powers of a guardian of the property of a minor cease (*a*) on his (the guardian's) death, removal or discharge; (*b*) by the Court of Wards assuming superintendence over the property of the ward; or (*c*) by the ward ceasing to be a minor.

While it is clear that the powers of a guardian cease on his own death, paragraph (*c*) declares that his powers also cease by the ward ceasing to be a minor. I think these words must mean by the minor becoming a major,—when he would have presumably reached years of discretion and would be able to look after his own interests. I do not think that the death of the minor was meant to put an end to the responsibility of the guardian to account to the Court whose officer he is for his stewardship. To hold otherwise would be to suggest that all that a dishonest guardian has to do to escape the disciplinary power of the Court which appointed him would be to procure the death of the minor. His liabilities are apparently only terminated by his death, removal or discharge. Unless and until the guardian on the death of the minor applies to the Court and gets his discharge and thereby obtains the safeguard provided under sub-clause 4 of section 41, it would appear that he still remains accountable to the Court for his administration of the minor's property. But this question is perhaps irrelevant here, as the guardian does not claim that the death of the minor in any way puts an end to his liabilities, and I, therefore, express no opinion on the point.

Dr. Tej Bahadur supports the order of the Court by arguing that under section 41(3) the Court may for "any cause" act under the section and, that "any cause" includes the death of a minor. The chief difficulty in accepting this argument is the fact that the wording of the sub-section and especially the concluding words, namely, "any past or present property of the ward," clearly contemplate that the ward was alive at the time (though he may have become a major) when the order was passed. But there is another serious difficulty to this argument. Orders under section 41, clause 3, are admittedly final and are not open even to appeal. If an order such as was passed in this case was within the jurisdiction of the Court it might well be held to operate as *res judicata* between the parties. Dr. Tej Bahadur has to admit this, but says the difficulty would in practice be removed because a Court dealing with such matters under the Act would not pass final orders except in cases where the issue is very simple. In difficult cases, he argues, or where a detailed enquiry was necessary, it would refer the parties to the ordinary Civil Courts. It seems to me that the Legislature either gave the Court jurisdiction finally to decide such questions or it did not. I cannot think, in the absence of any direction to the contrary, that it left it open to the whim or idiosyncrasy of the Judge concerned to decide whether or not to try a question of the kind involved.

No authority under the Act has been cited by either side nor have I been able to discover any.

The case of *Narbadabai, In the matter of* (1) has been cited.

That was a decision under Act XX of 1864 and is perhaps not quite decisive here because the language of the two Acts is not precisely similar, though they both deal with the guardianship of minors. But Act XX of 1864 was one of the Acts which was repealed and superseded by the present Act. The Legislature must, therefore, have been aware that the Bombay High Court had held that when a minor died during minority, the "administrator" of his estate, duly certificated, under section 6 of that Act, could not be called upon to render accounts to the Court on the death of the minor,

(1) 8 B. 14; 4 Ind. Dec. (N. S.) 383.

because the Court, as representing the minor, was "*functus officio*", and yet took no steps in framing the present Act to provide for the case of the ward's death during his minority. From first to last the only section in the Act which seems to contemplate the consequences of the death of the minor during his guardianship is section 37, which has no application here. There is nothing in this Act corresponding to section 48 of Act IV of 1912 (The United Provinces Court of Wards Act).

On the whole I am satisfied that the order of the Court was without jurisdiction and must be set aside with costs. I would allow this application with costs.

WALSH, J.—I agree that this application must be allowed, for the reasons stated. We are not deciding that the death of the minor puts an end to the jurisdiction of the Court. On the contrary I incline to agree with what my brother has said about the termination of a guardian's liability to the Court exercising jurisdiction under the Guardians and Wards Act. But it will be time enough to decide that question when the point arises.

BY THE COURT.—The order of the Court is that the application is allowed with costs, and the order of the Court below must be set aside.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 228 OF 1918.

April 3, 1919.

Present:—Mr. Stuart, J. C.

Lala LACHHMAN PRASAD—PLAINTIFF—APPELLANT

versus

Musammat CHAMELA AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale—Withdrawal of suit on payment of money, whether amounts to sale.

Where one person is in possession of certain property and another person claiming title to the property is out of possession, and the latter brings a suit and withdraws it on terms, the withdrawal cannot be considered as a sale of the property in dispute so as to give rise to a right of pre-emption. [p. 171, col. 1.]

Appeal against the decree of the District Judge, Sitapur, dated the 21st March 1918, confirming that of the Subordinate Judge, Tahsil Biswan, Sitapur, dated the 30th June 19.7.

Mr. *Ishri Prasad*, for the Appellant.

Mr. *Girja Saran Lal*, for Respondent No. 2.

JUDGMENT.—These are the facts. A certain woman *Musammat* Sarsuta died leaving certain property and leaving two daughters, Chamela and Miro. Ordinarily the property would have descended in equal shares to Chamela and Miro. Miro sold not only her own share but the whole of the property to a certain Lachhman Prasad. The property was at the time in the possession of Munwan Lal. Munwan Lal alleged that he was the devisee of the whole property by virtue of a Will made by *Musammat* Sarsuta. Lachhman Prasad, claiming the whole property as vendee from Miro, sued Munwan Lal for possession of the whole property joining Miro and Chamela as co-defendants. The Courts decided that Munwan Lal was unable to make out any title to the property, but that Miro had no title to more than half the property, and they, therefore, decreed half the property, in other words, Miro's share, to Lachhman Prasad. This left Munwan Lal in possession of the remaining half. Chamela sued Munwan Lal for the remaining half and these proceedings were terminated by Chamela withdrawing her claim, in consideration of payment of money compensation by Munwan Lal. Lachhman Prasad wishes to exercise a right of pre-emption with respect to this transaction on the following grounds. He says that he has title as vendee from Miro and that Chamela has title to the remainder, that Chamela has sold her share to Munwan Lal, and that on this sale he has a cause to come in asserting a right of pre-emption. I do not consider that the transaction by which Chamela resigned her claim to the property receiving money compensation can be considered to be a sale. It does not follow that Chamela has a title superior to that of Munwan Lal. She may have or may not

have. Munwan Lal failed in the original proceedings to establish that he had a title as devisee. But the point is not *res judicata* as between Chamela and Munwan Lal in subsequent proceedings. Munwan Lal could have raised again his title as devisee against Chamela, and it is impossible to say what would have been the result if he had so raised it. But in any circumstances when a man is in possession and another person claiming title is out of possession and that person brings a suit and withdraws the suit on terms, the withdrawal could not ordinarily be considered as a sale of the property in dispute. I do not say that cases could never occur in which such a transaction might amount to a sale, but they would not ordinarily occur. In this instance I do not consider that there was any sale at all. As there has been no sale no right of pre-emption can arise and the suit was rightly dismissed. I dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2526 OF 1917 AND 170, 171 AND 172 OF 1918.

April 10, 1919.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Cuming.

Sreemati KUMODINI ROY AND OTHERS —PLAINTIFFS—APPELLANTS

versus

ABDUL GANI MATABBOR AND OTHERS— DEFENDANTS—RESPONDENTS.

Co-owners—Settlement of portion of joint land made by one co-owner—Co-owner, right of other, to declaration that settlement would not affect his share—Joint possession with tenant, whether can be decreed.

The plaintiff claimed an undivided 10-annas 8-pies share in a *taluq* by virtue of a redemption-decree. The defendant No. 2 claimed to hold 3 *drones* of land in the *taluq* under a settlement made by the owner of the remaining 5-annas 4-pies share of the *taluq* :

Held, (1) that the plaintiff was entitled to a declaration that the settlement in favour of defendant No. 2 was invalid and inoperative as regarded the 10-annas 8-pies share to which the plaintiff was entitled ; [p. 173, col. 1.]

(2) that, in the absence of any finding as to who was in possession of the remaining lands in the *taluq*, the plaintiff could not get joint possession with the defendant No. 2 of the three *drones* of land of which the latter was in possession by virtue of the settlement. [p. 173, col. 1.]

Appeals against the decrees of the Officiating Additional District Judge, Chittagong, dated the 8th September 1917, affirming those of the Munsif, Cox Bazar.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *Manindranath Banerji*), for the Appellants.—The plaintiffs brought this suit for a declaration of their Taluqa Maliki right in a 10-annas 8-pies share of 3 *drones* and for joint possession. In 1912 the plaintiffs sued for redemption of the 10 annas 8-pies share and on 19th March 1912 they obtained a decree for redemption of their share. In that suit defendant No. 3 was a party and also Sharafat Ali. Under the Taluq there were many tenancies and Ram Dayal, who got the equity of redemption from Uma Charan on 5th February 1901, had no right to create an Etmam of the 10-annas 8-pies share, as he did, in favour of defendant No. 1. We are not barred by the creation of an intermediate tenure by Ram Dayal during the subsistence of the mortgage. The Etmam is inoperative as regards plaintiffs' 10 annas 8-pies share. Moreover Ram Dayal could not grant a lease which could affect more than his own share. Defendant No. 2, purchaser from defendant No. 1, cannot support the Etmam as regards plaintiffs' 10 annas 8-pies share. Defendant No. 2 says that as Ram Dayal was a co-sharer in the mortgaged property, he had a right to grant an intermediary lease to bind the plaintiffs who, he says, must bring a suit for partition. The 10-annas 8-pies must be decreed to plaintiffs and they should be given joint possession. As regards the alleged transfer of a 1-anna share to Nurasha by Ali Hossain, the original proprietor of the Taluq, no deed of transfer has been produced, so it cannot stand.

Babu *Khitish Chandra Sen* (with him Babus *Dhirendra Nath Ganguly* and *Charu Chandra Sen*), for the Respondents, agreed to only a declaration being made in favour of the plaintiffs and opposed joint possession, contending that a partition suit would meet the requirements of the case.

Dr. *Dwarkanath Mitter* replied.

KUMODINI ROY *v.* ABDUL GANI.

JUDGMENT.

No 2526 OF 1917.

CHITTY, J.—The suit out of which this appeal arises related to about 3 *drones* of land comprised in Taluq Gouri Sanker Boidy Nath bearing No. 13400/12094 in Mouza Patoli Machnakhali and others. The plaintiffs claimed to be entitled by virtue of a redemption decree to a 10-annas 8-pies share in the Taluq. The defendant No. 2, who is the contesting defendant here, claimed to be entitled to 3 *drones* under the 5 annas 4-pies shares in Sikimi Taluqa rights. It appears that one Mahabat Ali Chowdhury owned two-thirds and one Uma Charan Ghose the remaining one-third share of this Taluq. Mahabat Ali and Uma Charan Ghose both mortgaged their rights in the Mahal to Bhecharam, the father of Ram Dayal Pal defendant No. 3. That was on 21st December 1883. They purported to mortgage two-thirds and one-third of the 16 annas. On 6th December 1900 the equity of redemption of Uma Charan, which had passed through several hands, came to Ram Dayal. On 5th February 1901 Ram Dayal granted an Etmam Patta of about 3 *drones* to defendant No. 1 Ali Neoz. On 7th June 1901 Ali Neoz transferred that to defendant No. 2, Abdul Gani Matabbor. On 28th May 1914 Ram Dayal sold the interest remaining in him to defendant No. 20 Kamala Kanta Sen. On 19th March 1912 the present plaintiffs instituted a suit for redemption of the 10-annas 8 pies share making Ram Dayal, who had presumably succeeded his father as mortgagee, party defendant No. 1 and Sarafat Ali Chowdhury defendant No. 2. On 19th August 1913 a decree was passed in favour of the plaintiffs for redemption. The plaintiffs then brought this suit on 25th January 1916 for a declaration of their Taluqa Maliki right in 10-annas 8-pies share of the 3 *drones* described in the schedule for joint possession thereof through the tenants defendants Nos. 4 to 19, for mesne profits, and fourthly, if the Etmam settlement was found to have been made, for a declaration that that settlement and sale were inoperative as regards the 10 annas 8-pies share of the plaintiffs. Both the lower Courts have dismissed the plaintiffs' suit, and hence this appeal.

Two points have been taken before us by the plaintiffs. The first is as to the extent of the plaintiffs' share. It was found by the Court below that long before the mortgage a 1-anna share of this Taluq had been transferred to Nurasha, the wife of Ali Hossein, and was no longer in Mahabat Ali Chowdhury or Uma Charan Ghose when they purported to mortgage their rights. This would be a question of fact into which we could not go in second appeal, but it was said that the learned Judge had erred in law in coming to the conclusion that there had been a transfer of this 1-anna share because such shares could only be transferred by registered deeds and there was no proof of any such document. In the first place, it would appear that the transfer to Nurasha must have been long before the Transfer of Property Act. She purported to convey 1 anna to Safdornessa in 1884, and the Judge says that the transfer to her was many years ago. It is not, therefore, by any means clear that a document was necessary for the transfer of this share. The date of it is left in uncertainty, but there is no doubt that the 1-anna share passed from hand to hand many times after 1884. Safdornessa sold to Sarafat Ali in 1889 and she bought it back from him in 1894. Again she transferred to one Golam Bari in 1894. Sarafat Ali appears to have again conveyed it to defendant No. 20 on 29th February 1912. Golam Bari made it over to defendant No. 2 on 11th January 1915. It will be observed that when the plaintiffs brought their redemption suit in March 1912 making Sarafat Ali a party defendant, Sarafat Ali had parted with his interest in the property—the subject-matter of that suit. There was, therefore, no one in that suit whose interest it was to raise the question as to this 1-anna share. We think that the findings of the Courts below must be accepted that this 1-anna share had passed away before the mortgage and that, therefore, Mahabat Ali and Uma Charan Ghose had not the full 16 annas to mortgage but mortgaged really 10 annas and 5 annas respectively.

The second point taken by the plaintiffs is that their suit should not have been

entirely dismissed. The Etmam lease of Ram Dayal purported to cover all the shares in the Taluq though as regards area it was only in respect of these 3 *drones*. It is obvious that, as owner of the equity of redemption in 5 annas, he could not grant a lease which would affect more than his own share. The plaintiffs may, therefore, be given a declaration in terms of prayer (*gha*) of the plaint that, if Ram Dayal made any settlement of the lands in suit in favour of defendant No. 1, from whom defendant No. 2 purchased, it should be declared that that settlement and sale are inoperative and invalid as regards the 10 annas share to which the plaintiffs are clearly entitled.

It was urged upon us by the learned Pleader for the plaintiffs-appellants that the plaintiffs should be given joint possession of these 3 *drones* along with defendant No. 2, through the tenants, defendants Nos. 4 to 19. But there seems to be no reason at this stage for disturbing what appears to be the exclusive possession of defendant No. 2 in these 3 *drones*. The whole estate, we are told, which was comprised in the mortgage, amounts to 65 *drones*. We do not know anything of the conditions under which the other 62 *drones* are held, who is in possession through what tenants or, indeed, anything about them. It is said that if the plaintiffs do get a decree for joint possession of these 3 *drones*, they cannot hereafter bring a suit for partition. I fail to see the force of this argument because it must necessarily depend on who is holding the balance of the estate—the 62 *drones* of which we know nothing.

The appeal must, therefore, be allowed. The decree of the lower Appellate Court dismissing the plaintiffs' suit will be set aside and there will be a decree in favour of the plaintiffs in terms of prayer (*gha*) of the plaint. The parties will bear their own costs throughout.

Nos. 170 TO 172 OF 1918.

In these appeals the question relates only to the 1-anna share. These appeals are governed by our decision in Appeal No. 2526 of 1917 and are dismissed with costs.

CUMING, J.—I agree.

Appeal No. 2526 *allowed*; *Other appeals dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 180 OF 1918.

April 3, 1919.

Present:—Mr. Stuart, J. C.

GOPI NATH AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

BENI MADHO—DEFENDANT—RESPONDENT.

Appeal, second—Finding of fact, whether can be challenged—Evidence, consideration of—Court, duty of.

A finding that the plaintiff has failed to prove a fact is *prima facie* a finding of fact which cannot be challenged in second appeal. [p. 173, col. 2]

The rule in Oudh regulating the consideration of evidence is, that the Court must apply its mind to every piece of relevant evidence produced, but it is not necessary for the Court to refer to every portion of such evidence. [p. 174, col. 1.]

Appeal against the decree of the District Judge, Gonda, dated the 2nd February 1918, confirming that of the Munsif, Gonda, dated 19th December 1917.

Mr. *H. N. Misra*, for the Appellants.

Mr. *N. N. Ghoshal*, for the Respondent.

JUDGMENT.—The case for the plaintiffs-appellants was that in a partition of joint family property the rights under a usufructuary mortgage had passed to them alone and that their brother, the defendant respondent, had no interest in the rights in question. There had admittedly been a partition in the family and the question for decision in these proceedings was whether the rights under the deed of usufructuary mortgage in question had or had not formed a part of the property partitioned. The lower Courts rightly held that it was for the plaintiffs-appellants to prove that the rights under the deed of usufructuary mortgage had been partitioned and they found that the plaintiffs-appellants had failed to prove that fact. The suit was accordingly dismissed. The finding that the plaintiffs-appellants failed to prove that fact is *prima facie* a finding of fact which cannot be challenged in second appeal. The learned Counsel for the appellants has, however, endeavoured to challenge that finding on two grounds. He has argued that the Courts had refused to receive evidence on behalf of plaintiffs-appellants which they should have received, and he has further argued that in the finding of fact the Courts have overlooked much evidence that was on the record.

With regard to the first point I consider that the Courts rightly refused to receive the

evidence which they refused to receive, as it was filed at a very late stage and at a time when the plaintiffs had no right to adduce it. With regard to the second point it is true that the decisions of the Courts below do not refer to every specific piece of evidence, but there is no reason why every specific piece of evidence produced should be referred to in a judgment either of a trial Judge or of a Court of first appeal. It would frequently be intolerable, and it would always be very inconvenient, if Courts were tied down to a rigid rule, by which they were compelled to state every piece of evidence in the case and to arrive at a specific finding upon each portion. The rule accepted in Oudh is the rule that the Court must apply its mind to every piece of relevant evidence produced, but that it is not necessary for the Court to refer to every portion of such evidence. I am satisfied from the judgments of the learned trial Judge and the learned District Judge that they did apply their minds to all the evidence that was produced and, such being the case, the finding of fact at which they have arrived cannot be challenged in second appeal. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 141 OF 1918.
June 16, 1919.
Present:—Mr. Justice Duckworth.
SOOLAYMAN CASSIM SINGI
—PLAINTIFF—APPELLANT
versus
S. S. A. O. CHETTY FIRM
—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 91, 92, 93—Execution of decree—Sale—Judgment-debtor having no saleable interest in property sold—Suit by auction-purchaser to recover purchase-money, whether maintainable.

At a Court-auction there is no warranty, express or implied, that the judgment-debtor has a saleable interest. [p. 177, col. 1.]

Where it is found that the judgment-debtor had no saleable interest in the property sold in execution of a decree against him, the auction-purchaser has, in the absence of fraud or misrepresentation, no right of action against the decree-holder, either under the Civil Procedure Code or apart from it, to recover the purchase-money paid by him. [p. 176, col. 2.]

Appeal against the decree of the Original Side of this Court, in Civil Reg. No. 192 of 1918.

Mr. *Ormiston*, for the Appellant.
Mr. *A. B. Banerji*, for the Respondent.

JUDGMENT.—The S. S. A. O. Chetty Firm obtained a decree against one Lim Po An. Certain immoveable property was sold by the Court Bailiff in execution proceedings, and the plaintiff-appellant, Soolayman Cassim Singi, purchased it at the auction-sale. He paid the money into Court, and the respondent-defendant withdrew it

In a subsequent suit between the plaintiff-appellant and one Ma Kyin Hlaing it was decided that Lim Po An had no saleable interest in the property sold. There was no appeal against this decision. The result was that the appellant obtained no benefit from the property. He, therefore, sued the respondent firm for Rs. 4,500 and interest thereon, in other words, for the return of the purchase money.

The respondent firm pleaded that they were not privy to the proceedings between the appellant and Ma Kyin Hlaing and contended that, in any case, there was no right of suit to recover the said purchase money.

The learned Judge on the original side held that there was no right of suit and that the appellant had no remedy against the judgment-creditor, either under, or apart from, the Code of Civil Procedure. The suit was dismissed with costs.

In this appeal Mr. Ormiston's main argument is that the learned Judge on the original side erred in holding that, in a case where there is a complete failure of consideration, a suit to recover the purchase money does not lie independently of the Code of Civil Procedure. He further contends that in every Court sale there is a representation that the judgment-debtor has some right, title and interest and that the learned Judge was in error in holding that "the chance that the judgment debtor may have some interest" amounted to a right, title and interest. He urged that the Judge was mistaken in coming to a conclusion that the right of suit, granted by the former Code, perished with it.

The matter has been argued at length. A very large number of authorities have been referred to by Mr. Ormiston, and his principal object in putting them before the Court was to show that there was a right of suit independently of the Code of Civil Procedure, quite apart from the fact that section 315 of the Code of 1882 had been held to give an implied right by a long series of decisions.

In the present case. I am only concerned with the Code of 1908, and the relevant portions are to be found in Order XXI, rules 91, 92 and 93. It may be taken as settled law that, when it is shown that the judgment-debtor has some interest, however small, in the property sold, there is no right of suit to recover from the judgment creditor a proportionate amount of the purchase money. What then is the purchaser's remedy when, as in this case, the judgment-debtor has been found to have no saleable interest?

The appellant's case is that he can either make an application within 30 days of the sale under Order XXI, rule 91, or else he can file a suit within six years, both as permitted by the Code of Civil Procedure and also independently thereof. In my opinion, there can, in the absence of fraud, be no right, apart from the Code of Civil Procedure, to file such a suit, unless there is some warranty, express or implied, on the part of the judgment-creditor that the judgment-debtor has *some* saleable interest in the property sold. This I consider is the crucial test, for otherwise there is no apparent cause of action, merely on the ground that it is subsequently found that the judgment-debtor has no saleable interest. As the Code of 1908 stands, I think that it is apparent that no suit will lie.

In the present case, in the sale proclamation, Ma Kyin Hlaing's claim was expressly set forth, though it was not admitted by the respondent, and the appellant had, therefore, obvious notice thereof. Nothing but the right, title and interest of the judgment debtor, with all its defects, was offered for sale at the auction. There was clearly no express warranty. The appellant did not make use of the special remedy provided by Order XXI, rule 91, whereby under rule 93 he would have been entitled to "an order" for a refund, *after* the sale had been set aside for want of any saleable interest. Mr. Banerjee argues that the appellant has thus lost his sole remedy and that he has no other. He contends that, perhaps on equitable grounds, the last two Codes have permitted this one remedy, but that the wording of Order XXI, rule 93, where the words "to an order for re-payment" are used, coupled with the omission of the second paragraph of the old section 315, makes it clear that there is no other remedy whatever.

Now it is apparent to my mind that this remedy in execution is conditional upon the sale having been set aside. It is expressly so stated. It is not contended that the fact that this sale was in execution of a mortgage-decree in any way affects the decision in this case. A Full Bench ruling of this Court, *Maung Tun* v. *Ma Ngan* (1), may be referred to with advantage at this stage. Therein several of the rulings, dealt with by learned Counsel on either side, were referred to. The ruling actually concerns moveable property, to which Order XXI, rules 91, 92 and 93, have no application, but the opinions of the Full Bench in regard to certain principles of law referring to immoveable property are of very great weight and must be considered. It was there held, on the authority of *Dorab Ally Khan* v. *Executors of Khajah Moheeooddeen* (2), (1) that, when property has been sold under a regular execution and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against the judgment-creditor, (2) that there is no warranty of title. Fox, C. J., was of the opinion that this statement of the law was applicable to all Court-sales whether, as in the Privy Council case, by a Sheriff or by Bailiffs. He pointed out that by the Code of Civil Procedure, 1877, the Legislature gave a summary remedy in execution to auction-purchasers of immoveable property, when the judgment-debtor has no saleable interest, but his conclusion clearly was that there was no right of suit in addition. Bell, J., referred to *Sowlaminee Chowdhrain* v. *Rishen*

(1) 35 Ind. Cas. 672; 5 L. B. R. 58.

(2) 3 C. 80; 2 C. L. R. 529; 5 I. A. 113; 3 Sath. P. C. J. 519; 3 Sar. P. C. J. 813; 2 Ind. Jur. 423; 1 Ind Dec. (N. s) 1097.

Kishore (3) decided under the Code of 1859, which contained no provisions similar to sections 313 and 315 of the Code of 1882. There it was held that the auction-purchaser had no right of suit on the ground that there was no warranty of title. The property sold in that case was land in the Mofussil in Bengal and not land situated in Calcutta. He further endorsed Muttusami Aiyar, J.'s views in the case of *Sundara Gopalan* v. *Venkatararada Ayyangar* (4) that the implied warranty of title in respect of private sales cannot be extended to Court-sales, except in so far as such extension is justified by the processual law in India. He was here dealing with the Code of 1882, and the changes introduced into that Code, "practically the same as the Code of 1877," were embodied in sections 313 and 315.

In my opinion, these sections gave a special and equitable remedy, which was provided in order to meet the absence in the 1859 Code of any similar provision and I do not think that it can be inferred that this special remedy was given *because* there was some implied warranty of title at an execution sale.

Again, in the 1908 Code, Order XXI, rule 92 (3), covers rule 91. Thus an auction-purchaser cannot sue to set aside a sale and, unless a sale is set aside, there is no remedy even under Order XXI, rule 93. There can be no doubt that the earlier decisions of the Allahabad High Court, commencing from the case of *Munna Singh* v. *Gajadhar Singh* (5), gave a separate right of suit. In the case of *Sidheswari Prasad Narain Singh* v. *Mayanand Gir* (6) it was held that apart from the Code of 1882, there was no right of suit, but the learned Judge appears to have interpreted the case quoted as *Munna Singh* v. *Gajadhar Singh* (5) which in reality allowed a right of suit independently of the Code. In the case of *Nannu Lal* v. *Bhagwan Das* (7) which was decided under the present Code, it was held that the auction-purchaser had no right of refund at all, unless the sale was set aside and that he had no right of action apart from the Code of Civil Procedure. This is the most important decision. In the last Allahabad case, *Girdhar Das* v. *Sidheshwari Prasad Narain Singh* (8), the judgment in *Mannu Lal* v. *Bhagwan Das* (7) was apparently overlooked, and it was decided that a suit lay. However, this decision was made under the Code of 1882. In the earlier Calcutta cases, it was held that such a suit could be brought, but the recent case of *Juranu Mahamad* v. *Jathi Mahamed* (9) decided to the contrary. The case reported as *Prasanna Kumar Bhattacharjee* v. *Ibrahim Mirza* (10), a decision by another Calcutta High Court Bench, is not to the point, inasmuch as the Judges appear to have been misled by the headnote of a Bombay ruling, as was pointed out by the learned Judge on the Original Side. The Madras High Court, generally speaking, has adopted the view that no suit lay apart from the Code. The last reported case, however, is that of *Subbu Reddi* v. *Ponnambala Reddi* (11) and here it was decided that in the present circumstances no suit would lie at all. The Bombay Court generally has decided that such a suit can be brought. The case of *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar* (12) even goes so far as to state that a suit is maintainable, and that there is an implied warranty at the auction-sale, but this case was decided under the Code of 1882 and I regard the decision as of doubtful value. It is thus apparent that the general consensus of recent opinion in India is that, in the absence of fraud or misrepresentation, no right of action either under the present Code, or apart from it, is reserved to the auction-purchaser, when the judgment-debtor is found to have no saleable interest.

The introduction of section 315 in the Codes of 1877 and 1882 was, in my opinion, merely a special and equitable remedy which must be taken advantage of within 30 days from the date of sale. The reason for this brief period is obvious. It was

(3) 4 B. L. R. F. B. 11; 12 W. R. F. B. 8.
(4) 17 M. 228; 3 M. L. J. 293; 6 Ind. Dec. (N. S.) 158.
(5) 5 A. 577; A. W. N. (1883) 130; 3 Ind. Dec. (N. S.) 491.
(6) 19 Ind. Cas. 986; 35 A. 419; 11 A. L. J. 606.
(7) 37 Ind. Cas. 9; 39 A. 114 at p. 115; 14 A. L. J. 1216.
(8) 44 Ind. Cas. 697; 40 A. 111 at p. 112; 16 A. L. J. 236.
(9) 46 Ind. Cas. 783; 22 C. W. N. 760.
(10) 41 Ind. Cas. 924.
(11) 49 Ind. Cas. 359; (1918) M. W. N. 655.
(12) 7 Ind. Cas. 955; 35 B. 29; 12 Bom. L. R. 723.

to prevent prolongation and multiplicity of proceedings, and to ensure finality in execution. Great injustice might be caused to the decree-holder if, on receipt of the sale-proceeds, he should enter up satisfaction of his decree. It is conceivable that he might lose all his remedy inasmuch as further execution proceedings might be barred by limitation at the time when a suit to recover the purchase money was brought. The wording of Order XXI, rules 91, 92 and 93 of the Code of Civil Procedure, 1908, seems to me to lead to the inference that no suit can be maintained. Mulla in the 6th Edition of his Code of Civil Procedure at page 574 would appear to take this view The sole remedy to which the purchaser is entitled is an order of refund, after he has had the sale set aside.

In conclusion I would say that the balance of authority is in favour of there being at a Court auction no warranty, express or implied, that the judgment debtor has a saleable interest, and that being so, I can only hold that the learned Judge on the original side decided this case correctly, and that no suit is maintainable under the Code of Civil Procedure, 1908, or independently thereof.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REVISIONS NOS. 107 AND 124 OF 1919.

July 8, 1919.

Present:—Mr. Justice Das.

Moulvi HAMID HASAN—PETITIONER IN No. 107 OF 1919

NIRSU NARAIN SINGH—PETITIONER IN No. 124 OF 1919

versus

SHAHZAD KHAN AND ANOTHER—OPPOSITE PARTIES IN BOTH.

Contract Act (IX of 1872), s. 230—Principal and agent—Agent, whether liable under contract made on behalf of principal—Agency, proof of—Contract, liability under—Stranger, whether liable.

No one is liable on a contract except a party thereto. [p. 177, col. 2.]

An agent cannot personally enforce a contract entered into by him on behalf of his principal, nor is he personally bound by such contract. [p. 177, col. 2; [p. 178, col. 1.]

A finding by a Court to the effect that it is "satisfied that the defendant took the articles, a list of which was prepared at the time, on hire..... He entered into the contract and disclosed the purpose for which he took, and the person to whom he sent, the articles" is not a finding that he acted as agent in the transaction. [p. 178, col. 1.]

Appeal from a decree of the Subordinate Judge, Patna.

In No. 107 of 1919.

Mr. *Shiv Narayan Bose*, for the Petitioner.

Mr. *Ragho Prasad*, for the Opposite Party.

In No. 124 of 1919.

Messrs. *Kulwant Sahay*, *Rajendra Prasad*, *Rai Guru Saran Prasad* and *Ram Prasad*, for the Petitioner.

Messrs. *Shiv Narayan Bose* and *Ragho Prasad*, for the Opposite Party.

JUDGMENT.—These two revision cases arise out of a Small Cause Court suit instituted by the opposite party against the petitioner in each of these cases and against another person against whom no decree has been passed by the Court of Small Causes. It appears that the opposite party hired out certain articles for the purpose of the Chatri Sabha which was held in Patna on the 27th August and 9th December 1916. The question for my determination is, who is liable on the contract.

The plaintiff in his plaint specifically states that he hired out the articles on the personal liability of Moulvi Hamid Hasan and defendant No. 2, who has been dismissed from the action. He does not state that there was any contract between him and defendant No. 3 at all and as I read the judgment of the learned Judge of the Small Cause Court, he does not find that there was any contract between defendant No. 3 and the plaintiff. It is, in my opinion, well settled that no one is liable on a contract except a party thereto. It is not the plaintiff's case that defendant No. 3 was a party to the contract. It is not found by the Court below that defendant No. 3 was a party to the contract.

It is, however, urged on behalf of Moulvi Hamid Hasan that he contracted merely as an agent and, therefore, no decree could be passed against him and he relies upon section 230 of the Indian Contract Act. That section, in accordance with the English rule, lays down that an agent cannot personally enforce a contract entered into by him on behalf of his principal nor is

he personally bound by such contract. Now, in this case as I read the judgment, there is no finding that Moulvi Hamid Hasan entered into the contract as agent. The finding upon which the learned Vakil appearing on behalf of Moulvi Hamid Hasan relies is this: "I am satisfied that defendant No. 1 took the articles, a list of which was prepared at the time, on hire for the Sabha. He entered into the contract and disclosed the purpose for which he took, and the person to whom he sent, the articles and paid Rs. 140." In my opinion it does not amount to a finding that defendant No. 1 acted as an agent in the transaction. I hold that upon the plaint itself and upon the finding of the learned Judge of the Small Cause Court he was wrong in passing a decree against defendant No. 3. Civil Revision Case No. 124 of 1919 must, therefore, be allowed with costs, which I assess at two gold *mohurs*, to be paid by the plaintiff. I further hold that Moulvi Hamid Hasan is liable on the contract into which he entered with Shahzad Khan.

Civil Revision Case No. 107 of 1919 must accordingly be refused with costs, which I assess at two gold *mohurs*.

Civil Revision No. 124 *of* 1919 *allowed;*
Civil Revision No. 107 *of* 1919 *dismissed.*

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 18 OF 1918-19.

January 21 & 26, 1919.

Present:—Mr. Lovett, S. M., and Mr. Ferard, J. M.

CHAB NATH—DEFENDANT—APPELLANT

versus

DEBI PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (U. P. II of 1901), ss. 25 (4), 66 (1)—*Joint tenants, male and female—Female tenancy—Power of Court to grant time for ejectment of sub-tenant—Discretion, exercise of—Appellate Court, interference by.*

The mere fact that one of several joint tenants of a holding is a female is not sufficient to constitute it a female tenancy within the meaning of section 25 (4) of the Agra Tenancy Act. [p. 178, col. 2,]

The power to grant time under section 66 (1) of the Agra Tenancy Act to tenants to eject sub-tenants, is discretionary with the Court and, when judicially exercised, will not be interfered with in appeal. [p. 178, col. 2.]

Second appeal from the order of the Commissioner, Allahabad Division, dated the 19th October 1918, in the case of ejectment.

JUDGMENT.

FERARD, J. M.—The facts of the case are admitted and are simple. The defendants-appellants are joint ex-proprietary tenants, three males and one female, a widow. They have sub let their holding for longer than the five years allowed under section 25 (1) Tenancy Act. The first Court dismissed the respondent-landlord's suit to eject them under section 57, his reason being that one of them is a female who under section 25 (4) may sub let as long as she lives. The Commissioner in first appeal holds that it is not a female tenancy covered by section 25 (4), as three of the four joint tenants are able-bodied males. Counsel are not able to show me rulings on the subject and the point does not seem to have hitherto come before the Board for decision, but I am of opinion that the Commissioner is right.

Two points of view present themselves on the wording of section 25 (*d*). On the one side it may be urged that though there are three male co-sharers in the tenancy with her, the lady's interest extends to every part of the holding and that it should, therefore, be regarded as the holding of a female. On the other side, it may be said that the protection of section 25 (*d*) is merely because females cannot cultivate themselves and was never intended to cover a case like this when three of the four tenants are males who can perfectly well do so. The latter view should, in my opinion, prevail, the intention of the law being to restrict sub-letting and only to protect, under section 25 (*d*), tenancies when the tenant is physically incapable of personal cultivation.

So far, therefore, I agree with the Commissioner, but I do not agree with him in not allowing the benefit of section 66 (1) and giving time to the tenants to eject the sub tenants. The power to give time is discretionary with the Court, and Appellate Courts are against interference with this discretion when it has been judicially exercised. There are rulings to this effect, but in

a recent case of 1918, *Radhey Shiam* v. *Bihari Lal* (1), the Hon'ble High Court has held that when the discretion has not been judicially exercised, it is open to an Appellate Court, to interfere. The Commissioner has given no reason for not allowing the discretion; he remarks: "I see no reason to allow the benefit of section 66; there are no extenuating circumstances that I can see." It is clear he did not scrutinize the circumstances; it is quite possible that the sub-letting may have been due to the appellants thinking that section 25 (*d*) permitted them to sub-let, and I have little doubt that if he had considered this point, as I think he should have done, the Commissioner would have given a *locus pœnitentiæ* before ejecting ex proprietary tenants.

I would, therefore, allow the appeal and modify the orders of the Commissioner. I would give the benefit of section 66 (1) to appellants. I would maintain the decree of ejectment but direct that the decree be not executed, except as regards costs, against the appellants, if within three months they eject the sub-tenants and resume personal occupation of the holding. I would give respondent his costs throughout.

LOVETT, S. M.—I agree

Appeal allowed.

(1) 48 Ind. Cas. 478; 16 A. L. J. 592; 40 A. 558.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 344 OF 1919.

May 16, 1919.

Present :—Mr. Justice Bevan-Petman.

ATTAR SINGH—PLAINTIFF—APPELLANT

versus

KARM CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XLI, rr. 18, 19—Appeal—Non-payment of process-fees—Appellate Court, duty of—Order dismissing appeal for non-payment of process-fees, whether appealable—Revision.

No appeal lies against an order passed under Order XLI, rule 18 of the Civil Procedure Code. [p. 179, col. 2.]

In order to be able to avail itself of the provisions of Order XLI, rule 18, of the Civil Procedure Code, it is the duty of the Appellate Court to fix a date by which the process-fees are to be paid. [p. 180, col. 1.]

The appellant filed an appeal in the Court of the District Judge and was ordered, at the time the date of the hearing was fixed, to pay the amount of the process-fee, which not having been paid even on the date of the hearing, the appeal was dismissed. He appealed to the High Court;

Held, (1) that no appeal lay. [p. 179, col. 2.]

(2) that inasmuch as the appellant had not pleaded that the non-payment was due to the fact that he had not been directed to pay by any fixed date, this was not a fit case for the exercise of the discretionary powers of revision. [p. 180, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Jullundur, dated the 22nd November 1918, affirming that of the Munsif, 1st Class, Jullundur, dated the 29th May 1918, dismissing the claim.

Mr. *Gopal Lal*, for the Appellant.

Mr. *Kanwar Narain*, for the Respondents.

JUDGMENT.—The appellant had instituted an appeal in the Court of the District Judge at Jullundur, and though a very long period was given for the hearing of the case, he paid no process-fees to have notice served on the respondents. On the date fixed for the hearing the appeal was dismissed on account of the said default, presumably under Order XLI, rule 18, of the Code of Civil Procedure. The appellant made no application under rule 19 of the same Order and has appealed to this Court. A preliminary objection is taken that no appeal lies. Though this appeal purports to be one under Order XLIII, clause (*t*), which relates to an order passed under Order XLI, rule 19, it is clear that no order was passed under that rule and the appeal is really one against an order passed under rule 18. The proper remedy was an application under rule 19, but this was not made. No appeal lies to this Court from an order under rule 18 and it is admitted that the order is not a decree. I, therefore, hold that no appeal lies, but I proceed to hear the case on revision.

The usual practice in the subordinate Courts is for the Clerk of the Court to give a date by which the process fees for serving the respondent with notice of the appeal is to be paid into Court. Such action by a ministerial officer of the Court is authorised in this respect and must

be regarded as an act of the Court. In the present case the appellant was directed to pay in the amount of the process-fee but no date was fixed by which the appellant had to make the payment.

Order XLI, rule 18, provides that tha Court may dismiss an appeal when on the date fixed for the hearing it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice. In order to enable the Appellate Court to avail itself of this provision a date must have been fixed by which the process-fee was to be paid. This was the view taken of the law in *Purshadee Lall* v. *Umbika Pershad Lal* (1). Though this decision was not given under the present Code of Civil Procedure, the law on the subject has not been altered. In fact a reference to the previous Codes makes it more clear that it is the duty of the Appellate Court to fix a date by which the process-fees are to be paid. Section 2 of Act XXIII of 1861 is as follows :—

"Every process required to be issued under Act VIII of 1859 shall be served at the expense of * * * and the sum required to defray the costs of such service shall be paid into the Court before the process is issued within a period to be fixed by the Court issuing the process."

The alteration in the language of the subsequent Codes has not altered the meaning.

In the present case the appellant was ordered at the time the date of the hearing was fixed to pay the amount of the process-fee. He certainly realised that he had to pay the fee before the date of hearing. The most that he can claim is that he was allowed time up to the date of hearing. Even on the date of hearing the process-fee had not been paid and he did not plead that the non-payment was due to the fact that he had not been directed to pay by any fixed period. It may be contended that he was given the whole period. However that may be, this is not, in my opinion, a fit case for the exercise of the discretionary powers of revision of this Court. The appeal is dismissed with costs.

Appeal dismissed.

(1) 11 W. R. 290; 3 B. L. R. App. 25

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 123 AND 555 OF 1917.

November 28, 1918.

Present:—Justice Sir Ernest Fletcher, KT., and Mr Justice Walmsley.

MONMOTHA NATH SANTRA MADAK—DEFENDANT NO. 1—APPELLANT

versus

Raja PEARY MOHAN MUKERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 106—Landlord and tenant—Tenant of homestead land, holding over—Notice, period of, necessary.

Where a tenant for a term of years of homestead land situated in a town holds over on the terms of the expired lease, the tenancy may be determined by reasonable notice or by a notice on the terms of the expired lease.

There is no authority for the proposition that a tenant of homestead land holding over is entitled to six months' notice expiring at the end of a year of the tenancy. [p. 181, col. 1]

Appeals against the decrees of the Subordinate Judge, 1st Court, Hooghly, dated the 2nd November 1916, affirming that of the Munsif, 2nd Court, Serampore, dated the 30th April 1915.

Babus *Biraj Mohan Mozumdar* and *Romendra Mohan Mozumdar*, for the Appellants.

Babus *Mohendra Nath Roy* and *Haradhan Chatterjee*, for the Respondents.

JUDGMENT.

No. 123 OF 1917.

This is an appeal against the decision of the learned Subordinate Judge, Hooghly, dated the 2nd November 1916, affirming the decision of the Munsif of Serampore. The plaintiff sued to recover possession of certain property. The property, which is said to be homestead land, is in a town. The defendant No. 1 had been a tennant of this land for many years. He held, first of all, under two leases for a period of ten years each. Then he held over and has been holding over on the terms of the expired lease, so far as they are applicable to the tenancy created by the holding over. The view of the appellant is that he is entitled to a notice of six months expiring at the end of a year of tenancy. He has got no such right at all. If the case is governed by the general law, then as regards the homestead the tenancy would be *prima facie* the tenancy of a monthly tenant capable of being determined with a 15 days

notice. If it is not, then the terms of the contract so far as they are applicable, must be taken to apply to the present case. The expired lease contained a proviso that the landlord might re-take possession on three months' notice. As a matter of fact, a six months' notice was served on the defendant. Such a notice was not provided for by the contract and the notice given in this case, which in fact extended over a period of six months, cannot be said to be unreasonable. No authority has been shown to suggest that a tenant holding over is entitled to a six months' notice expiring at the end of a year of tenancy. That would mean that a tenant who holds over for a week would be entitled to hold over for a year. The view of the appellant's Vakil is that notice expiring at the end of a year of tenancy means that the holding over must be at least for one year or so. There is no support to such a proposition either in the text books or in the reports of cases. The only provision is that the notice must be reasonable. The defendant No. 1 was only entitled to a three months' notice under the terms of the contract, but, as a matter of fact, a six months' notice was served on him. There is no reason to interfere with the decision of the learned Subordinate Judge in this case. The present appeal, therefore, fails and must be dismissed with costs.

No. 555 of 1917.

This appeal is not pressed and is accordingly dismissed with costs.

Appeals dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 127 of 1918.

June 23, 1919.

Present:—Mr. Justice Das.

KARIMAN AHIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NIRMAL KUMAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Village Chaukidari Act (VI B. C. of 1870), s. 51—Bengal Tenancy Act (VIII B. C. of 1885), s. 181—Chaukidari chakran *lands—Zemindar, title of, accrual of*—Chaukidar, *whether liable to be ejected—Occupancy rights, whether can be acquired in* chakran *lands.*

Inasmuch as *chakran* lands are held on condition of service, a *chaukidar* in occupation of such lands cannot acquire a right of occupancy therein. [p. 183, col. 2.]

A *chaukidar*, so long as he performs the duties of his office, is not a trespasser and is not liable to be ejected from such lands. [p. 183, col. 1.]

The title of a Zemindar to *chakran* land is always there and remains unaffected by the fact that such land is appropriated to the maintenance of an officer who performs the duties of village watchman. Upon the transfer of such land to the Zemindar, it is at his disposal, and may be treated by him as his *mal* land or *zerait* land, but once he elects to treat the land as his *mal*, he cannot afterwards say it is his *zerait* land. [p. 182, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 20th September 1917, reversing that of the Munsif, 3rd Court, Arrah, dated the 18th November 1916.

Mr. *Ambika Prasad Upadhya*, for the Appellants.

Mr. *Sushil Madhab Mullick*, for the Respondents.

JUDGMENT.—The question which I have to determine in this appeal is whether the appellants have acquired a right of occupancy in Khasra plot No. 434. The lower Appellate Court has come to the conclusion that the appellants are the tenants in respect of the plot No. 434, but that they have not acquired a right of occupancy therein. In the result, the lower Appellate Court refused to make a declaration that plot No. 434 is the *guzashta* land of the plaintiffs appellants, but did make a declaration that the plaintiffs are the tenants in respect of plot No. 434 and are entitled to remain in possession thereof. The plaintiffs have appealed, and on their behalf it has been argued that the lower Appellate Court should have held that they have acquired a right of occupancy in respect of plot No. 434. The respondents have filed a cross-appeal and they challenge the finding of the lower Appellate Court that the appellants are their tenants in respect of that land.

It will be convenient to deal with the cross-appeal first. The lower Appellate Court has arrived at the following findings of facts:—

(1) The disputed land is *chaukidari chakran* land.

(2) The plaintiffs' father was the *chaukidar* in possession of the land in dispute, but that the defendants have accepted rent from

him and have treated him and the plaintiffs as their tenants.

(8) There were resumption proceedings in respect of the land under the Chaukidari Act, and the Government transferred the land to the defendants.

It was argued on behalf of the respondents that on these findings the lower Appellate Court should have held that the plaintiffs are mere trespassers and are liable to be ejected as such. They contend that they are not hampered by any recognition of tenancy before the resumption proceedings, inasmuch as their title to the land accrued only after the resumption proceedings, when the Government transferred the land to them. They say that upon such transfer they were entitled to hold the land as their *zerait* land, and that they were at liberty to do so, notwithstanding the fact that they may have recognized the appellants as their tenants at a time when they had no title to the land.

This argument, in my opinion, is entirely unfounded, for it rests on the fallacy that the title to the land in dispute accrued to the defendants upon transfer of the land to them by Government. The nature of *chaukidari chakran* lands was the subject of very careful investigation in the case of *Joykishen Mookerjee* v. *Collector of East Burdwan and Brijo Roy Thareedar* (1). That case has always been recognised as establishing that the title of the Zemindar to the *chakran* land was always there and that it remained unaffected by the fact that such land was appropriated to the maintenance of an officer who performed, and was liable to perform, duties as a village watchman. Originally these duties were rendered solely to the Zemindar, who, instead of paying wages to the *chaukidar*, made a grant of some land to the *chaukidar* for his maintenance. It was recognized later that the general public as well as the Zemindar was interested in their services, and, therefore, by various Regulations the *chaukidars* were made removeable by the the Magistrate, but, as the Judicial Committee points out, there is "nothing in these Regulations which takes from the Zemindar the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the *chaukidar* such services as he was bound by law or usage to render to the Zemindar." It must also be remembered that by section 41 of Regulation VIII of 1793, the whole of these *chakran* lands were declared as annexed to the *malguzari* lands and responsible for the public revenue. In other words, the antecedent title of the Zemindar in these lands was recognized in the Regulation of 1793, and, in my opinion, having regard to that Regulation and the long series of cases decided by the Calcutta High Court [see *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2)] it is now too late in the day to argue that the title of the Zemindar to these lands accrues only on the transfer of such lands to the Zemindar after the resumption proceedings.

It was argued, however, on the basis of *Shaikh Jonab Ali* v. *Rakibuddin Mallik* (3), that upon the transfer of such land to the Zemindar, such land was at the disposal of the Zemindar, and could be treated by him either as his *mal* land or *zerait* land. That undoubtedly is so, but, in my opinion, having elected to treat the land as his *mal* land, he cannot turn round and say: "The land is now at my disposal, and I shall treat it as my *zerait* land." The argument would have great force if it could be shown that he had no title to the land at the time when he treated it as his *mal* land. But that is not my view, and I am supported by the language employed by the Legislature in section 51 of the Village Chaukidari Act, where the Legislature has said as clearly as it knows how to say that the transfer to the Zemindar will be subject to all contracts made before such transfer by virtue of which any person other than the Zemindar may have any right to such land. In my view, section 51 of the Village Chaukidari Act recognizes two principles which are absolutely destructive of the elaborate argument advanced before Mr. Mullick on behalf of the respondents. It recognized, first of all, the antecedent title of the Zemindar to these lands, and it recognizes, secondly, the validity of the antecedent contracts entered into by the

(1) 10 M. I. A. 16; 1 W. R. P. C. 26; 1 Suth. P. C. J. 542; 2 Sar. P. C. J. 54; 19 E. R. 879.

(2) 34 C. 109; 11 C. W. N. 201; 5 C. L. J. 33.

(3) 9 C. W. N. 571; 1 C. L. J. 303.

Zemindar respecting these lands. Contract of tenancy is one of the contracts within the scope of section 51, and, therefore, I am of opinion that the lower Appellate Court, on the facts found by it, was right in coming to the conclusion that the appellants were not trespassers and were not liable to be ejected as such.

I will now deal with the appeal. A right of occupancy is purely a statutory right, it is not a contractual right. Therefore, a right of occupancy is not saved by section 51 of the Village Chaukidari Act. But the appellants argue that they have been in occupation of the land in dispute as tenants for over twelve years, and, therefore, they have acquired a right of occupancy by Statute. In my opinion, this argument is not well founded. A right of occupancy is a right conferred by the Bengal Tenancy Act, and section 181 of that Act provides that nothing in that Act shall affect any incident of a *ghatwali* or other service tenure. It is true that the incidents of a *ghatwali* or other service tenure are not dealt with in the Bengal Tenancy Act, but if it can be established that one of the incidents of a service tenure is that rights of occupancy cannot be acquired therein, then there cannot be any doubt that a right of occupancy, being a right conferred by the Bengal Tenancy Act, cannot be acquired in the land in dispute.

It seems to me that on principle a *chaukidar* cannot acquire a right of occupancy in *chakran* lands. *Chakran* lands are held on condition of service, and occasonally a small rent is also paid by the *chaukidar*. Now, if it were possible for him to acquire a right of occupancy in such land, he could after twelve years' possession refuse to perform any services and yet claim to retain the land. The question was raised in the case of *Hurrogobind Raha* v *Ramrutno Dey* (4) but was not decided. But Garth, C. J., in that case said: "We are very much disposed to think that if the defendants held by a service tenure they could not acquire a right of occupancy. However, it is not necessary to decide that point in this case." But in the case of *Upendra Nath Hazra* v. *Ram Nath Chowdhry* (5) Maclean, C. J., held that a right of occupancy could not be acquired in a service tenure. He said: "I think that upon principle, having regard to the nature of *ghatwali* lands, the acquisition of occupancy rights in these lands is inconsistent with the incidents of such tenures; and this view gains support from section 181 of the Bengal Tenancy Act, which seems to me to be inconsistent with the view of the acquisition of such rights in *ghatwali* lands. This conclusion seems to be in accordance with Mr. Justice Mitra's view on the point expressed in the case cited, that any such right is not susceptible of acquisition in the *ghatwali* lands." In my opinion, it is clear both on principle and authority that so long as the lands retained the character of *chakran* lands, the appellants could not acquire a right of occupancy in such lands. I think, therefore, that, upon the facts found by the lower Appellate Court, it was right in coming to the conclusion that the appellants have not acquired a rignt of occupancy in plot No. 434. Both the appeal and cross-appeal, therefore, fail and they must each be dismissed with costs.

Appeal dismissed.

(4) 4 C. 67: 2 Ind. Dec. (N. S.) 44.
(5) 33 C, 630.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 136 OF 1917-18.

April 7, 1919.

Present:—Mr. Ferard, S. M., and Mr. Hopkins, J. M.

KALI CHARAN RAI—APPELLANT

versus

SHEIKH SAKHAWAT CHAUKIDAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (1), construction of—Withdrawal of suit—Co-plaintiff, whether can withdraw.

Per *Ferard, S. M.*—Rule 1 (1) of Order XXIII of the Civil Procedure Code should be construed according to its strict wording. One of several co-plaintiffs, when they have embarked upon a joint suit, cannot withdraw from the suit without the consent of the others. [p. 184, col. 1.]

Per *Hopkins, J. M.*—The meaning of rule 1 (1) of Order XXIII, Civil Procedure Code, is not clear, but the idea underlying it is that no person can be forced to prosecute legal proceedings against his will, or prevented from withdrawing from them; but, once a person has withdrawn from a suit, he ought not to be allowed to renew it without good cause shown for the withdrawal. [p. 184, col. 2.]

Second appeal from the order of the Commissioner, Gorakhpur Division, dated

the 16th August 1918, in the case of ejectment.

JUDGMENT.

FERARD, S. M.—(*March* 7, 1919).—The facts are not in dispute. The appeal is on a single point of law. The whole body of co sharers to whom respondent is liable to pay rent sued to eject him. Before the proceedings terminated one of them withdrew. The Commissioner in first appeal has dismissed the suit of all of them. The appellant, one of them, argues that under rule 4, Order XXIII, Civil Procedure Code, one of several co plaintiffs cannot withdraw without the consent of the others. The Commissioner, as set out in his judgment, does not give this wide interpretation to the rule.

It is, however, the plain meaning of the words as they stand and is the view taken in the note on page 410 of Agarwala's Tenancy Act, 5th Edition (note under section 194, Tenancy Act).

In Petition No. 73 of 1915 16, *Musammat Bitto* v. *Ramsidh*, the point came up before the late Junior Member, Sir J. Campbell, who wrote: "Two co sharers issue a notice for ejectment but only one of them now wishes to carry it out. The other has compromised with the tenant. It is quite clear that the tenant cannot be ejected under such circumstances. I uphold the Commissioner's order and dismiss this appeal with costs."

This, however, was an Oudh case and it was only a *notice* and not a *suit* for ejectment, so no question of the limits of rule 1 (1), Order XXIII, came in.

I have looked up Woodroffe and Ameer Ali's Civil Procedure Code and find nothing useful on the point.

I would construe the rule in its strict wording. One of several co-plaintiffs, when they have embarked on a joint suit, cannot withdraw without consent of the others.

I have considered whether there will be any subsequent difficulty in carrying out execution of decree of ejectment if the withdrawing party refuses to join. There will not: Order XXI, rule 15.

I would allow the appeal, set aside the Commissioner's appellate order and restore the order of the Assistant Collector decreeing ejectment. Parties to pay their own costs.

HOPKINS, J. M.—I regret that I am unable to agree with my colleague in this case. Rule 1 (1), Order XXIII, of the Civil Procedure Code, allows a plaintiff to withdraw his suit without any permission. Clause (2) says that the Court may in certain circumstances give a plaintiff permission to withdraw with liberty to institute a fresh suit. Clause (4) says that nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others. The word *permit*, I think, refers to the permission to be given under clause (2), as no permission is required under clause (1).

Ameer Ali and Woodroffe (page 1073) describe the effect of clause (4) as follows:—"This does not permit one of the plaintiffs withdrawing without permission to bring a fresh suit, even though the co-plaintiff do not consent."

Agarwala on page 410 is referring to suits for money under section 194 (3) of the Tenancy Act. He says that a suit for ejectment is outside the scope of the clause: but when all have joined in a suit, the subsequent withdrawal of one of them will not debar the others from obtaining a decree. He quotes *Dwarkanath Rai* v. *Kali Chander Rai* (1). I have referred to that case and I find that what was ruled there was that in a suit for ejectment in Bengal in 1885 when one plaintiff withdrew, the remaining plaintiffs could get a decree *for possession* of *their share of the estate.* The words Italicised should be added after the word decree in Mr. Agarwala's description of the case. The ruling, however, relates only to Bengal. But whatever may be the case there—in the Agra Province possession in an ejectment suit cannot be given in a portion only of the holding.

The meaning of the rule in Order XXIII is not clear, but I think the underlying idea is that no person can be forced to prosecute legal proceedings against his will, or prevented from withdrawing from them but that when once a person has withdrawn from a suit, he shall not be allowed to renew it without good cause shown for the withdrawal.

(1) 13 C. 75; 6 Ind. Dec. (N. S.) 548.

LAL NILMANI NATH SAHI v. BALDEO DAS BISTA.

BY THE COURT.—As members do not concur in accepting the appeal, the lower Court's order must stand. The appeal is, therefore, dismissed, parties paying their own costs. I do not give respondent his costs, as his mutability has caused this extra litigation.

Appeal dismissed.

PATNA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL No. 16 OF 1919.
January 31, 1919.
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.
LAL NILMANI NATH SAHI—
APPELLANT
versus
Rai Bahadur BALDEO DAS BISTA
—RESPONDENT.

Civil Procedure Code (Act V of 1908) s. 151, O. XLI, r. 5—Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 215 (3), 224, 229—Appeal to High Court under Chota Nagpur Tenancy Act—Stay of execution—High Court, power of, to stay execution.

The provisions of the Civil Procedure Code as to stay of proceedings do not apply to cases under the Chota Nagpur Tenancy Act, but, as that Act gives a right of appeal to the High Court, the Court has inherent jurisdiction as a Court of Appeal, where an appeal lies to it, to stay proceedings as ancillary to its powers as the appellate authority to reverse an order of an inferior Court. The jurisdiction, however, should be exercised sparingly and only in cases where it is manifest that justice demands such an exercise. [p. 186, col. 1.]

Mr. *Atul Krishna Roy*, for the Appellant.

Mr. *P. R. Das* (with him Mr. *Sailendranath Palit*), for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an application asking for a stay of execution on behalf of the appellant in an appeal brought under section 215 (3) and section 224 of the Chota Nagpur Tenancy Act. The appeal is from a decision of the Deputy Collector, acting with the powers of a Deputy Commissioner, the amount in dispute being over Rs 5,000, and objection is taken that this Court has no jurisdiction under the provisions of the Code of Civil Procedure to exercise its powers of stay. Now, it must be conceded that the Civil Procedure Code does not apply to cases except cases tried by the Civil Courts save in so far as there is any express provision in the Civil Procedure Code itself, and the question which we have to determine is whether, under the Chota Nagpur Tenancy Act, this Court is granted those powers of staying proceedings mentioned in Order XLI, rule 5 of the Civil Procedure Code. Section 229 of the Chota Nagpur Tenancy Act provides that the provisions of section 561 of the Code of Civil Procedure (now Order XLI, rule 22) which applies to cross-objections shall, so far as applicable, apply to all appeals under this Act from decisions of the Deputy Commissioner, and sections 215 to 229 deal with appeals in suits under the Act itself. Section 224 provides that certain appeals shall lie from the Deputy Commissioner or the Deputy Collector, where the amount in dispute exceeds Rs. 5,000, to the High Court, but no provision is made in the Act applying Order XLI, rule 5 of the Civil Procedure Code, to cases under the Chota Nagpur Tenancy Act. Certain provisions of the Civil Procedure Code are applied to the trial of cases under that Act, and the Local Government has power to make rules and prescribe the procedure to be followed. That appears from section 264, which provides that the Local Government may make rules to carry out the objects of this Act, and, in particular and without prejudice to the generality of sub-section (1), the Local Government may make rules in a great number of cases amongst others to prescribe the procedure to be followed and the information to be given by any party or applicant in any proceeding under this Act and section 265 provides, in sub-section (1), that the Local Government may, with the previous sanction of the Government of India, make rules for regulating the procedure of the Deputy Commissioner in matters under this Act for which a procedure is not provided hereby; and may, by any such rule, direct that any provisions of the Code of Civil Procedure shall apply with or without modification to all or any classes of cases before the Deputy Commis-

sioner, and sub section (3) which is important provides that, until rules are made under sub-section (1), which I have just referred to, and subject to those rules when made and to the other provisions of the Act, the provisions of the Code of Civil Procedure relating to certain matters which are described under headings (*a*) to (*k*) shall, so far as may be, and, in so far as they are not inconsistent with this Act, apply to all suits, appeals and proceedings before the Deputy Commissioner under this Act and to all appeals from decisions passed in such suits or proceedings Now, the Local Government, in fact, has made no provision for making rules for regulating the procedure and, therefore, under sub section (3) of section 265, the only rules which apply are those mentioned in that sub section and those rules which are enumerated, as I said, under the headings (*a*) to (*k*) do not include the powers of the Court to stay proceedings. Therefore, it appears to me that as the Civil Procedure Code does not in itself apply to cases of this sort, and as the Chota Nagpur Tenancy Act which alone gives a right of appeal to the High Court, although it prescribes the procedure to be followed, does not incorporate in that procedure the provisions of Order XLI, rule 5, of the Civil Procedure Code, that the right of the High Court to stay proceedings in cases of this nature cannot be exercised under the Civil Procedure Code. The matter, however, is not of very great importance in this case, because it seems to me quite clear that the Court has inherent jurisdiction as a Court of Appeal where an appeal lies to the High Court, to stay proceedings in the lower Court as ancillary to its powers as the Appellate authority to reverse an order of the inferior Court. That doctrine was laid down in *Panchanan Singha Roy* v. *Dwarka Nath Roy* (1) and again in *Balkishen Sahu* v. *Khugnu* (2). At the same time, I think that this right of staying execution in cases under appeal should be exercised sparingly and only in cases where it is manifest that justice demands such an exercise. We are prepared, therefore, to hear the applicant in this case and to consider whether there is any real ground upon which he is justified in asking us for a stay of execution.

COURTS, J.—I agree.

Order accordingly.

(1) 3 C. L. J. 29.
(2) 31 C. 722; 8 C. W. 572

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 92 OF 1917-18

March 6, 1919.

Present:—Mr. Ferard, S. M.

RAM JATAN SHUKUL—APPELLANT

versus

RAMA PRASAD SHUKUL—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22 (e)—Occupancy holding—Succession—Collateral assisting in cultivation—Co-sharer—Right of such collateral to inherit.

A person, collaterally related in the male line to an occupancy tenant, who assists in cultivating the land is a co-sharer in the cultivation, and on the death of the tenant is entitled, under section 22 (*e*) of the Agra Tenancy Act, to inherit his occupancy rights, his right being in no way affected by any proceedings of the landlord against a person who has no rights in the holding.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 22nd March 1918, in the case of determination of rent.

JUDGMENT.—It would have saved trouble if the respondent Ramprasad had been made a party in the suit of 1915. As he was not, the Commissioner is quite right in holding that it does not operate as *res judicata* against him.

On the merits, and I have gone through the record of both suits, I consider the Commissioner has come to a correct and equitable conclusion, and I find no legal flaw in it. The land was the ex proprietary holding of Ramkishan and, as his son predeceased him, it passed to his grandson, Sitaram. The respondent is a male collateral who undoubtedly helped Sitaram's mother to look after the land while Sitaram was away and, on the analogy of Selected Decision No. 3 of 1915, I think this would amount to co-sharing in cultivation. But there is further evidence that he did the same after Sitaram's return in

ill-health from Kuch-Bihar. Sitaram, I may say, was a major and not a minor as Commissioner says.

The respondent, a collateral in male line of descent, who co-shared in cultivation with Sitaram, occupancy tenant at the time of his death, is entitled under section 22 (*e*) to inherit his occupancy right, and his right is in no way affected by the proceedings of the landholder appellant, against *Musammat* Balwanta, mother of Sitaram, who, of course, had no rights in the holding, as her husband, father of Sitaram, had predeceased his father Ramkishan. The grounds of appeal have no force.

I dismiss the appeal but without costs as Ramprasad, respondent, is to blame for not insisting on being made a party in the previous suit, though the fault lay chiefly with the Assistant Collector who tried that suit.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 604 OF 1917.

June 19, 1919.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

JAMNA PERSHAD, MINOR, THROUGH HAR PERSHAD—DEFENDANT—APPELLANT

versus

RAM DULARE LAL—PLAINTIFF AND KAMTA PERSHAD—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Attachment—Objection by defendant whose name had been removed—Declaration, suit for, by decree-holder, maintainability of.

One *J. P.* was impleaded as one of the defendants in a suit to recover a sum of money; his name was removed from the array of defendants and a decree was passed against his father *K. P.*, but the decree stated that *J. P.* was exempted and was to bear his own costs In execution of the decree certain property was attached and it was objected on behalf of *J. P.*; that the property belonged to him and not to *K. P.*; his objection was allowed. The decree-holder then brought the present suit for a declaration that the property was in fact the property of *K. P.* The Courts found that, as the outcome of a family conspiracy, the property had been entered in the name of *J. P.* and decreed the claim. In appeal to the High Court it was contended that, as *J P.* was a party to the original suit, his objection was final by reason of section 47 of the Civil Procedure Code and it was not open to the plaintiff to bring the suit:

Held, that *J. P.*, having been expressly excluded from the former suit, was not a party to the suit, and, therefore, not a party to the decree, and that, on the findings of fact as to the family conspiracy, section 47 did not apply and the suit had been rightly decreed. [p. 187, col. 1.]

Second appeal against the decision of the District Judge, Farrukhabad, dated the 15th February 1917.

Messrs. *Gulzari Lal* and *Baleshwari Prasad*, for the Appellant.

Dr *S. N. Sen*, for the Respondents.

JUDGMENT.

RYVES, J.—In this appeal one technical point of some difficulty has been pressed. Ram Dulare Lal filed a suit in 1914 against Kamta Prasad and his minor son Jamna Prasad to recover a sum of money in the Court of the Munsif. During the pendency of the suit Ram Dulare Lal had petitioned that Jamna Prasad, the minor, should be exempted from the array of defendants. This was done. The suit was decreed against Kamta Prasad alone but it was stated in the decree that Jamna Prasad was exempted, the actual words being "*bari kiya gaya*", and he was to bear his own costs. In execution of that decree an objection was raised on behalf of Jamna Prasad to the effect that the property which had been attached as belonging to Kamta Prasad in fact belonged to him, and the execution Court upheld his objection because it appeared that the property stood recorded in the name of Jamna Prasad. Hence this suit for a declaration that the property was in fact the property of Kamta Prasad. It has been decreed in both Courts. The technical objection raised is that, inasmuch as Jamna Prasad was a party to the original suit, the objection raised by him being a party to the decree was final by reason of section 47 of the Code of Civil Procedure, and it is not open, therefore, to the plaintiff to bring the suit. It seems to me, personally, a little difficult to hold that, although Jamna Prasad had been expressly excluded from that suit by Ram Dulare Lal, he still must be held to be a party to that suit and, therefore, a party to the decree. However, there is authority in *Data Din* v. *Nanku* (1) which,

(1) 47 Ind. Cas. 864; 16 A. L. J. 752.

though the facts are different, nevertheless points in this direction. On the other hand, there is a Full Bench ruling in *Vaddadi Sannamma* v. *Koduganti Radhabhayi* (2) which certainly does fully support the contention of the appellant. It seems to me, however, that in this case the findings of fact render the application of section 47 of the Code inapplicable. In effect this suit is to get a declaration that the property has been entered in the name of Jamna Prasad as the outcome of a family conspiracy and the finding is that this is so. Under these circumstances, it seems to us on the facts as found that the suit was rightly decreed and the appeal must fail with costs including, in this Court, fees on the higher scale.

WALSH, J.—I agree.

BY THE COURT.—We dismiss this appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(2) 43 Ind. Cas. 935; 41 M. 418; 22 M. L. T. 532; 34 M. L. J. 17; (1918) M. W. N. 23; 7 L. W. 237.

LAHORE HIGH COURT.
CIVIL REVISION PETITION No. 283 OF 1918.
May 8, 1919.
Present:—Mr. Justice Bevan Petman.
NIKKA MAL—PETITIONER
versus
THE MARWAR BANK, LIMITED, LAHORE, IN LIQUIDATION—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 16 (2) (c), 20 (d), 37—Application to avoid sale—Right to apply, when accrues—Creditor, whether can make application—Receiver, whether necessary party—Limitation—Terminus a quo—*Limitation Act (IX of 1908), Sch. I, Art. 181—Insolvency Court, powers and duties of.*

Before the right to make an application under section 37 of the Provincial Insolvency Act accrues, two conditions precedent have to be fulfilled: firstly, the application for insolvency must be made within three months of the transfer sought to be avoided, and, secondly, the debtor must be adjudged an insolvent. [p. 189, col. 1.]

The limitation for such an application is three years from the date when the right to apply accrues. [p. 189, col. 1.]

One *L.* sold certain property of his on the 5th November 1913. An application for insolvency was made on the 30th of January 1914 and *L.* was declared an insolvent on the 29th April 1914. An application to set aside the sale as against the Official Receiver, was made on the 19th December 1916:

Held, that the starting point for limitation was the 29th April 1914 and the application was not time-barred. [p. 189, col. 1.]

An Insolvent Estates Court is not only competent to entertain an application under section 37 of the Provincial Insolvency Act, but it is bound to enquire judicially into the matter when it is brought to its notice. The proper procedure is for the Receiver to make the application or at least to be a party to it. [p. 190, col. 2.]

Kauleshar Ram v. *Bhawan Prasad*, 42 Ind. Cas 845 and *Simil Rowther* v. *Kumarappa Chetty*, 35 Ind. Cas. 875; (1916) 2 M. W. N. 182, followed.

Where, however, the Receiver fails to move in the matter, it is competent to a creditor to make the application. [p. 190, col. 2.]

Petition, under section 46 of Act III of 1907, for revision of the order of the District Judge, Lahore, dated the 20th December 1917, affirming that of the Judge, Insolvents Estates Court, Lahore, dated the 17th February 1917, ordering that the two sales be annulled against the Official Receiver.

Lala *Rama Nand*, for the Petitioner.

Mehta *Bahadur Chand*, for the Respondent.

JUDGMENT.—This revision arises out of an application under section 37 of Act III of 1907 made to the Court of Insolvent Estates at Lahore by the Marwar Bank, Limited, in liquidation, to have a sale by an insolvent, Labhu Mal, in favour of one Nikka Mal declared null and void as against the Official Receiver. That Court annulled the sale as against the Official Receiver. Nikka Mal appealed to the District Court, Lahore, and his appeal was dismissed with costs.

For the petitioner it is contended that the application was barred under Article 181 of the Limitation Act, which allows three years as the longest period for an application. The sale deed is dated the 5th November 1913 and the application was made on the 19th December 1916.

For the respondent it is submitted that Article 181 relates only to applications under the Civil Procedure Code and I am referred to page 559 of Rustomji's Limitation Act, 2nd Edition, where all the authorities on this point are collected. It is further contended that, even if Article 181 applied, the three years have to be calculated from the date when the

right to apply accrues and, before the right to make an application under section 37 of the Provincial Insolvency Act accrues, two conditions precedent have to be fulfilled, firstly, the application for insolvency must be made within three months of the transfer, and secondly, the debtor must be adjudged an insolvent. The application for insolvency was made on the 30th of January 1914, *i.e.*, within three months, and Labhu Ram was declared an insolvent on the 29th April 914. Consequently the starting point for limitation would be the 29th April 1914 and the present application was made within three years and is not barred. There is force in these contentions and I hold that the application is not time-barred.

The next contention is that the lower Appellate Court erred in law in holding that the Marwar Bank had any *locus standi* and that the Official Receiver alone was competent to make the application. For this contention reliance is placed on the words "as against the Receiver" in section 37 itself and on sections 16 (2) (*b*) and 20 (*d*) of the Provincial Insolvency Act. It is also urged that the Official Receiver cannot delegate his powers to a creditor and that in these proceedings the Court had suggested to the Official Receiver to move in the matter but that official had not done so. Reference is also made to *Sadodin* v. *Spiers* (1) and *Balaji Narayan Patvardhan* v. *Ram Chandra Govind Kanade* (2). The former case is distinguishable. There an insolvent had instituted a suit to enforce the terms of a settlement regarding landed property made before he filed his petition in insolvency, and the Court held that any rights which the insolvent had in such settlement had vested in the Official Assignee and that a suit to enforce such rights could be maintained by the Official Assignee only. That is a different case to the present. The person owning a right in property is ordinarily the proper person to bring a suit to enforce that right. In the present case no such position or claim is set up by the applicant. As a creditor and one interested he asks for a declaration that a transfer shall be deemed void as against the Official Receiver for the benefit of all creditors. The decision in *Balaji Narayan Patvardhan* v. *Ram Chandra Govind Kanade* (2) related to a Receiver appointed under the Civil Procedure Code, and it was held that such a Receiver is not justified in delegating or entrusting to another a duty entrusted to him by the Court. The case is not in point, nor does the question of delegation arise in these proceedings. It is not alleged.

The words "as against the Receiver" in section 37 of the Provincial Insolvency Act do not indicate who should make the application or that an application is necessary. The section provides that certain transactions shall be deemed fraudulent and void as against the Receiver and shall be annulled by the Court.

Section 16 (2) (*b*) of the same Act provides that after an order of adjudication and during the pendency of the insolvency proceedings no creditor to whom the insolvent is indebted shall, except as provided by the Act, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court. The applicant is not asking for any remedy in respect of its debt. The clause appears to be badly worded. It obviously was not intended that a creditor could not commence a suit or other legal proceedings of any kind against persons unconnected with the insolvency and relating to other matters. Apparently these words relate also to the subject of a creditor's debt. The object of the clause is to forbid litigation independent of the provisions contained in the Act. There is nothing in this clause which supports the contention.

Section 20 (*d*) of the same Act provides that for the purposes of realising the property of the debtor and of distributing dividends the Receiver may "institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent." This is an enabling section and there is no doubt but that the Receiver could have made the application.

The question here is, whether it is not competent to a Court of Insolvent Estates

(1) 3 B. 437; 4 Ind. Jur. 218 & 350; 2 Ind. Dec. (N. S.) 291.

(2) 19 B. 660; 10 Ind. Dec. (N. S.) 442.

to entertain an application under section 37 made by a creditor to which the Receiver is not a party or itself to initiate proceedings on facts brought to its knowledge, and are such proceedings illegal and void for the reason that the Receiver is not a party to them? This point has apparently not been decided by any Court in India.

The following decisions have not been cited before me but they have a bearing on the point: *Khushhali Ram* v. *Bholar Mal* (3), *Kauleshar Ram* v. *Bhawan Prasad* (4) and *Simil Rowther* v. *Kumarappa Chetty* (5). In the first of these an application, which was construed as being an application under section 36 of the Provincial Insolvency Act, was made by a creditor. The Judge held that no further inquiry was necessary. The learned Judges of the High Court held that the Judge misconceived the extent of his jurisdiction in insolvency proceedings and that he was bound to enquire into this question of the alleged mortgage at the instance of any creditor who claimed to be prejudiced thereby. The following passage occurs in the judgment:—

"He (the Judge) might have come to the conclusion that there had been a transfer by way of mortgage under circumstances calling for interference on his part under section 36 of the Insolvency Act, or he might have found that there had been a purely fictitious transaction, not involving a transfer.....and the property purporting to be affected by this mortgage would become available for the benefit of all the creditors free of incumbrance. We think that Khushaliram's application should have been taken up, notice of the same given.....and the questions raised enquired into and decided."

Section 36 of the Insolvency Act also contains the words "be void against the Receiver." This decision would equally apply to an application under section 37.

In *Kauleshar Ram* v. *Bhawan Prasad* (4) creditor made an application under section 36 of the Insolvency Act. On appeal to the High Court no objection was taken regarding the *locus standi* of the creditor. The objection was that proceedings had been taken without proper notice to the transferee. In accepting the appeal on this ground the learned Judges made the following observations:—

"We think that the proceedings to set aside the transfer ought to have been taken in the name of the Receiver and that no proceedings should have been commenced until after the appointment of a Receiver. No doubt the creditors (or any of them) are entitled to furnish the Receiver with information and evidence and to be examined when the matter is tried out."

In *Simil Rowther* v. *Kumarappa Chetty* (5) the learned Judges set aside an order of the Insolvency Judge relating to section 36 on the ground that he had not made a judicial enquiry and remarked: "We observe that the Official Receiver should have been and should now be made a party to the proceedings."

It would thus appear that the correct procedure is for the Receiver to make the application or at least be a party to them. In the present case, however, though his attention was called to the matter by the Court, the Receiver took no action. The Court should probably have directed the Receiver to make the application. Failure on the part of the Receiver and the Court in these respects compelled the applicant to move in the matter and to ask the Court to take action.

In my opinion the Court, under the circumstances, had power to entertain the application and, further, that it was the duty of the Court to judicially enquire into the matter when it was brought to its notice. This view is strongly supported by the decision in *Khushhali Ram* v. *Bholar Mal* (3) already referred to.

The next point urged for the petitioner is that the provisions of section 37 of the Insolvency Act have not been complied with. This matter is sufficiently dealt with by the lower Appellate Court. It is obvious that the insolvent could not meet his liabilities as they fell due. Counsel for the petitioner urges that if this property be held as that of the insolvent, it would form a further asset with which to pay, but he ignores the fact that the property is alleged to be worth Rs. 1,500 and was transferred in consideration for an alleged debt of Rs. 3,500 which

(3) 28 Ind. Cas. 573; 37 A. 252; 13 A. L. J. 270.
(4) 42 Ind. Cas. 845.
(5) 35 Ind. Cas. 875; (1916) 2 M. W. N. 182.

was thereby paid off. It is obvious that until this transfer is set aside, the property is not available to the creditors.

It is also urged that the matter is *res judicata*. This contention is new and untenable. There was no final or other adjudication between the parties by order of the Insolvency Court dated the 26th August 1916.

Lastly it is urged that the transfer was not a voluntary one. This point has been fully dealt with by the lower Appellate Court and I see no grounds for interference. This revision is dismissed with costs.

Revision dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 313 OF 1916.

July 10, 1919.

Present:—Mr. Justice Stuart and Mr. Justice Ryves.

Maharaja Sri RAMESHAR SINGH SAHIB BAHADUR—PLAINTIFF—APPELLANT

versus

Raja MUNSHI MADHO LAL—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 4 (2), 19, 58—Grove held on yearly rent—Tenancy, whether established—Ejectment—Jurisdiction of Revenue Courts.

B., the grantee of some land, planted a grove thereon; after his death *D.* was admitted as a tenant on payment of a yearly rent. He continued to pay this rent from 1899 till 1910 when the present defendant sued in the Revenue Court and obtained a decree for his ejectment, the Board of Revenue holding that, though the grove in question was not "land" within the meaning of the Tenancy Act, a decree for ejectment could be given on the ground that *D.* came in after the death of the original grantee, not as his heir and not under the same contract as would bind him and the original grantee, but simply as a tenant paying rent from year to year. *D.* thereupon brought the present suit to obtain a declaration that the decree of the Board of Revenue was illegal being one which the Revenue Courts had no jurisdiction to pass:

Held, that a grove-holder such as *D.* was a non-occupancy tenant and the Revenue Courts had the power to eject him, and that the decision of the Board of Revenue was in no way illegal.

First appeal against the decision of the Additional Subordinate Judge, Benares, dated the 28th June 1916.

Dr. *S. N. Sen* and Mr. *N. Upadia*, for the Appellant.

Messrs. *Sarat Chandra Chowdhri*, *L. M. Banerji* and *Kashi Narain Malvaya*, for the Respondent.

JUDGMENT.—The present respondent gave some land to Swami Bishudha Nand, it is said some 56 years ago, to plant a grove. In 1899 the Swami died. Subsequently, the Maharaja of Darbhanga was admitted as a tenant and paid the respondent Rs. 14 a year as rent. It appears that he was recorded in the revenue papers as a non-occupancy tenant. Be that as it may, he continued paying the rent up till the year 1910 when the respondent brought a suit to eject him under section 58 of the Tenancy Act. In his reply to that suit the Maharaja of Darbhanga made two somewhat contradictory statements. In paragraph 2 of his written statement he stated that the holding was a grove pure and simple, and that he was merely managing it as a sort of Shebait. In the 3rd paragraph he went on to say that, inasmuch as he had been in charge and management of the property for over 12 years, he had acquired a right of occupancy. Both the Assistant Collector and the Commissioner dismissed the suit holding that the defendant had proved himself to be an occupancy tenant. On revision to the Board of Revenue it was held, that occupancy rights could only be acquired in "land", and that the grove in question was not "land" within the meaning of the Act. It held that a decree for ejectment of the defendant could be given on the ground that, after the death of the Swami, the Raja of Darbhanga came in not as the heir of the Swami and, therefore, not under the same contract as would bind the defendant and the Swami, but that he simply came in as a tenant paying Rs. 14 year by year. The result was that the Raja of Darbhanga was ejected from the land. He then brought this suit for a declaration, for possession of the grove and mesne profits, on the ground that the defendant had no right to eject him and that the ruling of the Board of Revenue was illegal being one which the Revenue Courts had no jurisdiction to pass. There can be no doubt that such a grove-holder as the appellant is a tenant according to the definition in section 4 of the Act. Next, it remains to be seen whether he is a non-occupancy tenant. Section 19, in which the

word "land" does not find a place makes it quite clear, that the appellant is a non-occupancy tenant. Therefore, the Revenue Court had power to eject him. Section 58 lays down the conditions under which a non-occupancy tenant may be ejected and there is nothing in that section which seems to exclude such a grove-holder. It is argued that section 58 implies a suit for ejectment from land, the word "land" as defined in section 4 (2) of the Act being land used for agricultural purpose. But there is no force in this argument. The section lays down how such a tenant is to be ejected from his tenancy. That tenancy need not necessarily be over land used for agricultural purposes. It seems to us, therefore, that the decision of the Board of Revenue was not only one which it had jurisdiction to pass but which was right. In this view, it is unnecessary to consider the various rulings of this Court and also of the Board of Revenue which have been cited to us, as our finding on this point concludes the appeal. The result is that the appeal fails and is dismissed with costs including in this Court fee on the higher scale.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 19 OF 1918-19.

January 19, 1919.

Present:—Mr. Ferard, S. M.

SHEO RATAN SINGH—

APPELLANT

versus

Kunwar GUR PRASAD SINGH—

RESPONDENT.

Landlord and tenant--Settlement—Holding wrongly described as occupancy—Status of occupier, whether can be contested—Landlord, whether can confer occupancy rights on tenant.

Where a plot of land is misdescribed in the proceedings of a settlement as an occupancy holding, such misdescription would not prevent the *zemindar* from afterwards contesting the occupier's status.

A landlord cannot confer occupancy rights upon a tenant.

Second appeal from the order of the Commissioner, Allahabad Division, dated the 10th October 1918 in a case of ejectment.

JUDGMENT.—The plot in suit was recorded as a grove in 1313. It could not have become occupancy of respondent in 1319 when settlement took place. It was misdescribed in proceedings before the settlement as an occupancy tenure and in a subsequent suit to enhance the Rs. 4 rent which the Settlement Officer fixed. Misdescription does not prevent the Zemindar from afterwards contesting the occupier's status and as in the enhancement case no enhancement was decreed, the Rs. 4 rent being maintained, there is no case for estoppel against the Zemindar on the ground that appellant accepted, without appealing, a decreed enhancement. The papers show that in 1320, wheat and barley was grown in 3 out of 5 *bighas*, *sawan* and peas on the same area in 1321, and paddy in 1322, 1323 and I have no doubt that the many young trees which a witness of appellant said are planted there now were planted there as a defence to suit. I notice that the Assistant Collector made a mistake in thinking that a landlord can confer occupancy rights on a tenant—he cannot do so, as decided in a Board's Selected Decision of 1918.

The Commissioner's decision is really one of fact, that the plot was a tenant's grove which has become arable by loss of trees and treated as such by the Settlement Officer who fixed rent and afterwards by the occupier, appellant, who grew wheat and other crops. There are no legal flaws in the Commissioner's decision and I am not prepared to interfere with it.

Appeal dismissed.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 338 OF 1917.
August 30, 1917.
Present :—Mr. Justice Shadi Lal.
JINDA—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Arms Act (XI of 1878), ss. 19, 20—Chhavi, whether "arm"—Possession of chhavi, whether offence.

To determine whether a particular instrument is an arm within the meaning of the Arms Act, the real test is whether it is usually employed for the purpose of offence or defence

Crown v. *Santa Singh*, 16 P. R. 1900 Cr, followed.

The possession of a *chhavi* is unlawful under the Arms Act.

Khem Singh v. *Crown*, 28 Ind. Cas. 796: 8 P. R. 1915 Cr.; 76 P. L. R. 1915; 16 Cr. L. J. 412, followed.

Appeal from the order of the Magistrate, Ist Class, with section 30 powers, Gurdaspur, dated the 29th March 1917, convicting the appellant.

Mr. *Morton*, for the Appellant.

JUDGMENT.—This is a very clear case under section 20 of the Indian Arms Act and does not require any lengthy discussion. There is a mass of evidence upon the record to prove the fact that on the night of the 19th February 1917 the appellant, Jinda, was arrested outside the *abadi* of the town of Sri Gobindpur, and that upon search a *chhavi* blade was found concealed in his loin cloth. The finding of the Magistrate upon this point has not been seriously assailed by the learned Counsel for the appellant.

The contention that *chhavi* does not come within the category of the word "arms" in the Arms Act cannot be accepted. As pointed out in *Crown* v. *Santa Singh* (1), the real test is, whether a particular instrument is usually employed for the purpose of offence or defence, and this test is fully satisfied by the weapon in question. There are numerous cases in which the possession of *chhavi* has been held to be unlawful under the Indian Arms Act, XI of 1878, *vide, inter alia*, *Khem Singh* v. *Emperor* (2). The fact that the offender was passing in front of the *thana* when leaving the town of Sri Gobindpur and that the *chhavi* was concealed in his loin cloth goes to show

(1) 16 P. R. 1900 Cr.
(2) 28 Ind. Cas. 796; 8 P. R. 1915 Cr.; 76 P. L. R. 1915; 16 Cr. L. J. 412.

that he concealed it with the intention that it should not be known to the Police. These and other circumstances bring the case under section 20 of the aforesaid Act.

For the reasons set out above I confirm the conviction, and in view of the notorious character of the appellant I am not prepared to hold that the sentence of five years' rigorous imprisonment is too severe. The appeal is accordingly dismissed.

Appeal dismissed.

PATNA HIGH COURT.
FULL BENCH.
CIVIL CRIMINAL REVISIONS NOS. 5 AND 6 OF 1919.
June 20, 1919.
Present:—Mr. Justice Atkinson,
Mr. Justice Jwala Prasad and
Mr. Justice Das.
LALJI TEWARI—PETITIONER IN NO. 5 OF 1919
DIPAK TEWARI—PETITIONER IN NO. 6 OF 1919
versus
EMPEROR—RESPONDENT IN BOTH.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute, application for—Small Cause Court, order made by—Revision—Court, proper.

Held by a majority of the Court (*Jwala Prasad, J.*, dissenting), that clause (*c*) of sub-section 7 of section 195 of the Criminal Procedure Code applies to a Small Cause Court, and that the authority to review an order made by the latter Court granting or refusing sanction to prosecute is the District Court within whose local limits the Small Cause Court is situate. [p. 199, col. 2; p. 200, col. 2; p. 202, col. 1.]

Jwala Prasad, J.—Neither sub-section 7 of section 195 of the Criminal Procedure Code nor any of its clauses, (*a*), (*b*) or (*c*), applies to Courts of Small Causes. Under sub-section 6 of that section an application can be made both to the District Court and to the High Court for the purpose of revoking or granting a sanction given or refused by a Court of Small Causes. As a matter of procedure, however, such applications should not, except under special circumstances, be entertained by the High Court. [p. 204, col. ; p. 205, col. 2]

The scope of section 195 of the Criminal Procedure Code examined and discussed.

Civil Criminal revisions against the orders of the Small Cause Court Judge, Chapra, dated the 31st January 1919, granting sanction to prosecute the petitioners under sections 209, 210, 467 and 471 of the Indian Penal Code.

LALJI TEWARI v. EMPEROR.

FACTS appear from the judgment.

Mr. *Yunus* (with him Mr. *Ram Prasad*), for the Petitioners.—This case involves a point of great importance and its importance is enhanced by the difference of opinion between eminent Judges of various High Courts. According to the law as it stands at present, the Allahabad High Court and the Calcutta High Court are against the view taken by the Patna High Court.

The preliminary point taken by the Crown is that the petitioners could not move the High Court direct against the order of the Small Cause Court Judge granting sanction to prosecute them. But I submit that if the word appeal is understood to have the meaning given to it in *Sheo Nandan Prasad Singh* v. *Emperor* (1), the contention of the other side is well met. In that case it was held that revision is a modified form of appeal, that 'revision' and superintendence are incidents of appellate jurisdiction and that the words 'Courts of Appeal' include a Court which entertains applications for revision. This being so, section 25 of the Provincial Small Causes Courts Act makes the High Court only as the Court of Appeal which can entertain appeals (including revisions) from the order of the Court of Small Causes and, therefore, by virtue of section 195 (7), Criminal Procedure Code, the petitioners are entitled to move the High Court direct.

Moreover, for the purposes of the Criminal Procedure Code appeal includes revision under section 439. Therefore, for all intents and purposes so far as the High Court is concerned, there is under the Criminal Procedure Code no difference between an appeal and a revision when section 195 is mentioned in section 439.

A reference to the provisions of section 195 as it found place in the previous Criminal Procedure Code is instructive. I shall have to refer to three Acts, namely, Act X of 1872, Act X of 1882 and Act V of 1898.

Sections 467 to 470 of Act X of 1872 contained provisions regarding sanction only but were silent regarding the subordination of Small Cause Courts relating to sanction. In Act X of 1882 the Sessions Judge was expressly given power to hear appeals against the sanction given by Small Cause Courts—compares section 195 of Act of 1882 with section 195 of the present Code. Therefore, under the present Act the intention of the Legislature was to take away this power from the District Court and vest it in the High Court. Reads section 25 of Act IX of 1887 and contends that the powers of the High Court under that section are as wide as that of an Appellate Court. Quotes *Behram Kaikhushru Irani* v. *Ardeshir Kavasji* (2), *Elahi Buksh Mandal* v. *Ram Narayan Ghose* (3), *Shanker Singh* v. *Musammat Rekha* (4) and *Rupchand* v. *Minhomal Hardasmal* (5).

Having regard to section 25 and section 28 of the Small Causes Courts Act and the view taken in *Sheo Nandan Prasad Singh* v. *Emperor* (1), the High Court is to all intents and purposes the Appellate Court of Small Causes and not the Court of the District Judge.

My second contention is that the Court of Small Causes is not a Civil Court. In the enumeration of the Civil Courts in the Civil Courts Act, *i. e.*, the Bengal, N. W. P. and Assam Civil Courts Act, 1887, section 3, the Small Cause Court is not mentioned.

[DAS, J.—But that enumeration is not exhaustive. Read the opening words of the section; that is only for the purposes of this Act.]

Mr. *Yunus*.—I submit the Legislature has enumerated all the Civil Courts then in existence and it is significant that the Small Cause Court is left out.

[DAS, J.—For the obvious reason that there was a separate Act governing or defining the procedure, constitution, etc., of a Court of Small Causes.]

Section 16 of the Small Causes Courts Act excludes the jurisdiction of every other Court in cases coming within the jurisdiction of the Small Cause Court and, therefore, a Court of Small Causes is distinct from a Civil Court. Reads section 24 of the Small Causes Courts Act, and section 102, Civil Procedure Code.

[JWALA PRASAD, J.—But read sections 2 (8), and 9, Civil Procedure Code, and section 15, Small Causes Courts Act.]

(1) 46 Ind. Cas. 977; 3 P. L. J. 581; 19 Cr. L. J. 833 (F. B.); (1919) Pat. 1; 5 P. L. W. 324.

(2) 27 B. 563; 5 Bom. L. R. 555.
(3) 10 Ind. Cas. 117; 16 C. W. N. 288.
(4) 28 Ind. Cas. 969; 13 A. L. J. 394.
(5) 27 Ind. Cas. 366; 8 S. L. R. 164.

LALJI TEWARI *v.* EMPEROR.

Mr. *Yunus*.—These sections of the Civil Procedure Code are not applicable to Courts of Small Causes. Only such portions of the Civil Procedure Code apply as are made expressly applicable either by the Civil Procedure Code itself or by the Small Causes Courts Act. Further section 2 (8) gives the meaning of the Judge for the purposes of the Civil Procedure Code only.

I submit that if my contention is correct that a Small Cause Court is not a Civil Court, in that case it follows logically that the District Judge cannot review the sanction granted by the Small Cause Court and the High Court alone can interfere.

My third contention is that if your Lordships are against me on my previous submission, then there is no Court in existence capable of reviewing a sanction to prosecute given or refused by a Small Cause Court under the machinery provided by section 195, or in other words, clause (7) of section 195 does not apply to the Court of Small Causes. I rely on *Ajudhya Prasad* v. *Ram Lal* (6) and the cases of the High Court reported as *Ambica Tewary* v. *Emperor* (7) and *Sukhdeo Singh* v. *District Magistrate of Muzaffarpur* (8)—clearly sub clauses (*a*) and (*b*) of section 197 (7) do not apply, because there is no Court to which appeal ordinarily lies from a proceeding in a Small Cause Court (assuming that my first argument fails).

The principal Court of original jurisdiction must have reference to the class of cases in respect of which the principal Court is to be discovered. In civil cases for instance, it is the Court of the District Judge but inasmuch as the District Court has no original jurisdiction in Small Cause Court suits, therefore clause (7) cannot apply in such a case.

In the alternative I submit that as the High Court can try in its extraordinary jurisdiction suits of small causes, the authority capable of reviewing the sanction granted or refused under section 195 is the High Court, not the District Court.

The principal case against me of the Calcutta High Court is *Nibaran Chandra* v. *Akshoy Kumar Banerjee* (9). But their Lordships in that case did not discuss the point at all. They simply said that the practice in the Calcutta High Court was that such applications should be made to the District Judge and as such practice was not inconsistent with the interpretation of section 195, their Lordships did not deem it advisable to disturb that practice. I submit that your Lordships will not disturb the practice of this Court since its establishment. It is not correct to say that the view of *Ajudhya Prasad* v. *Ram Lal* (6) is followed here. Their Lordships have considered the point independently in this Court and come to the same conclusion. This interpretation is a reasonable one.

The Full Bench of the Allahabad High Court in *Chidda Lal* v. *Bhajan Lal* (10) has no doubt taken a different view, but the contentions which I have advanced were not considered there and in any view the High Court have ample power to interfere under section 115 of the Civil Procedure Code or section 107 of the Government of India Act.

Mr. *Sultan Ahmad*, Government Advocate (with him Mr. *Monohar Lall* Assistant Government Advocate), for the Crown.—My first submission is this that when a Subordinate Judge or Munsif is vested with the powers of a Small Cause Court Judge under section 25 of the Civil Courts Act of 1887, such officer nevertheless remains a Subordinate Judge or a Munsif, as the case may be although he is now exercising the powers of a Small Cause Court Judge, and, therefore, under clause (7) of section 195, Criminal Procedure Code, the authority entitled to review the sanction order is the authority to which appeals from him ordinarily lie, *i.e.*, the Court of the District Judge. For instance when a District Court is exercising its jurisdiction as a Probate Court or a Matrimonial Court it does not cease to be the Court of a District Judge. I submit that if this submission of mine is admitted as well founded, a great deal of difficulty in interpreting the section so far as

(6) 13 Ind. Cas. 284; 34 A. 197; 9 A. L. J. 124; 13 Cr. L. J. 44.

(7) 34 Ind. Cas. 320; 1 P. L. J. 206; 17 Cr. L. J. 208.

(8) 38 Ind. Cas. 754; 2 P. L. J. 1; 18 Cr. L. J. 370.

(9) 41 Ind. Cas. 311; 21 C. W. N. 918; 26 C. L. J. 138; 18 Cr. L. J. 791.

(10) 42 Ind. Cas. 167; 39 A. 657; 15 A. L. J. 721; 18 Cr. L. J. 935 (F. B.).

it relates to Courts of Small Causes is removed.

My next submission is that the present applications are governed by clause (*c*) of sub-section (7) of section 195, Criminal Procedure Code.

The object of sub section 7 is to indicate that only one Court can review a sanction given or refused under section 195 and, therefore, clause (*a*) defines which of the two Courts is to be deemed to be the one Court which can review such an order, and clause (*b*) again defines or points out the one Court when there are different Courts, Civil or Criminal. But these two clauses contemplate a situation when appeals do lie ordinarily. In order to make clause 7 exhaustive the Legislature provides a Court even in cases when no appeal lies, *e.g.*, a case tried by a Court of Small Causes. In such a case we must look to the class of Court trying that case, *e g.*, Civil Court or Criminal Court or Revenue Court. I may submit here that the reasoning of Roe, J., in *Ajudhya Prasad* v. *Ram Lal* (6) is open to criticism when the learned Judge proceeds to consider the various sub divisions of Civil, Criminal and Revenue Courts, because no matter how you subdivide a Civil or a Revenue Court, the sub division must remain a Civil or a Revenue Court, as the case may be, and section 195 (2) distinctly points out that a Court means a Civil, a Criminal or a Revenue Court. Having then determined the Court which has tried the particular case out of which the sanction proceedings have originated and when no appeal lies, we find out, as directed by section 195 (7) (*c*), which is the principal Court of original jurisdiction for that class of Court, *i.e.*, if it is a Civil Court we find out which is the principal Court of original civil jurisdiction, etc That is the authority to which the first mentioned Court shall be deemed to be subordinate, although it is not in fact so subordinate.

To resume, it cannot be doubted that a Small Cause Court is a Civil Court because it tries only suits of a civil nature. See section 15 (2) of the Act, reads the lines "all suits of a civil nature"—no appeal ordinarily lies from its decisions. I may submit here that the argument of the other side that revision is a modified form of appeal overlooks the word "ordinarily" purposely used by the Legislature in section 195 (7), and section 3 (15) of the General Clauses Act, X of 1897, defines the District Judge to be the Judge of the principal Civil Court of original jurisdiction. Therefore, for the purposes of section 195 (7) (*c*) the Court of Small Causes shall be deemed to be subordinate to the Court of the District Judge.

In the prior Code of 1882 the clause corresponding to clause (*c*) in the present Code under section 195 provided that in the case of Small Cause Courts the right of review in matters of sanction rested with the Sessions Court. This anomaly was removed in the present Code, because it seemed extraordinary to vest a Criminal Court with jurisdiction over a Court of Small Causes, over which it could have no jurisdiction whatever as a Criminal Court.

As far as the case law is concerned, the Full Bench case of the Allahabad High Court reported as *Chidda Lal* v. *Bhajan Lal* (10) is the last word on the subject. The cases of this High Court reported as *Ambica Tewary* v. *Emperor* (7) and *Sukhdeo Singh* v. *District Magistrate of Muzaffarpur* (8) have been discussed and dissented from in that judgment as well as the ruling of Chamier, J., in *Ajudhya Prasad* v. *Ram Lal* (6). The case of *Nibaran Chandra* v. *Akshoy Kumar Banerjee* (9) likewise embodies the view of the Calcutta High Court.

Mr. *Yunus*, in reply.—The novel argument advanced by the learned Government Advocate as to a Small Cause Court Judge being still a Sub Judge or a Munsif, is quite erroneous. Section 33 of the Small Causes Courts Act is a complete answer to this argument.

JUDGMENT.

ATKINSON, J.—This application in revision comes before this specially constituted Bench on a reference made by my learned brother Mr. Justice Jwala Prasad and myself with the consent of the Chief Justice.

The question which arises for decision in this application is: to what Court, if any, can an application, with respect to a sanction given or refused by a Court of Small Causes under section 195 of the

Code of Criminal Procedure, be made for its revocation or grant as the case may be?

Before dealing specifically with the point requiring determination, it is desirable briefly to examine the scope of section 195 of the Criminal Procedure Code, and the procedure laid down with reference to the rights created thereby.

Section 195 of the Criminal Procedure Code confers upon certain authorities the right of granting sanction to prosecute certain individuals for offences against the specific sections of the Indian Penal Code mentioned therein. The power conferred to grant or refuse sanction rests (*a*) with certain public servants and (*b*) with Courts before whom offences against public justice may have been committed.

By sub-section (2) of section 195 of the Criminal Procedure Code the term "Court" is defined, and "Court" is therein declared to mean a Civil, Revenue or Criminal Court, but does not include a Registrar or a Sub-Registrar under the Indian Registration Act of 1877. Therefore, I take it, the term "Court" applies without restriction to the general classification of all Civil Courts, all Revenue Courts and all Criminal Courts.

Sub-section (6) of section 195 provides that any sanction given or refused may be revoked or granted by any authority to which the authority granting or refusing it is subordinate. Sub-section (6), however, does not apparently give an express and unqualified right of appeal to the persons or parties against whom sanction has been given or refused respectively. It is merely an enabling section authorising a superior authority to review an order of sanction granted or refused by a subordinate authority.

The word "authority", as used in section (6), applies to public servants within the meaning of clause (*a*) of sub section (1) and to Courts within the meaning of clauses (*b*) and (*c*) of sub section (1). When, however, the authority granting or refusing sanction to prosecute is a *Court*, then the provisions of sub section (6) apply and regulate the procedure to be adopted with reference to the authority to be vested with power to review a sanction antecedently given or refused. Sub section (7) runs as follows: —"For the purposes of this section every Court shall be deemed to be subordinate only *to the Court* to which appeals from the *former Court ordinarily lie*." Then by way of explanation of the meaning and purport of sub-section (7) are added three clauses (*a*), (*b*) and (*c*) for the purpose of defining when one Court is or may be deemed to be subordinate to another, with a view of ascertaining the Court which has power to review a sanction to prosecute granted or refused by a Court subordinate to it.

Section 195 of the Criminal Procedure Code is self-contained, and provides its own procedure, and from within the four corners of the section itself we must ascertain its true meaning and intent.

Sanction to prosecute the petitioners Lalji Tiwari and Dipak Tiwari was granted by the Judge of the Small Cause Court of Chapra on the 31st January 1919 under sections 209, 210, 467 and 471 of the Indian Penal Code, read with section 195 of the Criminal Procedure Code. From the sanction so granted application was made by the petitioners respectively by separate applications to the High Court to revoke the sanction so granted by the Judge of the Small Cause Court of Chapra. It was contended before us that in such cases the High Court is the authority within the meaning of sub-section (7) of section 195 to review a sanction granted or refused by a Small Cause Court Judge, inasmuch as the Court of Small Causes is immediately subordinate to the High Court, as appeals from a Court of Small Causes lie directly to the High Court by virtue of the provisions of section 25 of the Provincial Small Causes Courts Act of 1887.

Mr. Yunus argues that the right to review a sanction given or refused by a Small Cause Court is *only* entertainable by the High Court, and he relies upon sub-section (7) of section 195.

The argument of Mr. Yunus is based entirely on the right of revision and superintendence exercisable by the High Court over a Court of Small Causes under section 25 of the Small Causes Courts Act, and he contends that section 25 confers in a modified form a right of appeal even though applications presented under section 25 to the High Court may be revisional; and he cites in support of this contention a case reported as *Sheo Nandan Prasad* v. *Emperor* (1), in which it was laid down

that an application in revision is an appeal in a modified form.

However, we feel unable to assent to the first branch of the argument addressed to us by Mr. Yunus.

Sub-section (7) of section 195 refers to cases in which an unqualified and absolute right of appeal is given from the decision by one Court to another at the instance of a party to the litigation before it. Section 25 of the Provincial Small Causes Courts Act does not confer an absolute and unqualified right of appeal. It merely enables the High Court in the exercise of its discretion and power of superintendence to revise the proceedings of the Small Cause Court with a view of seeing that justice is done and that the law is properly applied and administered. In no sense, therefore, can it be said that the High Court is the Court to which appeals from Small Cause Courts ordinarily lie, in the sense contemplated by sub section (7) of section 195.

Alternatively Mr. Yunus suggests that if his first argument fails that then there is no Court in existence capable of reviewing a sanction to prosecute given or refused by a Small Cause Court; and in support of this contention he relies upon what he conceives to be the true construction of clause (*c*) of sub section (7), which he argues has no application to a Small Cause Court and reliance is placed in support of this proposition upon the rulings reported as *Ajudhya Prasad* v. *Ram Lal* (6), *Ambica Tewary* v. *Emperor* (7) and *Sukhdeo Singh* v. *District Magistrate of Muzaffarpur* (8).

Mr. Yunus admits that clauses (*a*) and (*b*) of sub section (7) of section 195 of the Criminal Procedure Code cannot apply to a Small Cause Court, inasmuch as there is no Court (if his first argument fails) to which an appeal ordinarily lies from a proceeding in a Small Cause Court; and thus it is conceded that the only clause of sub-section (7) which can apply with reference to the question now requiring determination by this Court is clause (*c*); and in support of this contention reliance is strongly placed on the reported decisions of this Court which were decided by our late and distinguished Chief Justice, Sir Edward Chamier, that clause (*c*) does not apply to a Small Cause Court and that, therefore, a Small Cause Court is a Court whose orders as to granting and refusing sanction to prosecute are immune and incapable of review by any superior authority whatsoever.

Clause (*c*) runs as follows:—"Where *no appeal lies, such Court shall be deemed* to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first-mentioned Court is situate."

Two contentions are put forward as to what is the construction of this clause: The first is that the principal Court of original jurisdiction in any district or area defined by the Local Government under its powers is the District Court; but that inasmuch as the District Court has no original jurisdiction in Small Cause Court suits that, therefore, no right of review can rest with it in respect of sanctions granted or refused by a Small Cause Court.

The second contention advanced is that on the authority of the decisions cited, clauses (*a*), (*b*) and (*c*) of sub section 7 of section 195, Criminal Procedure Code, deal *not with Courts* granting or refusing sanction to prosecute, but to cases in which sanction to prosecute has been granted or refused, and that consequently clause (*c*) applies to a proceeding of a non-appealable character in an original suit in which an appeal lay This argument was assented to by a Division Bench of the Allahabad High Court reported as *Ajudhya Prasad* v. *Ram Lal* (6) and as a logical extension of the *ratio decidendi* of that decision, Chief Justice Chamier held in this Court in a case reported as *Ambica Tewary* v *Emperior* (7) that a Small Cause Court was not directly or indirectly within the purview of clause (*c*) of sub-section (7) of section 195 of the Code of Criminal Procedure.

Mr. Justice Roe, following the decision of Sir Edward Chamier in this Court, likewise yielded to a similar contention, and held that the District Court was not the Court of original jurisdiction with reference to Small Cause Court matters and suits, and that the District Court could not, therefore, be said to be the authority contemplated by clause (*c*) for reviewing

sanctions granted or refused by a Small Cause Court situated within its territorial limits. Mr. Justice Roe further held that on the true construction of clause (*c*) of sub-section (7) the only Court of original jurisdiction in existence in respect of Small Cause Court matters was the Small Cause Court *itself* and that, therefore, the Small Cause Court was the only authority capable of reviewing its own decisions granting or refusing sanction to prosecute. This decision was criticised in the Full Bench ruling reported as *Chidda Lal* v. *Bhajan Lal* (10), and as was pointed out, such a construction of clause (*c*) of sub-section 7 would lead to hopeless anomaly and render the interpretation of the sub-section 7 of section 195 an obvious absurdity, a result which we must presume the Legislature never intended according to the established rule for the construction of Statutes.

The fundamental error underlying the decision of the Division Bench of the Allahabad High Court reported as *Ajudhya Prasad* v. *Ram Lal* (6) appears to us to be in construing sub-section 7 of section 195 and the explanatory clauses annexed thereto as dealing only with *cases* in which appeals lie to certain Courts. It appears to us for the purpose of construing sub-section 7 of section 195 to be immaterial whether an appeal lies in certain cases or not; but the vital consideration is whether an appeal ordinarily lies from one Court to another superior to it, and to which the first Court is as a general rule subordinate If this then be the true construction of sub-section (7), as we believe it is, then clause (*c*) of sub section (7) cannot have the restricted and limited interpretation put upon it by the Division Bench of the Allahabad High Court in the ruling already referred to.

Sub-section 7 purports to define when a Court is subordinate to another; and in order to make the meaning of the Legislature clear illustrations are appended to that sub-section in sub-clauses (*a*), (*b*) and (*c*) for the purpose of showing when one Court is or is deemed to be subordinate to another. The illustrations contained in clauses (*a*) and (*b*) are free of difficulty; and clause (*c*), we think, was intended to apply where no appeal at all lay from the Court exercising the functions and powers conferred by section 195 of the Criminal Procedure Code. A Small Cause Court is such a Court, because no appeal lies from it save and except by way of revision under section 25 of the Provincial Small Causes Courts Act, and to a limited extent in certain respects under section 24 of the Small Causes Courts Act to the District Judge.

The majority of us are of opinion that clause (*c*) of sub-section 7 of section 195 of the Criminal Procedure Code applies only to Courts from which no appeal lies, whether the Court be a Civil Court, a Criminal Court or a Revenue Court.

The Government Advocate, however, submits a very clear argument in answer to the case put forward on behalf of the petitioners by Mr. Yunus. Shortly summarised, the Government Advocate's contention is that in cases of Small Cause Courts a review of a grant or refusal of sanction to prosecute is only entertainable by the District Judge's Court, and not by the High Court. This argument on behalf of the Government Advocate is subdivided into two branches:—

It appears that in this province only one Small Cause Court was created under the provisions of the Small Causes Courts Act of 1887 and that that Court is the Small Cause Court situate at Dinapur. In every other District a Subordinate Judge or Munsif is vested with the powers of a Small Cause Court Judge under section 25 of the Civil Courts Act of 1887; and thus the Government Advocate contends that the Subordinate Judge or Munsif, as the case may be, vested with the powers of the Small Cause Court Judge is still, while acting as a Small Cause Court Judge, nevertheless a Munsif or a Subordinate Judge, as the case may be, and that in testing the right of the authority to review a sanction given or refused by a Subordinate Judge or a Munsif while so acting as a Small Cause Court's Judge, the authority to review such sanction is with the tribunal to whom an appeal ordinarily would lie from a Subordinate Judge or a Munsif as such; and that, therefore, the provisions of clause (*a*) of sub-section 7 come into play and the authority to review such sanction given by a Subordinate Judge or a Munsif vested with powers of a Small Cause Court's Judge is the Court to whom an appeal would ordinarily lie from each of them. This argument was strongly assailed in reply; and, in

our opinion, it is not well founded. The Subordinate Judge or Munsif vested with powers of the Small Cause Court's Judge exercises, while acting as such, a different and wholly distinct jurisdiction from that which they exercise either as a Subordinate Judge or as a Munsif; and consequently that the limitations and rights and obligations attaching to their jurisdiction as a Subordinate Judge or a Munsif cannot affect the rights and obligations which they exercise in their capacity as a Judge of a Small Cause Court. The two jurisdictions are materially independent of each other.

In the alternative the Government Advocate contends that then the present applications are governed by clause (*c*) of sub-section (7), and he argues that *in every case* where no appeal lies from a Court that then the authority to review a grant or refusal to sanction a prosecution is the principal Court of original jurisdiction within the local limits of whose jurisdiction such first-mentioned Court is situate; and he urges that this applies in every case whether it be civil, criminal or revenue. The learned Government Advocate concedes that no appeal lies directly from a Small Cause Court to the District Judge's Court as such, save within the limits of section 24 of the Small Causes Courts Act; but he contends that clause (*c*) was not designed to create new or disestablish existing rights or to fetter a jurisdiction antecedently existing, but that it was merely designed to constitute an authority which should *be deemed* for the purpose of clause (*c*) as the authority capable of reviewing a sanction to prosecute granted or refused by a Court from which no appeal lay. In the prior Code of Criminal Procedure in 1882, the clause which corresponds to clause (*c*) of sub-section (7) of the present Code provided that in the case of Small Cause Courts the right of review in matters of sanction should rest with the Sessions Court. This was an extraordinary provision to have enacted, inasmuch as the Court of Session as a Criminal Court had no jurisdiction whatsoever over a Court of Small Causes. However, the enactment contained in the prior Code of 1882 may be regarded to afford some indication of why the change was made in clause (*c*) as it, at present, stands; the idea being to take away the power of review from the Sessions Court, *viz.*, a Criminal Court, and giving it to the Civil Court of principal original jurisdiction in which the Small Cause Court is within the limits of the territorial jurisdiction of the District Court situate. The later enactment is no more arbitrary than the prior enactment, and for apparent reasons the principal Civil Court was given a special jurisdiction to review sanctions granted by a Court exercising a civil jurisdiction from whom no appeal lay.

District Judge is defined by clause 15 of the General Clauses Act of 1897 as being the Judge of the principal Court of original jurisdiction in which the District Court is situate. It would appear that there is no corresponding *statutory* enactment defining a principal Court of original jurisdiction referable to criminal and revenue matters and proceedings; but by analogy it would seem to be that in criminal cases the District Magistrate is the Court of original criminal jurisdiction, while in revenue cases the Collector is the Court of original jurisdiction.

Shortly summarised, therefore, clause (*c*) clearly appears to bear the interpretation that where no appeal lies from a Court administering civil, criminal or revenue jurisdiction respectively, that then the principal Court of each of such classifications of jurisdiction *shall be deemed* the principal Court for reviewing sanctions granted or refused by a Court in respect of each from which no appeal lies.

It was contended by Mr. Yunus that the Small Cause Court, though a *Court*, is not a Civil Court; and the only ground suggested to support such a contention was, that the Small Cause Court as a Civil Court was not mentioned in the enumeration of Civil Courts specified in the Civil Courts Act.

With great respect to Mr. Yunus's argument we think it is entirely and absolutely unfounded. The test is not whether the Court is within the purview of the Civil Courts Act; but whether it is a Court constituted for the administration of civil justice, and regulating the civil rights of His Majesty's subjects *inter se*. Undoubtedly the Small Cause Court is a Court exercising civil jurisdiction, and as such is within the general scope and purview of section 195 of the Code of Criminal Procedure

However, the question which we have to consider has been recently the subject of a considered judgment of a Full Bench of the Allahabad High Court, presided over by the Acting Chief Justice, with his colleagues Mr. Justice Piggott and Mr. Justice Walsh. The Allahabad High Court unanimously held that the decision of Sir Edward Chamier reported as *Ajudhya Prasad* v. *Ram Lal* (6) was an erroneous expression of the law; and the Allahabad High Court reversed the authority of the decision, which was challenged; and likewise the Allahabad High Court dissented in strong and definite terms from the decisions of this Court reported as *Ambica Tewary* v. *Emperor* (7) and *Sukhdeo Singh* v. *District Magistrate of Muzoffarpur* (8). By the ruling of the Full Bench of the Allahabad High Court it is now the positive law of the United Provinces that clause (*c*) of sub-section (7) of section 195 of the Code of Criminal Procedure applies to a Small Cause Court, and that the authority to review its orders granting or refusing sanction to prosecute is the District Court in which such Small Cause Court is situate.

Following the decisions already referred to in this Court the matter was also agitated in the Calcutta High Court and discussed in a ruling reported as *Nibaran Chandra* v. *Akshoy Kumar Banerjee* (9), and in that case the learned Judges of the Calcutta High Court held that it had always been the universal practice in Bengal that in respect of Small Cause Courts constituted under the Provincial Small Causes Courts Act of 1887, that the District Court was the Court to review grants or refusals of sanctions to prosecute made by a Small Cause Court; and that the practice was too long settled and too firmly established to admit of being reviewed at so late a period of time, and accordingly the Calcutta High Court declined to follow the decisions of this Court reported as *Ambica Tewary* v. *Emperor* (7) and *Sukhdeo Singh* v. *District Magistrate of Muzaffarpur* (8) respectively.

So also in a ruling reported as *Jamna Das* v. *Subapathy Chetti* (11) the High Court of Madras declined to follow the decisions of this Court.

(11) 12 Ind. Cas. 521; 36 M. 138; 10 M. L. T. 278; (1911) 2 M. W. N. 259; 21 M. L. T. 1074; 12 Cr. L. J. 545.

It has been stated more than once by distinguished Judges of this Court that where a uniform course of practice existed referable to particular legal principles in the province of Bengal before the partition, that then this Court would recognise such practice in the administration of law in this province. Therefore on the grounds of continuity from long established practice I would have thought that in this province at least a new departure would not have been hastily embarked on without consideration which was inconsistent with the prior existing practice prevailing in old Bengal when the present province of Behar and Orissa fell within its jurisdiction.

However, the decision of Sir Edward Chamier reported as *Ajudhya Prasad* v. *Ram Lal* (6) having been so severely criticised, the entire foundation to support the authority of his pronouncement in this Court as declared in the ruling reported as *Ambica Tewary* v. *Emperor* (7) loses much of its weight.

Having considered very carefully all the authorities, and finding that in all the other High Courts in India the practice is in conformity with the law as now declared by the Full Bench ruling in the Allahabad High Court, we are of opinion that the law laid down in *Ajudhya Prasad* v. *Ram Lal* (6) and the two subsequent cases in this Court reported as *Ambica Tewary* v. *Emperor* (7) and *Sukhdeo Singh* v. *District Magistrate of Muzaffarpur* (8) can no longer be regarded as a sound or proper legal interpretation of section 195 of the Code of Criminal Procedure.

Just one additional word. Clause (*c*) only deems a certain Court to be an authority to review a sanction granted or refused by a Small Cause Court. It in no way affects the antecedent jurisdiction of the Small Cause Court, nor does it enlarge the powers of the District Court, *viz.*, the principal Court within whose local limits the Small Cause Court is situate. Section 195 merely provides that the District Court shall be deemed, *viz.*, shall be considered or taken to be the authority to review; and this is so irrespective of the fact that the District Court as the principal Court of original jurisdiction is not a Court in respect of which the Small Cause Court

stands in any relationship in the exercise of its original jurisdiction as such.

Consequently the majority of this Court is of opinion that the application as presented on behalf of the petitioners to the High Court is not entertainable under the provisions of section 195 of the Small Causes Courts Act, and that the proper Court to review the order of the Small Cause Court is the District Court of Chapra.

The law, however, has been in some doubt; and, therefore, we think it would be unfair to the petitioners to deprive them now of exercising the right to which we believe they are entitled, as a result of this decision. Accordingly we shall give the petitioners leave to withdraw the applications made to this Court with a view of presenting the same to the District Court for its consideration, as the authority indicated by law to review orders made in such cases as the present.

Sanctions granted or refused by a Small Cause Court may come before this Court in its revisional jurisdiction under section 115 of the Code of Civil Procedure, or possibly under section 107 of the Government of India Act, but not certainly under the provisions of section 195 of the Code of Criminal Procedure, which is self-contained and marks out and defines the procedure applicable in its own terms.

Accordingly both these petitions are dismissed.

DAS, J.—I concur in the judgment delivered by Mr. Justice Atkinson.

JWALA PRASAD, J.—The question for determination is "whether an order granting sanction to prosecute by a Judge of a Small Cause Court is appealable under the provisions of section 195 of the Code of Criminal Procedure; and if an appeal is sustainable, to what Court does such an appeal lie."

The first part of the question must be answered in the affirmative. Although, strictly speaking, there is no right of appeal against an order giving or refusing sanction under section 195 of the Code of Criminal Procedure, any person aggrieved by such an order is entitled to apply for the setting aside of the same. Such a right was given by the former Code of Criminal Procedure of 1882, under which an application against an order passed by a Small Cause Court under section 195 was entertainable by the Court of Session for the Division within which the Small Cause Court was situate and to which it was declared to be subordinate by an express enactment in the section. The present Code has only omitted the provision of the former Code declaring a Court of Small Causes to be subordinate in the matter of giving or refusing sanction to the Court of Session but has not taken away the substantive right of making an application to a superior authority. The right has been re-affirmed in clear and unambiguous terms in sub-section 6, which provides that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate."

The word 'authority' has been advisedly used in the sub section in order to include a 'public servant' where sanction is given or refused under clause (*a*) of sub-section (1) in respect of offences mentioned therein, and a 'Court' where sanction is given or refused under clauses (*b*) and (*c*) of sub-section (1). In either case the sanction given or refused may be revoked or granted by the authority to which the 'public servant' or the 'Court', as the case may be, is subordinate. A sanction given or refused by a Judge of a Small Cause Court comes under clause (*b*) or (*c*) of sub section (1) and is liable to be revoked or granted by any authority to which the Court of Small Causes is subordinate and an application for the same purpose may be made to such an authority.

In order, therefore, to answer the second part of the reference, namely, to what Court an application against the order made by a Small Cause Court under section 195 would lie, it is necessary to find out the authority to which a Court of Small Causes is subordinate.

Under the Code of Civil Procedure (section 3) and the Small Causes Courts Act (section 28), a Court of Small Causes is subordinate both to the District Court and the High Court within the territorial limits of which the Small Cause Court is situate. By 'District Court' is meant the principal Civil Court of original jurisdiction within the local limits of a district presided over

by a District Judge [*vide* section 2 (4) of the Code of Civil Procedure and section 3 (15) of the General Clauses Act].

Accordingly, Mr. Justice Piggott in the Full Bench case of *Chidda Lal* v. *Bhajan Lal* (10) came to the conclusion that "the Judge of a Court of Small Causes" is an authority subordinate, within the meaning of sub-section 6, both to the High Court and to the District Court.....and that according to this sub section, therefore, a person against whom an order giving sanction has been passed by a Judge of Small Cause Court would be entitled to apply for revocation of the same either to the District Judge or to the High Court." With this view I entirely agree.

It is, however, contended that under sub-section 7 a Small Cause Court should be deemed subordinate only to the District Court and that the right of making an application under sub-section 6 is, therefore, restricted to that Court only.

Sub-section 7 runs as follows:— "For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say:—

(*a*) Where such appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(*b*) Where such appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case in connection with which the offence is alleged to have been committed;

(*c*) Where no appeal lies, such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first-mentioned Court is situate." It has to be seen whether and which of the aforesaid clauses (*a*), (*b*) and (*c*) of sub-section (7) would apply to a sanction given by a Court of Small Causes.

Broadly speaking, no appeal ordinarily lies from the decision of a Court of Small Causes and hence the main sub section 7 with clauses (*a*) and (*b*) has obviously no application. The doubt and difficulty has hitherto arisen with respect to clause (*c*) only, but the learned Government Advocate contends that clause (*a*) would apply to a sanction given by a Subordinate Judge in the exercise of his jurisdiction as a Judge of a Court of Small Causes conferred upon him under section 25 of the Civil Courts Act, XII of 1887.

It is argued that an appeal ordinarily lies from the decision of a Subordinate Judge exercising civil jurisdiction under the Civil Courts Act and hence even in respect of his orders passed in the exercise of his jurisdiction vested under section 25 of the Civil Courts Act as a Judge of a Small Cause Court from which there is no appeal, it must be held for the purposes of sub-section 7 of section 195 of the Code of Criminal Procedure that an appeal ordinarily lies. Hence applying section 21 of the Civil Courts Act under which an appeal from the decision of a Subordinate Judge ordinarily lies either to the District Judge or the High Court according to the value of the suit, it is said that the former Court, being "the Appellate Court of inferior jurisdiction," should be deemed to be the Court to which a Subordinate Judge exercising powers of a Small Cause Court is subordinate under clause (*a*) of sub section 7. The argument, no doubt, was very ingenious and at the first sight appeared to be plausible, but looking closely into the matter there does not appear to be much substance in it.

It is conceded that the clause has no application to the sanction granted by a Court of Small Causes established under section 5 of the Provincial Small Causes Courts Act, IX of 1887. The distinction is sought to be made between the Court so constituted and that of a Subordinate Judge vested with the powers of a Small Cause Court under section 25 of the Civil Courts Act. This is a distinction without any difference.

The answer to the aforesaid contention is to be found in sections 4 and 33 of the Provincial Small Causes Courts Act. These sections make it perfectly clear that a Court of a Subordinate Judge, while trying suits cognizable by a Court of Small Causes under powers vested by section 25 of the Civil Courts Act, is a Small Cause Court within the meaning of section 4 of the said Act and exercises jurisdiction quite distinct from and independent of his jurisdiction as a Court of civil jurisdiction under the Civil Courts Act.

LALJI TEWARI *v.* EMPEROR.

Sections 24, 25 and 27 of the Small Causes Courts Act will, therefore, apply to decrees or orders passed by a Court of Subordinate Judge while exercising powers under the Small Causes Courts Act and no appeal will ordinarily lie from the decree or order of that Court. Clause (*a*) of sub-section 7 has, therefore, no application to the present case and the contention of the learned Government Advocate must fail.

Clause (*b*) of sub-section 7 also has obviously no application.

It then remains to be seen whether sanction given by a Court of Small Causes comes under clause (*c*) of the sub-section. If this clause is read as a distinct and separate sub-section, a Court of Small Causes might come under it inasmuch as no appeal lies from a Court of Small Causes. But if this clause is read as a part of and as explanatory of sub-section 7, it would be difficult to apply this to a Court of Small Causes for sub-section 7 applies only to a Court from which appeals "ordinarily lie." In the case of *Ajudhia Prasad* v. *Ram Lal* (6) Chamier, J., although the matter did not directly arise in that case, held that the whole sub-section 7 and with it clause (*c*) did not apply to a Court of Small Causes, inasmuch as that sub section is "confined to Courts against whose decisions or some of whose decisions appeals do lie" as the opening words of the sub-section clearly indicate, and hence the words in clause (*c*) "where no appeal lies" did not "refer to Courts against none of whose decisions an appeal lies but to refer to particular cases in which no appeal lies." Karamat Hussain, J., agreed in this view and in support of it quoted his own decision in *Wazir Mohammad* v. *Hub Lal* (12). The point directly arose subsequently in this Court in the case of *Ambica Tewary* v. *Emperor* (7) and Sir Edward Chamier, then Chief Justice of this Court, adhered to the opinion expressed by him in the aforesaid Allahabad case and held that clause (*c*) of sub-section 7 cannot be construed as if it were an independent sub section. This view was followed by Mr. Justice Roe in a later decision of this Court in *Sukhdeo Singh* v. *District Magistrate of Muzaffarpur* (8), where the learned Judge held that the words 'that is to say' "indicate not that a supplementary provision is to be found in clause (*c*) but merely an explanation of the words 'to which an appeal ordinarily lies.'" This view has since been acted upon by this Court in several cases without any discussion. Placed as clause (*c*) is, namely, as a subordinate clause to sub section 7 and introduced into it by the words 'that is to say', it is difficult to disagree with the view taken in the aforesaid cases and to hold that clause (*c*) does anything more than explaining and elucidating the opening words of the sub section, namely, "for the purposes of this section every Court shall be deemed subordinate only to the Court to which appeals from the former Court ordinarily lie." The difficulty in applying the clause to a Court of Small Causes created by the words 'that is to say' in sub-section 7 has been felt by almost all the learned Judges who had to construe it. I would now discuss the cases in which a contrary view was taken and clause (*c*) was applied to orders made by a Small Cause Court. In the case of *Nibaran Chandra* v. *Akshoy Kumar Banerjee* (9) it was expressly said that the said words 'that is to say' in sub section 7, when read with sub-clause (*c*), "entail a difficulty." But the sub clause was applied to the Court of Small Causes not on the ground of true construction of it but on the ground of practice and of analogy drawn from the fact that the Presidency Small Cause Court is subordinate to the Original Side of the Calcutta High Court and hence the Provincial Small Cause Courts should be deemed to be subordinate to the District Courts. The decision of the Madras High Court in *Appavu Kavundan, In re* (13) is of no assistance for the purpose of construing the clause, inasmuch as it has not given any reason, or discussion for the view taken by it. This difficulty was got over by a Full Bench of the Allahabad High Court in the case of *Chidda Lal* v. *Bhajan Lal* (10) by trying to omit the words 'that is to say' from sub-section 7 altogether while construing clause (*c*), or by putting a loose interpretation upon the words in

(12) 2 Ind. Cas. 182; 31 A. 313; 6 A. L. J. 231.

(13) 36 Ind. Cas. 878; 18 Cr. L. J. 46.

order to give effect to an intention of the Legislature, namely, to restrict the right of application under sub-section 6 in respect of orders made by a Small Cause Court to one Court instead of to two Courts, as would have been the case if clause (*c*) had not applied.

In order to determine whether this was the "Legislative intent", let us look to the law on the point prior to the present Code and the object with which clauses (*a*), (*b*) and (*c*) were inserted in the present Code. Section 195 of the Code of 1882 simply provided that the Court giving or refusing sanction should be deemed to be subordinate only to the Court to which appeals ordinarily lie, and there were no provisions similar to those in clauses (*a*), (*b*) and (*c*) of the present Code. This led to conflicting rulings and clauses (*a*), (*b*) and (*c*) were added in the present Code with a view to getting rid of the difficulty. Clause (*a*) provides for the case of a Subordinate Court against whose decisions appeals lie to two different Courts of different grades. For instance, under section 21 of the Civil Courts Act, an appeal lies to the District Court and the High Court according to the value of the suit decided by a Subordinate Judge. Clause (*b*) provides for the case of a subordinate Court against whose decisions appeals lie to two different kinds of Courts; for instance, Civil and Revenue Courts in certain rent cases. Clause (*c*) provides for cases where appeals ordinarily lie from the decisions of a Court but no appeals lie in particular cases. The object of adding clauses in the present Code to the provision in sub section 7 was only to explain and elucidate sub section 7 and to meet the exigencies created by the conflicting authorities under the old Code. Neither in the old nor in the present Code, a Court of Small Causes comes under the main provision in sub section 7.

Again the Legislature does not pretend to restrict the right of making an application under sub-section 6 to one public servant as a superior authority, where sanction is given by a public servant under sub section (1) (*a*) of section 195.

Take the case of a Sub-Inspector of Police or an Excise Sub-Inspector, who is subordinate to more than one officer, where an order giving or refusing sanction by him may be set aside by any one of the public servants to whom he may be subordinate. There are many instances of a public servant being subordinate to more than one authority. Why should we then assume an intention of restricting the right to make an application to one Court only as a superior 'authority' referred to in the said sub section 6, unless such an intention is clearly expressed by the Legislature? This intention of course is clear in the case of a Court giving or refusing sanction from which an appeal ordinarily lies, but in the particular cases no appeal lies. The intention is not clear in the case of a Court from which no appeal at all lies, as in the case of a Small Cause Court.

There is, therefore, no justification for reading clause (*c*) as a separate sub-section, or to interpret it otherwise than its plain language, its position and the grammatical construction indicate, on the ground of carrying out effectually the intention of the Legislature. The intention of the Legislature to include a Small Cause Court within clause (*c*) is not clearly established.

This clause was, however, applied to a Small Cause Court in the case of *Nibaran Chandra* v. *Akshoy Kumar Banerjee* (9), on the analogy that as a Presidency Small Cause Court is subordinate to the High Court within the limits of whose jurisdiction it is situate, it would appear to follow that a Provincial Small Cause Court is similarly subordinate for the purposes of section 195 to the Court of the District Judge. This analogy has been quoted with approval in the Allahabad Full Bench case of *Chidda Lal* v. *Bhajan Lal* (10). But the analogy does not hold good, inasmuch as under section 6 of the Presidency Small Causes Courts Act the High Courts of Judicature at Fort William in Bengal, Madras and Bombay have been expressly declared to be the only Courts to which the Presidency Small Causes Courts are subordinate, whereas the Small Causes Courts Act and the Code of Civil Procedure have declared a Small Cause Court to be subordinate both to the District Court and the High Court.

Again, the cases already adverted to have referred to the prevailing practice, whereby the District Judge exercises jurisdiction in respect of sanction given or refused by a Court of Small Causes. This practice necessarily must have grown after 1898 when the new Code came into operation, for prior to that the Sessions Judge was declared by an express provision in the Code of 1882 to be the authority to which a Court of Small Causes was to be deemed subordinate for the purposes of section 195. There are, therefore, not many reported cases relating to the practice referred to above. On the other hand, within these few years the views taken in the different High Courts have been different. It is more than doubtful if there has been an uniform interpretation of the Statute and that that interpretation has been adhered to without interruption, or that the practice has been so general and of such a long standing that it has taken the place of a settled law in the province : *vide* Maxwell on the Interpretation of Statutes. On the other hand, the decision in the case of *Ambica Tewary* v. *Sing Emperor* (7), passed soon after this Court was created, has been followed by this Court in several reported and unreported cases. I would, therefore, not rely upon practice for the determination of the question before us as to which Court should have power under section 195 to set aside an order passed by a Small Cause Court. I, therefore, hold that on none of the grounds of "Legislative intent," "analogy" or "practice", sub-section 7 or any of its sub-clauses (*a*), (*b*) and (*c*) applies to Courts of Small Causes.

In the view that I have taken it is unnecessary to consider what would be "the principal Court of original jurisdiction" referred to in clause (*c*) as the authority to which a Small Cause Court should be deemed subordinate in case the said clause did apply.

I would only observe that the omission on the part of the Legislature to define "the principal Court of original jurisdiction" has created hopeless difficulties and conflict of opinions. It is said that the said words must be construed to be the principal Civil, Criminal and Revenue Courts of original jurisdiction according as the order passed under section 195 be by a Civil, Criminal or Revenue Court respectively, and in support of this sub-section (2) of section 195 is referred to. In that sub-section the Legislature no doubt has declared that "in clauses (*b*) and (*c*) of sub-section (1), the term 'Court' means a Civil, Revenue or Criminal Court", but that definition is expressly restricted to the clauses (*b*) and (*c*) of sub-section (1) and has not been declared to apply to the rest of the section including sub-section (7).

Again, the difficulty is not solved by reading the words "civil, criminal or revenue" in the said clause, for there is no definition in the General Clauses Act or anywhere else of a principal Court of original, criminal or revenue jurisdiction, though "the principal Civil Court of original jurisdiction" has been defined by clause 15 of section 3 of the General Clauses Act to mean the Court of a District Judge. Much is left to surmise and guess in order to find out what Court is meant by the Legislature in using the said expression in clause (*c*).

Mr. Yunus argues that with regard to suits cognizable by a Small Cause Court, the Small Cause Court itself is a principal Court of original jurisdiction and not the District Court. [This was the view of Roe, J., in the case of *Sukhdeo Singh* v. *District Magistrate of Muzaffarpur* (8)]. The fallacy of the argument is that if the Legislature intended to apply this clause to a Court of Small Causes, it must have intended to convey by the words "the principal Court of original jurisdiction" some Court other than the Small Cause Court itself, for the simple reason that the clause would be without any meaning and would frustrate the object in pointing to a superior authority which would have power to set aside the sanction given or refused by a Small Cause Court.

It is next argued that "the principal Court of original jurisdiction" with regard to Small Cause Court cases must be held to be the High Court. But the High Court of Patna has no ordinary original civil jurisdiction "to receive, try and determine any suit." Under section 9 of the Letters

Patent constituting this Court, it has only "extraordinary original civil jurisdiction" "to remove, and to try and determine a suit" within the jurisdiction of any Court subordinate to its superintendence. The distinction is noteworthy. The power to receive a suit constitutes original jurisdiction and power to remove a suit constitutes extraordinary jurisdiction. This Court has no original jurisdiction to receive and entertain a Small Cause Court suit.

However, had clause (*c*) of sub-section 7 applied, it would have been possible to hold that the Legislature intended that a Small Cause Court in respect of orders made by it under section 195 should be deemed subordinate to the District Court as being the principal Court of original civil jurisdiction within the meaning of section 2 (4) of the Civil Procedure Code and section 3 (15) of the General Clauses Act notwithstanding the difficulties created by the inartistic drafting of the section. But I have already held that according to the true construction, sub-section (7), with all its sub-clauses (*a*) (*b*) and (*c*), does not apply to Courts of Small Causes. We have, therefore, to find out the superior authority referred to in sub-section (6) uncontrolled in any way by sub section (7). It has already been shown that such an authority competent to deal with sanction given or refused by a Court of Small Causes will be both the District Court and the High Court within the meaning of that sub-section. I, therefore, do not accept the view taken by this Court that the application could not be made to the District Court, or the view taken by the other High Courts that the application could not be made to the High Court. Had the Legislature intended to restrict the jurisdiction of entertaining applications under section 195, clause (6), to one Court only, the intention should have been expressed clearly and they failed to carry out their intention, if any, by the language employed in section 195, to which only we should refer for the purpose of interpreting the Statute and its intention, instead of roaming over the previous law and the authorities thereunder: *vide* the *dictum* of Lord Herschell in *Bank of England* v. *Vagliano* (14). The drafting of section 195 has been criticised by several Judges and it may be of some use to note incidentally that in the proposed bill for the amendment of the Code of Criminal Procedure I do not find any suggestion to define the 'subordination of Courts' for the purpose of section 195.

As the two Courts, the District Court and the High Court, have concurrent jurisdiction over the orders passed by a Court of Small Causes, it will be open to the High Court to refuse to entertain an application under sub-section (6) of section 195, unless the party aggrieved had in the first instance moved the District Court. I would, therefore, hold that as a matter of procedure it should be ruled that in such a case an application should in the first instance be made to the District Court. This will be reasonable, inasmuch as it will save trouble and expense to the party concerned in coming to the High Court instead of having his redress in the District Court. And at the same time a second opportunity would perhaps be afforded to the aggrieved party to come to the High Court either under sub-section (6) of section 195 or under the powers vested in the High Court by section 115 of the Code of Civil Procedure, or section 107 of the Government of India Act.

I would, therefore, answer the second part of the reference as follows:—

That under sub-section (6) of section 195 an application can be made both to the District Court and to the High Court for the purpose of revoking or granting a sanction given or refused by a Court of Small Causes. But as a matter of procedure the High Court should not entertain an application except under special circumstances, unless such an application was first presented to the District Court.

Petitions dismissed.

(14) (1891) A. C. 107 at p. 145; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

LAHORE HIGH COURT.

CRIMINAL PETITION No. 457 OF 1919.

July 16, 1919.

Present :—Mr. Justice Shadi Lal.

RADHE SHAM—ACCUSED—PETITIONER

versus

EMPEROR, THROUGH JAGAN NATH—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 437—Further enquiry after discharge, when to be ordered—Evidence recorded and considered by Magistrate, effect of.

Further enquiry into the case of a discharged person should not be ordered, unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete.

Where, therefore, the Magistrate recorded the evidence of all the witnesses whom the complainant wanted to produce in support of his complaint and, after considering the evidence, being of the opinion that the story told by them was an improbable one, dismissed the complaint; but the Sessions Judge, holding that the story might be improbable but was by no means impossible, ordered a further enquiry:

Held, that this was not a valid ground for dissenting from the conclusion of the Magistrate and for directing further enquiry.

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Lahore, dated the 25th March 1919, reversing that of the Magistrate, 1st Class, Lahore, dated the 11th December 1918, and ordering further enquiry to be made.

Bakhshi *Tek Chand*, for the Petitioner.

Lala *Moti Sagar*. R. S., and Lala *Devi Das*, for the Respondent.

JUDGMENT.—After perusing the judgments of the lower Courts and examining the arguments advanced by the learned Vakils on both sides, I have reached the conclusion that the order of the learned Sessions Judge directing further enquiry cannot be sustained and must be set aside. It is to be observed that the Magistrate recorded the evidence of all the witnesses whom the complainant wanted to produce in support of his complaint, and that after considering that evidence he came to the conclusion that the story told by them was an improbable one, and he consequently dismissed the complaint. The learned Sessions Judge holds that the story "may seem an improbable one but it is by no means impossible." Now, I do not think that this is a valid ground for dissenting from the conclusion of the trial Court and for directing a further enquiry. It is possible that another Magistrate may come to a different conclusion on the evidence, but that does not justify an order for further enquiry. The principle of law enunciated in the Full Bench ruling in *Emperor* v. *Kiru* (1), though directly applying to a case of fresh enquiry after discharge, has an important bearing on the case before me, in which, as pointed out above, the whole of the evidence on behalf of the complainant was recorded by the Magistrate. The learned Judges laid down in that judgment that further enquiry is improper, unless the order of discharge was manifestly perverse or foolish, or was based upon a record of evidence which was obviously incomplete. Judged by this test, the order of the learned Sessions Judge cannot be upheld. Further, I must say that I am inclined to endorse the view of the Magistrate that it is difficult to believe the story related by the complainant.

Accordingly I accept the application for revision and set aside the order directing further enquiry.

Application accepted.

(1) 11 Ind. Cas. 132; 10 P. R. 1911 Cr.; 24 P. W R. 1911 Cr.; 205 P. L. R. 1911; 12 Cr. L. J. 364.

ANNIE BESANT *v.* ADVOCATE-GENERAL, MADRAS.

PRIVY COUNCIL.

APPEALS FROM THE MADRAS HIGH COURT.

May 13, 1919.

Present :—Viscount Haldane, Viscount Cave, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

MRS ANNIE BESANT—APPELLANT

versus

THE ADVOCATE GENERAL OF THE GOVERNMENT OF MADRAS AND ANOTHER —RESPONDENTS.

Press Act (I of 1910), ss. 3 (1), 4 (1), 17, 22—Printing Presses and Newspapers Act (XXV of 1867), ss. 4, 5—Liberty of press—Control of printing presses—Declaration by owner of printing press—Deposit of security—Magistrate, power of, to dispense with security or to cancel or vary order relating to security, whether judicial or administrative—Notice to person affected, whether necessary—Order forfeiting deposit—Criminal Procedure Code (Act V of 1898), s. 435—Civil Procedure Code (Act V of 1908), s. 115—Revision—Certiorari, writ of, issue of—High Court, power of—Bringing into hatred or contempt—Attack upon system as distinguished from attack upon class—Press Act and Penal Code, provisions of, comparison between—Appeal to His Majesty in Council—Practice of Privy Council in criminal cases—Limitations on Committee's powers.

The Indian Press Act contemplates that in ordinary cases security shall be deposited by the owner of a printing press used for printing a newspaper, and the only duty of the Magistrate is to fix the amount and to receive it. The proviso to section 3, sub-section (1), gives him the power, for special reasons, to dispense with any deposit, but the same proviso also gives him the power to cancel any such order of dispensation, and the necessary consequence of such cancellation will be that security will have to be deposited according to the amount thereupon fixed by him within the limits prescribed by the Act, as would be done in normal course on the first making of the declaration required from every person who keeps in his possession a printing press. [p. 214, col. 1.]

The action of the Magistrate in requiring or dispensing with a deposit or in cancelling an order dispensing with a deposit is administrative and not judicial, nor is he bound, strictly speaking, to hear the person affected by his order, though it may be more discreet to do so. [p. 215, col. 1.]

The power of the High Courts, which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court, to issue writs of *certiorari* has not been taken away by the provisions of section 435 of the Criminal Procedure Code and section 115 of the Civil Procedure Code of 1908. But *semble*, that, assuming the order of the Magistrate to be a judicial order, the power to issue a writ of *certiorari* against any such order would be taken away by section 22 of the Indian Press Act (I of 1910). [p. 215, col. 2; p. 216, col 1.]

The provisions of the Indian Press Act, section 4, as to the forfeiture of deposits are closely analogous to those of sections 124A and 153A of the Indian Penal Code. Both sets of provisions attempt to balance two important public considerations, the undesirability of anything tending to excite sedition or to excite strife between classes and the undesirability of preventing any *bona fide* argument for reform. [p. 217, col. 2.]

In substance, the question under clause (*c*) of section 4, sub-section (1), of the Indian Press Act comes to this, are the words used such as in fact to excite, or do they disclose an attempt (which implies intention) to excite hatred, contempt or disaffection towards the Government or of any class or section of His Majesty's subjects in India, and, in judging the question of intent, the publisher must be deemed to intend that which is the natural result of the words used having regard, among other things, to the character and description of that part of the public who are to be expected to read the words. [p. 218, col. 1.]

An attack upon a school of opinion does not necessarily involve an imputation upon the class who hold or give effect to that opinion. But one is apt to lead to the other, and in judging whether the second exists regard must be had to the fact that the words in clause (*c*) which refer to the hatred or contempt of a class or section are not limited by Explanation 2. In this respect the Press Act differs from the Penal Code. [p. 218, col. 2.]

The Board, in this case, observed that as they found that the Statute applicable had not been misconstrued by the local tribunal, they would not, in any event, having regard to the constitutional limitations on their functions in criminal cases, have considered themselves justified in interfering, but that if they had thought it proper to look into the matter in detail, they would have held that on the merits the Court appealed from was right in supporting the declaration of forfeiture. [p. 218, col. 2; p. 219, col. 1.]

Consolidated appeal by special leave from two judgments of the Madras High Court, both dated October 18, 1916, reported as 37 Ind. Cas. 525 and 607.

FACTS of the case and the main provisions of the Statutes concerned are set out in their Lordships' judgment. Full reports of the earlier proceedings are contained in 37 Mad. 1085; 37 Ind Cas. 525, and 39 Mad. 1164; 37 Ind. Cas. 607. The appellant's application to the Madras High Court for leave to appeal from their judgments was refused—Abdul Rahim, Officiating, C. J., and Seshagiri Aiyar, J., holding that the Court had no power to grant leave to appeal, though Ayling, J., considered that leave could and should be given under clause 39 of the Letters Patent. Appellant thereupon obtained from the Privy Council special leave to prefer the present appeals.

Mr *Upjohn*, *K. C.*, (with him Messrs. *J. Robertson Christie*, *K. C.*, and *W. Ingram*), for the Appellant.—The Supreme Court of Madras had the same right to issue writs of *certiorari*

as the King's Bench have in England. That jurisdiction was given them by the Letters Patent of 1800 constituting the Supreme Court. The right formerly vested in the Supreme Court was preserved to the High Court by the Charters of 1861 and 1865, by clause 17 of the Letters Patent of 1865, and by the Government of India Act, 1915, section 106.

It is true that the Madras High Court has never before issued *certiorari*: but this does not affect its power to issue that writ. Such power has in fact been exercised by other High Courts which are on precisely the same footing.

Nundo Lal Bose v. *Corporation for the Town of Calcutta* (1).

The right to a writ of *certiorari* can be taken away by statutory provision only by express words, and in clear terms.

Rex v. *Moreley* (2), *Rex* v. *Flowright* (3), *Rex* v. *Jukes* (4), *Rex* v. *Cashiobury Justices* (5), *Colonial Bank of Australasia* v. *Willan* (6).

Section 22 of the Indian Press Act, 1910, which is said to take away the right to the writ, is not sufficiently precise in its terms; in addition to which the Madras High Court had jurisdiction to interfere under section 435 of the Code of Criminal Procedure.

Nor is this a case where a *certiorari* was a matter of discretion only, as in *Reg.* v. *Nicholson* (7).

Here the appellant was not complaining of a public grievance, but of one peculiar to herself: she was entitled to the writ *ex debito justitiæ*:

Queen v. *Justices of Surrey* (8).

Section 22 itself in terms excepts an application to the High Court under section 17: upon an application under section 17 the application can raise any objection to the forfeiture, either in law or in fact: this includes an objection to the order to make the deposit.

The High Court erred in holding that the making of the order of May 22, 1916 (cancelling the order of dispensation and requiring appellant to make the deposit) was an administrative act upon the part of the Magistrate, and as such not open to review. The powers of a Magistrate under section 3 of the Indian Press Act, 1910, no doubt include some which are merely ministerial: but the power to cancel or vary an order of dispensation is not one of them. Such a power is something to be done according to the rules of reason and justice, not according to private opinion:

Sharp v. *Wakefield* (9).

It is "the exercise of a right or duty to decide."

Rex v. *Woodhouse* (10).

The Act differs from Act XXV of 1867 as to the class of Magistrate by whom the order is to be made: this shows a judicial act was intended.

Assuming that the High Court had, as we contend, jurisdiction to review the order of May 22, 1916, either by *certiorari* or under section 435 of the Criminal Procedure Code, the order should have been set aside as invalid, and this for two reasons:—

(1) Upon the true construction of section 3 (1) of the Indian Press Act, 1910, once the Magistrate has made an order dispensing with a deposit, he has no power to order a deposit to be made. The power given by the proviso to cancel or vary an order is in qualification of the power given in the earlier part of the section: it is not in qualification of the power to dispense with a deposit, which is given by the proviso itself. If the section is ambiguous it should be construed in favour of the subject.

(2) The appellant was given no opportunity of being heard. It is a duty lying upon every one who decides anything to listen to both sides [Loreburn, L. C., in *Board of Education* v. *Rice* (11)]. Irregularity of proceedings is expressly mentioned as a ground of review in section 435 of the Code of Criminal Procedure.

(1) 11 C. 275; 5 Ind. Dec. (N. S.) 943.
(2) (1760) 2 Burr. 1040; 1 Black 231; 97 E. R. 696.
(3) (1686) 3 Mad. Rep. 94.
(4) (1800) 8 T. R. 542; 5 R. R. 445; 101 E. R. 1536.
(5) (1823) 3 D. & R. 35; 26 R. R. 604.
(6) (1874) 5 P. C. 417; 43 L. J. P. C. 39; 30 L. T. 237; 22 W. R. 516.
(7) (1899) 2 Q. B. 455; 68 L. J. Q. B. 1034; 81 L. T. 257; 48 W. R. 52; 64 J. P. 388.
(8) (1870) 5 Q. B. 466.

(9) (1891) A. C. 173 at p. 179; 60 L. J. M. C. 73; 64 L. T. 180; 39 W. R. 551; 55 J. P. 197.
(10) (1906) 2 K. B. 501 at p. 524; 75 L. J. K. B. 745; 95 L. T. 367; 399; 70 J. P. 485; 22 T. L. R. 603.
(11) (1911) A. C. 179; 80 L. J. K. B. 793 104 L. T. 689; 75 J. P. 393; 9 L G. R. 652; 55 S. J. 440; 27 T. L. R. 378.

ANNIE BESANT *v.* ADVOCATE-GENERAL, MADRAS.

Assuming that the order of May 22, 1916, requiring security was not open to review, or if open to review, was valid, we submit that the order of forfeiture of August 25, 1916, is bad. The Indian Press Act is such a severely restrictive Act that it should be construed as favourably to the subject as possible. On a fair and reasonable interpretation, none of the articles complained of falls within section 4, sub section 1. The High Court did not give effect to Explanation II, which provides that "comments expressing disapproval of Government measures without exciting or attempting to excite hatred, contempt or disaffection do not come within the scope of clause (*c*)." The Government admit that to advocate Home Rule for India is not in itself a ground for forfeiture: yet this is all that appellant did.

Further, we submit that the Indian Press Act, 1910, and especially section 22 thereof, is *ultra vires* the Indian Legislature. It contravenes the proviso to section 65 of the Government of India Act, 1858 (21 and 22 Vict. c. 106), which was in force when it was enacted. So far as it interferes with constitutional rights, it is not validated by the Government of India (Amendment) Act, 1916 (6 & 7 Geo. V, c. 37), section 2. The object of section 65 of the Government of India Act, 1858, was to prevent the subordinate legislation from tampering with those fundamental rights on which the allegiance of the subject depends. *Ameer Khan, In the matter of* (12).

There are certain constitutional rights which bind the subject and the Crown one to another. The Indian Press Act violates those rights in so far as it interferes with the liberty of the press, gives the Executive Government arbitrary powers over the subject's property, and in other respects.

Sir *Erle Richards, K. C*, (with him Messrs. *DeGruyther, K. C.*, and *Kenworthy Brown*), for the Respondents.—The order of May 22, 1916, was valid. An order dispensing with security is an order under sub-sections 1 to 3 of the Indian Press Act, and may, therefore, under that very sub section be varied or cancelled. If it does not apply to an order for dispensing with security, the word "cancel" is meaningless: the only other case is when the press is no longer kept, and that is specially dealt with by section 24. The words "or may" in the proviso to section 3 (1) show that the power to cancel or vary is a substantive power, applying to all orders under the sub section, including an order dispensing with security. The Act nowhere requires the Magistrate to hear the party affected before making an order: such a requirement would often involve inconvenient delay, and that may have prevented the requirement. Under sub-section 2 the Local Government can, as a purely administrative act, require such deposit as they please in the case of an existing press; it would be strange if the position under sub-section 1 were different. It was in the appellant's power to apply to the Magistrate to cancel or vary his order under the proviso. An *ex parte* order is not necessarily contrary to natural justice: it is a common practice to make *ex parte* injunctions: all such orders are subject to the implied right to apply for their discharge.

The making of the order of May 22, 1916, was a purely administrative or ministerial act. The mere fact that the person making it was a Magistrate does not render it liable to appeal or revision, whether by *certiorari* or otherwise:—

Minakshi Naidu v. *Subramanya Sastri* (13), *Vijiaraghavalu Pillai* v. *Theagaroya Chetti* (14).

The statutory powers of revision given by the Code of Criminal Procedure, 1898, (sections 435, 439) and the Code of Civil Procedure, 1908, (section 115), so far as they apply, supersede proceedings by *certiorari*. The rule that the right to *certiorari* can only be taken away by express words does not apply to these statutory provisions. The power to revise is discretionary, and this is not a case where it should be exercised if it existed: not only has there been delay, but at the time of the application the deposit had been forfeited: the order was merged in the order of forfeiture.

The High Courts' right of review under section 435 of the Code of Criminal Procedure is excluded by section 22 of the Indian Press Act. The appellant is in

(12) 6 M. L. R. 392 at pp. 450, 452.

(13) 11 M. 26 (P. C.); 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. s.) 18.

(14) 25 Ind. Cas 345; 38 M. 581; 27 M. L. J. 227; 16 M. L. T. 128; 15 Cr. L. J. 593.

this dilemma, if the making of the order was a proceeding under the Act, the High Court has by section 22 no power except under section 17: if it was not a proceeding under the Act, it was a mere administrative order and the High Court cannot interfere with it at all.

Upon the merits the articles fall within section 4, sub-section 1, of the Act. The question greatly depends upon local conditions, with which the Judges of the High Court would be well acquainted. But the matter is not really one for the Board's decision, as the question comes before them on an appeal under the prerogative in a criminal matter, and in the absence of special circumstances which are not shown to exist here, the Board will not interfere, upon such an appeal, with the decision of the local tribunal.

Arnold Channing v. *Emperor* (15), *Dal Singh* v. *Emperor* (16).

Mr. *Upjohn, K. C.*, replied.

JUDGMENT.

LORD PHILLIMORE.—These are two appeals for which the appellant, Mrs. Besant, obtained special leave from His Majesty in Council against two decisions of the High Court of Judicature at Madras.

They arise in the following circumstances:—There are in India two legislative Acts of the Governor General of India in Council relating to printing, one being the Printing Presses and Newspapers Act No. XXV of 1867, and the other being Act No. 1 of 1910 entitled "An Act to provide for the better control of the Press," and shortly "The Indian Press Act, 1910." Under the first Act, section 4, the person who keeps in his possession a printing press must make and subscribe a declaration before a Magistrate, stating that he has a press for printing, and where it is situated. And by section 5 no printed periodical work containing public news, or comments on public news, shall be published without the printer and publisher making a declaration stating that he is the printer or publisher, the name of the periodical and the place where the printing or publishing is conducted.

Under the second Act, section 3, sub-section 1, the person making the declaration is required to deposit before a Magistrate in money, or in certain securities, a sum not being less than Rs. 500, or more than Rs. 2,000, as the Magistrate may think fit to require.

But the Magistrate may, for special reasons which he is to record, dispense with the deposit, and he has certain powers of cancelling or varying any order made under this sub-section.

By section 4 of the Act the Local Government, when it appears to it that any printing press, in respect of which any security has been deposited, is used for the purpose of printing any newspaper which contains words, signs or visible representations of a nature deemed to be objectionable under the detailed provisions of the section which will be hereinafter specifically set forth, may, by notice in writing addressed to the keeper of the press, declare the security and all copies of the newspaper wherever found forfeited to His Majesty, and after the expiry of 10 days from the date of the issue of the notice of forfeiture, the declaration required of every keeper of a press is to be deemed to be annulled.

By section 17 :—

"Any person having an interest in any property in respect of which an order of forfeiture has been made under section 4"... ...[or under certain other sections not material to the present appeal] "may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the newspaper.....in respect of which the order was made did not contain any words, signs, or visible representations of the nature described in section 4, sub-section 1."

And by section 18 :—

"Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges....."

By section 23, anyone who keeps in his possession a press without making a deposit under section 3, when required so to do,

(15) 23 Ind. Cas 661; 41 I. A. 149: 41 C. 1023; 26 M. L. J. 621; 18 C. W. N. 785; 16 M. L. T. 79; 1 L. W. 461; 20 C. L. J. 161; 12 A. L. J. 1042; 16 Bom. L. R. 544; (1914) M. W. N. 506; 7 Bur. L. T. 167; 15 Cr. L. J. 309; 8 L. B. R. 16 (P. C.).

(16) 39 Ind. Cas. 311; 44 I. A. 137; 15 A. L. J. 475; 1 P. L. W. 661; 19 Bom. L. R. 510; 21 C. W. U. 818; 26 C. L. J. 13; 6 L. W. 71; 22 M. L. T. 31; (1917) M. W. N. 522; 18 Cr. L. J. 471; 86 L. J. P. C. 140; 33 M. L. J. 555; 44 C. 876; 11 Bur. L. T. 54; 13 N. L. R. 100 (P. C).

shall be liable to the same penalty as if he had failed to make the declaration required by the first Act.

On the 2nd December 1914 the appellant, being the owner and keeper of a printing press, and printer and publisher of a newspaper called at that time, and thereafter, "New India," made the declaration required of her under the Act of 1867, and the Magistrate before whom it was made, using the power of dispensation given to him by section 3 of the Act of 1910, thought fit to dispense with the deposit of the security which under the provisions of the same section she would otherwise have had to give. The document in which the dispensation was embodied is not contained in the record of these appeals, and their Lordships have not before them the reasons which the Magistrate recorded as the grounds for granting this dispensation.

On the 28th May 1916 the appellant received a notice from the Magistrate, dated the 22nd May, in which it was stated that he, under sub-section 1 of section 3, cancelled the order dispensing with the security and required her within 14 days to deposit Rs. 2,000 as security.

In accordance with this order the appellant, under protest, as she says in one of her affidavits, deposited the security.

On the 28th August 1916 she was served with an order, dated the 25th August and made by the Governor-in-Council, reciting that 20 passages published in the newspaper and identified in the order were of the nature described in sub-section 1 of section 4 of the Act of 1910, and declaring that the security which the appellant had deposited and all copies of "New India" wherever found were to be forfeited to the Crown.

The appellant thereupon, purporting to avail herself of the provisions of section 17 of the Act, presented her petition to a Special Bench of the High Court of Judicature at Madras, praying that both the order of the Magistrate requiring security and the order of the Governor in Council should be revised and set aside. It being, however, obvious that the procedure under section 17 was not available for questioning any act of the Magistrate, the appellant the next day presented what is called a Criminal Revision Petition under sections 103 and 107 of the Government of India Act (5 and 6 George V c. 61) and section 435 of the Code of Criminal Procedure. This application, also described in the course of the proceedings as an application for a *certiorari*, was also heard by the Special Bench.

After argument, both applications were refused; all the Judges agreeing that they should be refused, but not being in agreement as to the grounds on which the revision petition failed, and not being wholly in agreement as to all the articles in the newspaper which might merit condemnation.

The petitioner thereupon applied to the High Court for leave to appeal in both cases, and on this leave being refused by the High Court, applied to His Majesty in Council for special leave to appeal, and this leave having been given (as already stated) in respect of both orders, both matters are now before their Lordships.

It will be convenient to consider first the application to quash the order of the Magistrate. This question divides itself into two parts: was the procedure adopted a competent and suitable method of reviewing the order, and if it be open to review, is it to be deemed an illegal and unwarranted order?

It is convenient to consider first the nature of the order, or supposed order. The Statute contemplates that in ordinary cases security shall be deposited, and the only duty of the Magistrate is to fix the amount, having regard to the two limits, and to receive it.

Then follows the proviso: —

"Provided that the Magistrate may, if he thinks fit, for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this sub-section."

It was contended before their Lordships that to read this proviso as enabling the Magistrate to cancel or vary an order of dispensation would be to make a proviso upon a proviso, and to collect a positive enactment out of that which was only a qualifying provision. But it is well settled that there is no magic in words of proviso, and that the plain meaning must be given to the words of the Legislature, and those words enable the Magistrate to cancel or

vary any order made under the sub-section, which should mean among other orders orders of dispensation

If the Magistrate having fixed the minimum security may vary his order by imposing the maximum, there is no reason why he should not, as time goes on, think fit to require security when at first he thought fit to require none. Under the second sub-section a power of requiring a deposit, where none up to that moment had been required, is given in certain cases to the Local Government, and it is natural to suppose that what the Local Government may do in a proper case under sub-section 2, may be done in a proper case by the Magistrate under sub-section 1. It is somewhat difficult to find any case, other than this one, to which the word cancel would be properly applicable. If the normal course is adopted, and a deposit is required, and if the Magistrate thereafter thinks it too much or too little, the appropriate word for the new order is that it is one varying the old. But if he were to cancel *simpliciter* an order fixing the deposit at a particular sum, it is difficult to see what would happen. There must be a deposit unless there is a positive order of dispensation; the cancelling of an order fixing the deposit at say Rs. 2,000 would leave the keeper of the printing press in the position of having to apply to the Magistrate to make some further order, either fixing a new sum or dispensing with any; and till such new order had been made and complied with, the keeping of the printing press would apparently be an unlawful act, so that the cancellation of the order fixing the deposit at Rs. 2,000 would be injurious instead of beneficent to the keeper of the press. But if the Magistrate had originally thought fit to dispense with security and afterwards changed his mind, the right phrase to use would be that he had cancelled his order of dispensation.

Their Lordships are, therefore, of opinion that the Magistrate has power under the section to cancel an order of dispensation, the necessary consequence of which will be that security will have to be deposited according to the amount thereupon fixed by him within the limits prescribed, as would be done in normal course on the first making of a declaration.

Their Lordships are in agreement in this respect with the opinion of Ayling, J., and in disagreement with the view of Seshagiri Aiyar, J. The Officiating Chief Justice Abdur Rahim, J., agreed in principle with Seshagiri Aiyar, J., and so expressed himself in his judgment upon the other application.

It is next contended on behalf of the appellant that the act of the Magistrate in cancelling the dispensation was a judicial order, and was bad, because she was given no opportunity of being heard before an adverse order was made against her.

To this argument several answers have been given; that the order might be treated as an *ex parte* order which it would have been open to her to move to discharge instead of complying with it as she did under protest; that as a judicial order it was still one made by the Magistrate within the exercise of his jurisdiction, and that the omission to hear her was only an irregularity which could not be reviewed, or at any rate could not be reviewed by process of *certiorari*; and lastly, that the act was not a judicial act but one done in the exercise of administrative functions.

It was on this last ground that all three Judges in the High Court decided the point against the appellant; and without pronouncing any opinion on the other grounds their Lordships agree that this one furnishes a sufficient answer.

The Magistrates to whom this power is entrusted by the Act are the District Magistrates and the Chief Presidency Magistrates. Those to whom power was entrusted by the Act of 1867 were "any person exercising the full powers of a Magistrate," and were to include "Magistrates of Police and Justices of the Peace." At that time there were no Chief Presidency Magistrates.

It was argued before their Lordships that the change in the second Act, that is in especial the substitution of the Chief Presidency Magistrate for territory within his jurisdiction, showed an intention on the part of the Legislature to make the action of the Magistrate judicial and not administrative. But their Lordships do not think that this change alters the nature or character of the action of the Magistrate. It is true that the duties of the Chief Presidency Magistrate are primarily judicial; but the

Magistrates outside the presidency town exercise both judicial and administrative functions, and the District Magistrate is principally an administrative officer. These two considerations appear to balance one another. The action of the Magistrate under sub-section 1 of section 3 is (like the action of the Magistrate under sub-section 1 of section 8) analogous to the action of the Local Government under the second sub section in the same clauses, and the action of the Local Government is clearly administrative.

It being once established that the normal course is to have a deposit, the action of the Magistrate in increasing or diminishing, withdrawing or imposing, is a pure matter of administrative discretion. It is only in one case that he is to record his reasons and that is when there is a departure from the normal, and the object of recording them is, as the Officiating Chief Justice rightly said, for the information of his superiors in the Government.

Further, in this connection the provisions of section 22, upon which comment will shortly be made, must not be left out of sight. If a declaration of forfeiture by the Local Government can only be questioned in one respect and by one method—it is not unreasonable to suppose that the Legislature did not intend to open the Courts of Law to enquiries as to the exercise of so comparatively unimportant an official act, discretionary and in some respects facultative as it is.

The act of the Magistrate is after all only the withdrawal of a privilege which need never have been granted. It is not like a condemnation, in which case justice requires that the person to be condemned should first be heard. It would have been in their Lordships' opinion more discreet, and it would have removed an occasion for comment and complaint, if the Magistrate had given the appellant some opportunity for making her observations before the privilege was withdrawn; it might have been a wiser discharge of his duty as an officer. But having said this, their Lordships are unable to go any further.

It results, therefore, that if the order of the Magistrate was open to examination, either upon process of *certiorari* or by a way of revision, the consequence of an examination would be to leave the order as it stands; and this consequence is not without its bearing upon the question, which is prior in order of reasoning, whether it was competent to the Court to enter upon any such examination. The appellant based her demand partly upon the Code of Criminal Procedure and partly upon the supposed Common Law power to grant a writ of *certiorari*. She did not rely upon the power of revision given by the Code of Civil Procedure.

It is not easy to see how these proceedings could be deemed criminal proceedings within the Code of Criminal Procedure. They are not proceedings against the appellant as charged with an offence. They are at the utmost proceedings which rendered the appellant, if she should thereafter commit a criminal or forbidden act, open to a particular form of procedure for a penalty.

In any view, as their Lordships have intimated their opinion that the Magistrate in withdrawing the order of dispensation was not acting judicially, it follows that this is not a case for revision under the Code of Criminal Procedure.

As to *certiorari* it was contended on behalf of the respondent in the High Court, that there is no power in the High Court to issue a writ of *certiorari*, or alternatively that the provisions of section 22 forbid recourse to this writ in cases which come under the Press Act.

As to the first point it would seem that at any rate the three High Courts of Calcutta, Madras and Bombay possessed the power of issuing this writ [see *Re, the Justices of the Supreme Court of Judicature at Bombay* (17) and *Nundo Lal Bose* v. *Corporation for the Town of Calcutta* (1)]. Whether any of the other Courts which are by definition High Courts for the purposes of this Act have the power to issue writs of *certiorari* is another question.

Supposing that this power once existed, has it been taken away by the two codes of procedure? No doubt these codes provide for most cases a much more convenient remedy. But their Lordships are not disposed to think that the provisions of section 435 of the Criminal Procedure Code and section 115 of the Civil Procedure

(17) 1 Knapp. 1 at pp. 49, 51, 55; 12 E. R. 222.

Code of 1903 are exhaustive. Their Lordships can imagine cases, though rare ones, which may not fall under either of these sections. For such cases their Lordships do not think that the powers of the High Courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court, to issue writs of *certiorari*, can be said to have been taken away.

But assuming that the power to issue the writ remains, and that it might be exercised notwithstanding the existence of procedure by way of revision, section 22 has still to be considered:—

"22. Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court, on such application as aforesaid, and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act."

As to this section it was contended on behalf of the appellant that as the writ of *certiorari* was not in terms said to be taken away the right to it remained, notwithstanding the very express but still general words of this section.

However that might be according to English Law where there is no such revision procedure as in India, their Lordships see no reason for narrowing the express words of the Indian Act. *Certiorari* according to the English rule is only to be granted where no other suitable remedy exists. If the order of the Magistrate were a judicial order, it would have been made in the exercise either of his civil or of his criminal jurisdiction, and procedure by way of revision would have been open.

Even were it to be said that the order was of that *quasi* judicial kind to which *certiorari* has sometimes been applied in England or in India, the Press Act may quite reasonably have intended to take it away, and there is no reason why full effect should not be given to its language.

It was contended in the High Court and before this Board that it was beyond the competency of the Indian Legislature to enact section 22 and possibly even to enact the Press Act. This argument, which was mainly founded upon the language of Norman, J., in the case of *Ameer Khan, in the matter of* (12), received some encouragement from the Officiating Chief Justice. But their Lordships find themselves unable to appreciate it.

The order of the High Court dismissing this application was, therefore, right, and the appeal from it must be dismissed.

If their Lordships thought that the appellant had made any way, they would have had to consider whether she was not, according to the practice prevailing in cases of *certiorari*, too late in making her application. Indeed, what advantage the appellant would have gained if she had succeeded upon this application is not very apparent. The power of the Local Government to make a forfeiture under section 4 no doubt depends upon there being a deposit to forfeit. But at the time the order was made, 25th August 1916, there had been in fact a deposit since 5th June; and the appellant had taken no steps to get herself relieved from the order made on the 22nd May directing the deposit, or to get it back.

Even were it contended that the deposit ought to be regarded as having been so unwarrantably exacted that it ought to count as non existent, there was nothing to show that the Local Government was or ought to have been aware of this. Further, section 22 makes the declaration of the Local Government conclusive as to there being a forfeiture.

Lastly, the appellant made no application by way of *certiorari* or otherwise to quash the declaration of forfeiture; and the only way in which it was attacked was by using the procedure under section 17 which, as pointed out in the High Court, is available only for one purpose, that is, of showing on the merits that the published articles were not deserving of forfeiture.

Their Lordships have now to deal with the other appeal. Section 4, sub-section 1, of the Indian Press Act is, in so far as it is material, in the following terms:—

"(1) Whenever it appears to the Local Government that any printing press in respect of which any security has been deposited as required by section 3 is used for the purpose of printing or publishing any newspaper, book, or other document

containing any words, signs, or visible representations which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication, or otherwise—.....

"(*c*) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India, or any Native Prince or Chief under the suzerainty of His Majesty, or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government or any such Prince or Chief; or.....

"(*e*) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order; .....

the Local Government may, by notice in writing to the keeper of such printing press, stating or describing the words, signs, or visible representations which in its opinion are of the nature described above, declare the security deposited in respect of such press and all copies of such newspaper, book, or other document, wherever found, to be forfeited to His Majesty.

"EXPLANATION I.—In clause (*c*) the expression 'disaffection' includes disloyalty and all feelings of enmity.

"EXPLANATION II.—Comments expressing disapproval of the measures of the Government or of any such Native Prince or Chief as aforesaid with a view to obtain their alteration by lawful means, or of the administrative or other action of the Government or of any such Native Prince or Chief or of the administration of justice in British India without exciting or attempting to excite hatred, contempt, or disaffection do not come within the scope of clause (*c*)."

The notice of forfeiture issued on the 25th August 1916 stated that in the opinion of the Governor-in-Council 20 passages published in the appellant's newspaper on various dates from the 7th June to the 17th August were of the nature described in section 4, sub-section 1, and declared the security deposited by the appellant to be forfeited. The articles in question were numbered consecutively from 1 to 14, seven articles being numbered 4 and marked with consecutive letters of the alphabet. Thereupon the appellant availed herself of the remedy given to her by sections 17 and 18 and applied to a Special Bench of the High Court to set aside the order on the ground that the newspaper did not contain "any words, signs or visible representation" of the nature described in section 4, sub-section 1.

This application, as already stated, was heard by the same Judges as those who sat upon the application for a *certiorari*. In the unanimous opinion of the Bench, the articles numbered 2, 11, and 13 were within the terms of section 4, sub-section 1, clause (*c*). S. Aiyar, J., thought that article 11 was also obnoxious to clause (*e*). The majority of the Bench, that is to say, the Officiating Chief Justice and Ayling, J., thought articles 1, 6, 10 and 12 obnoxious to clause (*c*). Ayling, J., thought article 7 obnoxious to clause (*e*) and articles 9 and 14 obnoxious to clause (*c*). S Aiyar, J., thought article 8 obnoxious to clause (*c*). In accordance with these conclusions the Court dismissed the application made by the appellant.

The balancing of important political considerations, which is effected by adding Explanation 2 to the enacting words which are found in the earlier part of the section, has its analogy in sections 124A and 153A of the Indian Penal Code. The language is not precisely the same, but there is the same delicate balancing of two important public considerations, the undesirability of anything tending to excite sedition or to excite strife between classes and the undesirability of preventing any *bona fide* argument for reform.

It is perhaps not easy to see how Explanation 2, with its qualifications, adds to, or detracts from the direct language of clause (*c*). A similar observation might be made upon section 124A of the Penal Code. The utmost that can be said is that the addition of the explanation with its apparent repetition of the positive enactment in the guise of a qualification of the explanation shows an almost meticulous care by the Legislature to balance the two considerations, prominence being given to the first consideration in the first part of the section, and to the second in the explanation.

In applying these balancing principles it is inevitable that different minds may

come to different results, one mind attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony.

The section 124A of the Indian Penal Code has been the subject of careful consideration in the cases of the *Queen Empress* v. *Bal Gangadhar Tilak* (18), *Bal Gangadhar Tilak* v. *Queen Empress* (19) [in which case this Board refused leave to appeal. See *Bal Gangadhar Tilak* v. *Queen Empress* (19)] the *Queen-Empress* v. *Ramchandra Narayan* (20) and the *Queen Empress* v. *Amba Prasad* (21), and though as already stated the language of this section is not precisely the same as the language in the Press Act, these judgments are of considerable assistance towards the construction of section 4.

In substance the question under clause (*c*) of section 4, sub-section 1, comes to this; are the passages such as in fact to excite, or do they disclose an attempt (which implies intention) to excite hatred, contempt or disaffection towards the Government or of any class or section of His Majesty's subjects in India; and in judging the question of intent the publisher must be deemed to intend that which is the natural result of the words used having regard, among other things, to the character and description of that part of the public who are to be expected to read the articles.

As regards the question of hatred or contempt of a class or section, it was argued that the object of the article was to attack the system, not a class or section. It may be assumed, for the purposes of this case, that there may be reference to a class or section of His Majesty's subjects so couched as to show that the attack is merely upon a school of opinion, and that unless the language is such as to excite hatred or contempt of persons, it may escape condemnation. But assuming this, the appellant remains face to face with the difficulty that there is language used in certain of the articles which may legitimately be construed as tending by inference or suggestion to excite hatred or contempt in such a fashion that it may become personal.

It may well be that the primary object was a legitimate attack upon a system, but unless care is taken it becomes difficult to make a fierce attack upon a system without conveying some imputation upon the class which the system makes or which carries the system into practice. And it must be remembered that those words in clause (*c*) which refer to the hatred or contempt of a class or section are not limited by Explanation 2, and that there has been in this respect some departure from the policy of the Penal Code, which superadded a qualifying explanation which has not found place in the Press Act.

As to clause (*c*) the majority of the Judges in the High Court were brought to the conclusion that the attacks on Anglo-India or Anglo-Indians or the bureaucracy, as the case may be, were calculated whatever might have been the primary object of the writer to bring into hatred or contempt persons forming a class or section of His Majesty's subjects, namely, English Civil Servants in India, in some cases Englishmen in India generally.

All the Judges thought that several passages were calculated to bring the Government into hatred and contempt, and this after giving due weight to Explanation 2. There were also as already stated findings by Ayling and S. Aiyar, JJ., bringing some of the articles under clause (*e*), a clause which it should be noted is not qualified by any explanation.

Upon careful perusal of the several judgments their Lordships find that weight has been properly given to the several portions of the section. They do not find that the section has been misconstrued. There remains only the question of application in detail of the principles of the law to the language of the various articles.

When their Lordships have progressed so far, the question becomes one which partakes so much of the nature of a question of fact, that it would be difficult for their Lordships even if they were inclined to construe the natural tendency of the words differently to interfere with the conclusions arrived at by the Court

(18) 22 B. 112, 11 Ind. Dec. (N. S.) 656.
(19) 22 B. 528; 25 I. A. 1; 7 Sar. P. C. J. 270; 11 Ind. Dec. (N. S.) 933. (P. C.)
(20) 22 B. 152 (F. B.); 11 Ind. Dec. (N. S.) 683.
(21) 20 A. 55 (F. B.); A. W. N. (1898) 1; 9 Ind. Dec. (N. S.) 395.

in India. For the Judicial Committee, when it sits to advise His Majesty in the exercise of his prerogative in criminal cases, does so under constitutional limitations which, as has often been explained and notably in the case of *Dal Singh* v. *Emperor* (16) [and in *Tilak's* case (19) already quoted], preclude it from exercising the full functions of a Court of Criminal Appeal.

It should be added that for the purpose of considering not the intention to excite, but the fact whether the articles are such as to excite, the Judges in India with a far closer knowledge of the character of the people likely to read the articles have better means of judging than their Lordships in England.

Here the matter might rest. But in the particular circumstances of this case, and after the elaborate argument at the Bar, their Lordships think it well to go further and to say that if they considered it proper to look into the matter in detail, they would hold that the articles which were the subject of unanimous condemnation, and at least some of those which came under the censure of Judges in the High Court, were obnoxious to the provisions of clause (*c*) and possibly in some cases to those of clause (*e*) and that the Court was right in supporting the declaration of forfeiture Their Lordships will, therefore, humbly recommend His Majesty that both these appeals should be dismissed with costs.

Appeals dismissed.

Solicitor for the Appellant.—Mr. *D. Graham Pole.*

Solicitor for the Respondents. – The Solicitor, India Office.

PATNA HIGH COURT.

CRIMINAL REVISION No. 69 OF 1919.

April 8, 1919.

Present:—Mr. Justice Das.

KUSUM SAO—ACCUSED—PETITIONER

versus

JANAK LAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 409—Penal Code (Act XLV of 1860), s. 211—Sanction to prosecute—Additional Sessions Judge, whether competent to grant sanction in matter arising out of trial before First Class Magistrate—Discretion of Court, exercise of—False charge, prosecution for, sanction for, when to be granted.

An additional Sessions Judge is competent to grant sanction to prosecute in a matter arising out of a trial before a Magistrate having first class powers, inasmuch as an appeal would ordinarily lie from the Court of the latter to the Court of the former. [p. 220, col. 2.]

In dealing with an application for sanction to prosecute, the Court to which the application is made ought to proceed with caution and discernment, and be guided by two principles, namely, (1) whether there is a *prima facie* case against the person for whose prosecution sanction is asked, and (2) whether the real object of the applicant is not to satisfy his private ends or personal spite. [p. 221, col. 2.]

The mere acquittal of an accused person is not sufficient for sanctioning a prosecution under section 211 of the Penal Code, there must be something more; there must be a reasonable belief in the mind of the sanctioning Court that there was no foundation whatever for the criminal charge: in other words, there must be a belief that in instituting criminal proceedings the petitioner acted knowingly without belief in the truth of the allegations made by him or recklessly without caring whether the allegations were true or false, and the judgment of the trial Court ought to show that there was no foundation whatever for the criminal case against the persons who were acquitted. [p. 221, col. 2.]

Criminal application against the order of the Additional Sessions Judge, Champaran, dated the 22nd January 1919.

Mr. *Gour Chandra Pal*, for the Petitioner.

Messrs. *Syed Hasan Imam* and *Harnarayan Prasad*, for the Opposite Party.

JUDGMENT —This application is directed against the order of the Additional Sessions Judge of Champaran granting sanction to the opposite party under section 195 of the Code of Criminal Procedure to prosecute the petitioner under section 211 of the Indian Penal Code. The facts and circumstances leading up to the application for sanction have been fully stated in the judgment of the Additional Sessions Judge and I do not propose to recapitulate them. It appears that in the first instance the

District Magistrate of Champaran granted such sanction. Against this there was an appeal to the Court of Session, and a point was taken before it that the District Magistrate had no power to grant such sanction as the alleged offence was not committed in, or in relation to, any proceeding in that Court or in a Court subordinate to that Court. In view of that objection a petition was filed before the Additional Sessions Judge, who heard the appeal for fresh sanction, and the Additional Sessions Judge, while holding that the District Magistrate had power to grant the sanction, acted on the fresh application made before him and himself granted fresh sanction.

At the very outset it was contended by Mr. G. C. Pal that the sanction granted by the District Magistrate was illegal. This was conceded by Mr. Hasan Imam who appeared on behalf of the opposite party, but he argued that the Additional Sessions Judge was competent to grant sanction and that he did in fact grant sanction for the prosecution of the petitioner under section 211 of the Indian Penal Code. If the Court which heard the criminal case be subordinate to the Court of the Additional Sessions Judge, that is to say, if appeals from the former Court ordinarily lie to the Court of the Additional Sessions Judge, then undoubtedly the Additional Sessions Judge had power to grant sanction in the case. Mr. Pal has taken me through the various sections in the Code of Criminal Procedure for the purpose of making his point that a Magistrate having first class powers is not subordinate to an Additional Sessions Judge. It will be noticed, however, on reference to section 195 of the Code of Criminal Procedure that the word deliberately used by the Legislature is "Court" and not "Judge", and the point for my determination is not whether a Magistrate having first class powers is subordinate to the Additional Sessions Judge, but whether an appeal would ordinarily lie from a Court of a Magistrate having 1st class powers to a Court of an Additional Sessions Judge. Now it cannot be disputed that an appeal would ordinarily lie from a Court of such a Magistrate to the Court of Session. If an appeal would lie from the Court of such a Magistrate to the Court of Session, such appeal can, in my opinion, be disposed of only by the Court of Session. Therefore, the point for investigation narrows down to this: what is the Court of Session? In my opinion section 409 makes it perfectly clear that a Court of Session consists of the Sessions Judge and the Additional Sessions Judge. I hold, therefore, that the Additional Sessions Judge was competent to grant sanction in a matter arising out of a trial before a Magistrate having first class powers.

The substantial question that has, however, been argued before me is that the Additional Sessions Judge did not act properly or with discretion in granting sanction in this case. The learned Judge says: "It has been laid down in the case reported as Mr. *Hume, Public Prosecutor of Calcutta* v. *Paresh Chandra Ghosh, An Attorney*, (1) that on an application for sanction the Court is not to try the guilt or innocence of the person for whose prosecution sanction is asked for, but is merely to consider whether the statutory bar imposed by section 195, Criminal Procedure Code, should be removed and the law allowed to take its ordinary course. What is, however, required to be seen is that no one be permitted to use the penal law merely to satisfy his own private ends or personal spite." As in my experience the judgment of the great and distinguished Judges who heard that case has frequently been misunderstood and misapplied, I propose to deal with that case as shortly as I can, in order to show that that case was decided on its own facts and that the learned Judges did not intend to lay down any general proposition applicable to all cases.

It is to be noted in the first place that there was in that case an enquiry as full and searching as the late Chief Justice of the Calcutta High Court knew how to make it, before the learned Judges made up their mind to remove the statutory bar imposed by section 195. They held the enquiry themselves and allowed witnesses to be examined and cross-examined before them. Not content with this, they placed the papers before Mr. Hume, the Public Prosecutor, "with complete confidence," as the Chief Justice says, "in his absolute integrity."

(1) 22 Ind. Cas. 324; 19 C. W. N. 503; 41 C. 734; 15 Cr. L. J. 51.

The passage which has been cited from the judgment of the learned Chief Justice by the learned Judge has in my experience been relied on by the Subordinate Courts as completely doing away with their responsibility in the matter, although the judgment of Mr. Justice Chaudhuri in the same case makes it perfectly clear that the power to grant sanction is evidently discretionary and has got to be exercised with caution and discernment. I accept the proposition of law enunciated in the passage cited, for it seems to me that if the sanctioning Court were to try the guilt or innocence of the person for whose prosecution sanction is asked, his subsequent trial would degenerate, to use the words of Mr. Justice Chaudhuri, "into a mere formality;" but, on the other hand, if an application for sanction is regarded merely as a mechanical device for removal of the bar, the rule imposing a bar on prosecutions under certain sections specified in section 195 of the Code of Criminal Procedure would appear to be a meaningless absurdity. I do not read the judgments delivered in that case as overruling, either expressly or by necessary implication, the series of cases that have been decided with reference to section 195, except such as have gone too far and have laid down that an application for sanction must be conducted on the same lines as a criminal trial. When the late Chief Justice says that he prefers to take his stand upon the section itself he is, in my opinion, merely protesting against the extreme argument advanced by Mr. Norton, and not in any way throwing any doubt on the rules of prudence which have been enunciated by eminent Judges as rules to which any Court exercising its discretion would have recourse. The learned Chief Justice himself refers to one of such rules of prudence, which is not to be found in the section itself but which has been read into the section as of universal application by successive generations of eminent Judges. The truth appears to be that the Legislature has deliberately vested the sanctioning Court with absolute discretion in the matter, because it is impossible to lay down rules governing all cases and new circumstances may arise calling for application of new principles. In my judgment the case of Mr. *Hume, Public Prosecutor of Calcutta* v. *Paresh Chandra Ghose, An Attorney*, (1) has left the law exactly where it stood, and in dealing with an application for sanction the sanctioning Court must still proceed with caution and discernment and must be guided by two principles which, in my opinion, have been well established, namely, (1) whether there is a *prima facie* case against the person for whose prosecution sanction is asked, and (2) whether the real object of the applicant is not to satisfy his private ends or personal spite.

Now, how has the Additional Sessions Judge dealt with this matter? He says: "I am, therefore, not to see in this case as to whether the case brought by the appellant was true or false, but whether in view of the finding of the learned Deputy Magistrate who tried the case and found the principal point of the case to be false, sanction should be granted." He does not record his opinion that there is a *prima facie* case or, for the matter of that, any case against the petitioner. But he evidently thinks that the finding of the Deputy Magistrate was something upon which he could proceed. Now it seems to me that the Legislature has said as plainly as it knows how to say that the mere acquittal of the accused person is not sufficient for sanction for prosecution under section 211 of the Indian Penal Code. If that were enough, there would be no meaning in imposing a bar on such prosecutions, and every acquittal would be followed by an application for sanction to prosecute. There must be something more than mere acquittal; there must be a reasonable belief in the mind of the sanctioning Court that there was no foundation whatever for the criminal charge; there must be a belief that in instituting criminal proceedings the petitioner acted knowingly without belief in the truth of the allegations made by him or recklessly without caring whether the allegations were true or false. The judgment of the trial Court in this case does not show that there was no foundation whatever for the criminal case against the persons who were acquitted.

I have read the judgment of the Magistrate and the record of the case with great care and I am bound to say that they have

left a suspicion in my mind as to whether the complainant had any chance whatever against the wealthy Zemindar of the place. The learned Magistrate was impressed by an entire absence of motive on the part of the accused and yet the same Magistrate records in his judgment that there is a long standing enmity between the petty shopkeepers of Madhuban Bazar and the Madhuban Babus. The question of motive is at all times a difficult matter for speculation, but in this case the finding of the Magistrate itself furnished a strong motive for the act complained against. The learned Magistrate very properly says that there being an old standing enmity between the complainant and the Madhuban Babus, the evidence of the prosecution witnesses must necessarily be received with caution. I agree with this and I would only add that the Additional Sessions Judge should have proceeded with the same caution in considering whether in this case, having regard to the admitted enmity between the parties, the statutory bar imposed by section 195 should be removed.

The whole prosecution case, however, rested on a very slender point, namely, whether the complainant had produced his books of account before the Police immediately after the alleged occurrence. As to this the prosecution case was that the complainant showed his account book to the junior Sub-Inspector who took away the book with him. With reference to this the learned Magistrate who tried the case says this:—"The fact that witness Nabijan Chowkidar has said in his evidence that he (that is to say, the junior Sub-Inspector) carried a *khata* and some paper to the Thana after the close of the investigation on the day of occurrence, combined with the somewhat unusual manner suggestive of interpolation in which the non production of the current account book is recorded on page 11 of the Case Diary, has given reason to suspect the veracity of the junior Sub-Inspector," and then by a curious piece of reasoning he comes to the conclusion that the account book was not in fact produced before the Police With reference to the junior Sub-Inspector, the learned Magistrate in another place says: "The conduct of the Police in this case has come in for a good deal of comment and it has been repeatedly insinuated that the Police have been conniving at the conduct of the accused from the beginning and that the report and Case Diary prepared by them are absolutely unreliable. There might be some apparent reason for such insinuation so far as certain acts of the junior Sub-Inspector are concerned, *e. g.*, delay in despatching the Case Diary, writing above the printed head-line on page 11 regarding the non-production of the current account which gives rise to suspicion as being an interpolation and which really led the Sub-Divisional Officer to order the trial of the accused." It is also to be noted that the Sub-Divisional Officer held a local enquiry into the matter and he expressed his deliberate conviction that the account book was actually produced and was taken away by the Police Officer. He says in his report that the entire bazar appeared to be almost deserted and that the bazar people were afraid to tell the truth and did not want to come forward.

A perusal of the record of the criminal case has convinced me that in the unequal contest between a petty shopkeeper and the Madhuban Babus the latter had all their own way. I am unable to hold that there was no foundation whatever for the criminal case instituted by the complainant and I think that this matter should have been taken into consideration by the learned Additional Sessions Judge in granting sanction for the prosecution of the petitioner.

In the next place, the Additional Sessions Judge does not exclude the possibility of a personal spite on the part of the Madhuban Babus. With reference to this he makes the following extraordinary observation:—"In such a circumstance I think it would be serving a public interest that the matter should be threshed out and if the appellant be found guilty he may be punished so that such things may not occur in future. And if he be found innocent the Babus' men will take a lesson so as never more to assume an air of injured innocence. Under these circumstances I think the sanction granted by the learned District Magistrate should stand." I am clearly of opinion that sanction should not be so light-heartedly given in order to enable the parties to have a trial of strength. I do not think that the liberty of any person should

by any act of the Court be jeopardized so that the person who asks for sanction "may take a lesson."

In my opinion, the learned Additional Sessions Judge has failed to exercise his discretion as it should have been exercised and I would, therefore, revoke the sanction granted by him and by the District Magistrate and direct that no further proceedings be taken in the matter.

Sanction revoked.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 375 OF 1919.
May 23, 1919.
Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.
THE CHAIRMAN OF THE CORPORATION OF CALCUTTA—COMPLAINANT—PETITIONER
versus
PAGLI AND ANOTHER—ACCUSED—OPPOSITE PARTY.

Calcutta Municipal Act (III B. C. of 1899), s. 495—Tea-dust, whether article of food or drink—Food, what is.

The accused were charged with an offence under section 495 of the Calcutta Municipal Act for selling as tea-dust some substance which was found not to contain any tea:

Held, that tea-dust came within the purview of the words "article of food or drink" in section 495 of the Calcutta Municipal Act. [p. 224, col. 1.]

The word "food" includes any article which ordinarily enters into or is used in the composition or preparation of food, and includes flavouring matters and condiments. [p. 224, col. 1.]

Criminal application against the order of the Municipal Magistrate, Calcutta.

FACTS appear from the judgment.

Babu *Manmatha Nath Mookerjee* (with him Babu *Satindra Nath Mookerjee*), for the Petitioner.—This Rule was obtained on behalf of the Chairman of the Calcutta Corporation against an order of acquittal passed by the Municipal Magistrate of Calcutta. The accused-opposite party have a tea shop. They sold to the Food Inspector some foreign dust as tea dust. The learned Magistrate, without either taking evidence or examining the accused, acquitted them, holding that tea was not an article of human food or drink, relying upon the English Food Hoarding Order. I submit 'food' was not defined in that Order. The case of *Hinde* v. *Allmond* (1) is not applicable to the present case. Tea has been held to be 'food.' See 82 Justice of the Peace 548 (notes). There is nothing to show that tea cannot be treated as food and drink. The fact that tea has been considered to be an article of food and drink in England supports my contention. The present case clearly falls within the purview of section 495 of the Calcutta Municipal Act. The learned Magistrate ought not to have discharged the accused without taking any evidence or examining the accused. I would, therefore, ask your Lordships to set aside the order of the Magistrate and order a fresh trial of the accused under section 495, Calcutta Municipal Act.

JUDGMENT.

WALMSLEY, J.—This is an application made on behalf of the Chairman of the Calcutta Corporation against an order passed by the Municipal Magistrate of Calcutta acquitting two persons of an offence under section 495 of the Calcutta Municipal Act. That section provides that no person shall sell to the prejudice of the purchaser any article of human food or drink which is not of the nature, substance or quality of the article demanded by such purchaser. It is alleged in this case that the accused persons sold to the Food Inspector as tea-dust some substance which, on analysis, was found not to contain any tea. When the case came on for trial the learned Magistrate, without examining the witnesses or the accused, acquitted the latter on the ground that tea-dust does not come within the purview of the words "article of human food or drink." He wrote a judgment which shows that he had in his mind the words of the learned Judges who decided the case of *Hinde* v. *Allmond* (1). That judgment was passed under the very special rules of the Food Hoarding Order; and it was pointed out in the course of the judgment that the word "food" in that Order was not identical with the description of the word "food" as given in the "Sale of Food and Drugs Act of 1875" be-

(1) 82 J. P. 151.

cause the word "drink" was omitted from the Order. The definition given in the Act of 1875 in that Court is that 'food' shall include every article used for food or drink by man other than drugs or water; and when the Act was amended in 1899, an addition was made to this effect that food shall include also any article which ordinarily enters into or is used in the composition or preparation of food and shall include flavouring matters and condiments. It appears to me that the learned Magistrate has erred in seeking for guidance as to the meaning of the words "Article of human food or drink" in a case that arose from a prosecution under the Food Hoarding Order. That Order was promulgated in very peculiar circumstances to achieve an object very different from that of Chapter XXXV of the Calcutta Municipal Act, and as I have already mentioned, the words used in the order are different from those of the Sale of Food and Drugs Act, and of section 495.

If there is any difficulty in determining the true meaning of the words "Article of human food or drink", I think that the definition given in the Sale of Foods and Drugs Act makes the meaning plain, and I hold that tea-dust comes within the scope of section 495 of the Calcutta Municipal Act. As it appears that no evidence has been given and the accused have not been examined, the case must be sent back to the lower Court to be tried with reference to the above remarks.

SHAMSUL HUDA, J.—I agree.

Case sent back.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 438 OF 1919.

July 2, 1919.

Present:—Sir George Knox, Acting Chief Justice, and Mr. Justice Stuart.

PIARE—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 300, 302—Murder—Death caused by lathi *blow—Offence—Burden of proving exception.*

In order to take a case out of the category of murder, it is for the accused to show that his act was covered by one of the exceptions to section 300 of the Penal Code.

If a man takes a *lathi* and deliberately assaults another on the head with the result that the skull is fractured, that act is murder unless the accused can show that it was removed from the category of murder by one of the exceptions to section 300.

Criminal appeal against the order of the Sessions Judge, Aligarh, dated the 25th March 1919.

Mr. *Uma Shankar Bajpai*, for the Appellant.

Mr. *Lalit Mohan Banerjee* (Government Pleader), for the Crown.

JUDGMENT.—Notice was served on Piare to show cause why he should not be convicted of an offence punishable under section 302 of the Indian Penal Code. Piare has been defended in this Court by a learned Vakil, and we have heard what is to be said in his behalf. The evidence shows that the man Bansi went to the house of Piare to collect rent due from Piare, but when there he was assaulted by Piare, who went into his house, fetched a *lathi* and dealt him one blow on the head. Bansi dropped down and two others, who were assisting Piare, joined in assaulting Piare. We are not concerned with them at present. The learned Sessions Judge appears to us to have quite misunderstood the case. The *post mortem* shows that the blow inflicted by Piare was so severe that it caused a fracture, at the base of the skull. It was for Piare to show that the blow which he struck under these circumstances was not an act of wilful murder. He has not brought it under any exception to section 300. If a man takes a *lathi* and deliberately assaults another on the head with the result that the skull is fractured, that act is murder unless the accused can show that it was removed from the category of murder by one of the exceptions to section 300. We alter the conviction to one under section 302 and the sentence will be a sentence of transportation for life with effect from the 25th of March 1919.

Conviction altered.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION NO. 90 OF 1917-18.

March 22, 1919.

Present:—Mr. Ferard, S. M., and Mr. Hopkins, J. M.

SAHU AJIT PRASAD AND OTHERS —PLAINTIFFS—APPELLANTS

versus

JAITHU AND OTHERS —DEFENDANTS— RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 11, 12—Landlord and tenant—Ejected tenant, lease to relation of, whether continues tenancy.

Where a tenant is ejected by his landlord and a lease of the holding is given to a relation of the ejected tenant such lease does not amount to a continuation of the tenancy, in spite of the fact that the ejected tenant continues to cultivate either as sub-tenant or partner in cultivation.

Second appeal from the order of the Commissioner, Rohilkhand Division, dated the 29th July 1918, in the case of ejectment.

JUDGMENT.

FERARD, S. M.—I am unable to agree with the Commissioner in this case. The facts are admitted. The appellant-landlord in 1315 ejected Jhanjhu in the 12th year of his tenancy. He then gave a seven years' lease to Kanha, another member of the family. Jaithu, the son of Jhanjhu, the former tenant, is actually cultivating it. He and Kanha both say that he, Jaithu, has been cultivating it all along, in fact ever since his father Jhanjhu cultivated it before ejectment.

It is not suggested that anyone but Jhanjhu was the tenant in 1315 when he was ejected. The landlord was within his legal rights in preventing accrual of occupancy rights by ejecting Jhanjhu. There was no obligation on him to eject Jaithu, son of Jhanjhu, also because he happened to be helping his father in cultivation. He did not let in either the father or the son—he let in Kanha, another member of the family—it is immaterial that he may have known that Kanha could let the son go on cultivating as his sub tenant or partner in cultivation It is, I consider, a perverse view of law that a lease to a relation is a continuation of an ejected tenancy. The case is one of a class in which sympathy with tenants is often pressed much too far.

The case is in fact a blend of examples (*ii*) and (*iii*) cited at page 102 of Agarwala's Commentary on the Tenancy Act, 5th Edition, cases in which a landlord can avoid pitfalls when seeking to prevent accrual of occupancy right. I hold that Jhanjhu's ejectment in 1315, followed by a lease to another member of the family Kanha, was a complete break and that neither Kanha nor Jaithu, defendants-respondents, can count any period prior to 1316. I would allow the appeal, set aside the Commissioner's order and restore that of the Assistant Collector decreeing ejectment with costs to appellant throughout.

HOPKINS, J. M.—I think there were good reasons for holding that Kanha, to whom the land was leased after Jhanju's ejectment in 1315 *Fasli*, was only a dummy. But as Jhanjhu and his son Jaithu were re admitted under cover of the lease in the name of Kanha, they were bound by that lease. It was a registered lease for a term of seven years and the period of 12 years necessary for the acquisition of occupancy rights did not begin to run until the expiry of its term under section 12 of the Tenancy Act. On these grounds I concur in the order proposed.

Appeal allowed.

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

SECOND CIVIL APPEAL NO. 5 OF 1918.

April 8, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Roe.

Seth JAHAR MAL—PLAINTIFF—APPELLANT

versus

G. M. PRITCHARD—DEFENDANT—RESPONDENT.

Appeal, second—Discretion, exercise of, interference with, by Appellate Court—Decision based on erroneous grounds—Limitation Act (IX of 1908), s. 5—Appeal filed beyond time—Extension of time—Sufficient cause—Delay in taking steps, effect of.

Where the law leaves a matter to the discretion of a Court, and the Court decides to exercise that

discretion, and does exercise it, but bases its decision upon entirely erroneous grounds, the discretion cannot be said to have been exercised in a legal and proper manner and cannot be allowed to stand. [p. 227, col. 2.]

Parties ought not to be encouraged to defer till the very last moment the taking of a step in the course of an action for which a limit of time is prescribed by rules, and no indulgence ought to be shown to a party who so puts off taking action, if by an unexpected accident he exceeds the time limit. [p. 228, col. 1.]

Appeal from a decision of the District Judge, Sambalpur, dated the 22nd November 1917, reversing that of the Subordinate Judge, Sambalpur, dated the 28th August 1916.

Messrs. *Janki Nath Bose* and *Satish Chandra Bose*, for the Appellant.

Mr. *B. N. Sinha*, for the Respondent.

JUDGMENT.

MILLER, C.J.—In this case the plaintiffs sued the Gangpur Light Tramway Company, Ld., and Mr. Pritchard, their manager, to recover a sum of Rs. 3,945, the principal amount of a loan, together with interest for money lent to Mr. Pritchard, alleging that the money was borrowed by him as manager on behalf of the Tramway Company. They succeeded before the Subordinate Judge in obtaining a decree against both Mr. Pritchard and the Company. That judgment was dated the 28th August 1916 and, with a view to appeal, the defendant Company, on the same day, applied to obtain copies of the judgment and decree. On the 2nd September they were notified by the office of the requisite number of folios and stamps required. These folios and stamps were supplied in due course, and the copy was ready for delivery on the 9th September. According to the rules the defendants had 30 days for appealing reckoned from the 9th September, but from the 26th September to the 29th October the Courts were closed in consequence of the vacation, so that the time was, therefore, extended until the first day after the opening of the Court after the vacation, *viz*, the 30th October. The result was that instead of having only 30 days for lodging their appeal the defendant Company did, in fact, have over 50 days altogether. Notwithstanding this, however, their memorandum of appeal was not filed until the 8th November, which was eight days after the time when it ought to have been filed.

When the appeal came on for hearing before the District Judge he had to consider, in the first instance, whether he should, in the circumstances which were disclosed, extend the time for filing the appeal in favour of the defendant Company. The case put forward by the defendants before the District Judge is contained in two affidavits, one made by the Managing Agent of the Company, Mr. Bhupendra Nath Basu, and another made by Mr. Kali Das Lahiri, who is the Head Assistant of the Company in Calcutta. The first affidavit does not throw very much light upon this question. In effect it says that the Managing Agent left Calcutta for Simla to attend a meeting of the Viceroy's Council on the 2nd September and was detained there until the 27th September and arrived back in Calcutta on the 29th September. That he instructed his Head Assistant to take the opinion of the Directors as to the course to be taken with a view to an appeal, that so far as he was concerned he left the matter there and went away to Darjeeling for the Puja holidays and came back again on the 29th October, which was the last day of the vacation. Between the time that he went to Darjeeling and the time when he came back he does not appear, so far as the affidavit is concerned, to have communicated at all with Mr. Kali Das Lahiri to see what steps were being taken with a view to prosecuting the appeal. He seems to have left everything in that gentleman's hands.

The second affidavit, that of Mr. Kali Das Lahiri, the Head Assistant, is to this effect. He corroborates what is said in the previous affidavit, and he says that he did consult the Directors; on the 16th October he obtained their consent to appeal, and they directed him to file the appeal. As the Courts were closed until the 30th October he could not file the appeal until that day arrived; but until the 29th October no steps at all were taken, either to consult his Vakil or legal adviser at Sambalpur where the appeal had to be filed, or to have the necessary memorandum of appeal prepared. Although it is not definitely stated in his affidavit I think perhaps, it may be inferred in his favour that he intended, on the 29th October, to

leave Calcutta and go to Sambalpur for the purpose of having his appeal filed in the ordinary way; but I should like to mention, in passing, that in so doing he was running things very fine. It is, we are told, about a day's journey and rather a difficult journey by train from Calcutta to Sambalpur, and if he had left on the 29th October he could not have arrived at Sambalpur till the following day, which was the last day for filing the appeal. There he would have had to consult his legal adviser, and the memorandum of appeal would have had to be prepared and filed on the same day. It is just possible that he may have been able to do that, but the reason which he alleges for not proceeding to Sambalpur on the 29th October is that he was taken ill on that day and was confined to his bed until the 1st November. He says that he was so ill in fact that it was impossible for him to communicate his inability to go to Sambalpur to Mr. Bhupendra Nath Basu, the Managing Agent. He does not say in his affidavit that he was so ill that he was unable to instruct anybody else to proceed to Sambalpur on his behalf to take the necessary steps for filing the appeal. I suppose all that was necessary for the purpose would be the documents in the case, which would have to be laid before his Pleader in order to put him in possession of the necessary facts for filing the appeal. These, it seems to me, could easily have been handed over to somebody else on his behalf; and although there is a Doctor's certificate to say that he was ill of colic for four days from the 29th October, this does not in itself seem to me to be a sufficient reason for failing to file the appeal in time.

Had it been necessary for me to decide this question and to use my discretion in the matter, I should certainly have come to the conclusion that no sufficient reason had been made out, but the learned Judge who had to determine this question arrived at the conclusion that sufficient cause had been shown for the delay. If the matter had stood there I should have been very loth, whatever my own view of the matter, to interfere with his discretion; but the learned Judge seems to me to have based his decision upon entirely erroneous grounds. Although he was entitled and in fact it was his duty to exercise his discretion, if one finds that the conclusions of fact at which he arrived which were the basis of his decision were not such as could possibly support that decision, then I think this Court is entitled, and, indeed, is bound, to say that that discretion was not exercised in a legal and proper manner. What the learned Judge found was this. He accepted the facts set out in the affidavits as he was entitled to do and came to the conclusion that the Head Assistant was prevented from travelling from Calcutta to Sambalpur on the 29th October. But he goes on and says:—

"Although it appears remiss on his part not to have taken steps to have had the appeal forwarded by other means, it would be a hardship on the appellants to debar them owing to the carelessness of a servant from the appeal."

Now having read that part of the learned Judge's judgment it seems to me that the conclusion at which he arrived was in fact not that the illness of the Head Assistant prevented this appeal from being filed in time, but that if the Head Assistant had exercised ordinary diligence notwithstanding his illness the appeal might have been filed within the proper time, and it was only through his remissness that this course was not adopted. Then the learned Judge goes on and says it would be a hardship on the appellants to debar them owing to the carelessness of a servant from the appeal. I entirely dissent from the view taken by the learned Judge. If parties in this Court choose to entrust these matters to their servants then they must take the consequences of any remissness or negligence which may be exhibited on the part of their servants, and they cannot come to Court and say: "This is a very hard case. Had my servant done his duty as I expected he would, then my appeal would have been in time, therefore, I pray that some indulgence may be shown to me." That is not a ground upon which the Courts ought to exercise in their discretion any indulgence in favour of litigants, and, therefore, I think that the decision of the learned District Judge in allowing the time to be extended for filing this appeal cannot possibly stand.

There is one other matter I should like to draw attention to. It is a matter which is continually being brought to the notice of

the Courts in this country, and that is this. It almost invariably happens that one party or the other intending to appeal or to take some other step in the course of an action for which a time limit is prescribed by the rules, waits until the very last moment before taking that step. Sufficient time in all these cases is granted to the parties for doing whatever may be necessary for furthering their suit, and if they choose to put off until the very last minute either the filing of the appeal or the taking of any other steps which are a necessary part of the prosecution of their case they run a very great risk, and it does not seem to me that it is sufficient for a party to come to Court and say that if everything had gone absolutely smoothly, and if no unexpected accident had happened, he would have been in time in taking the steps required for his appeal. One is not entitled to put things off to the last moment, and hope that nothing will occur which will prevent them from being in time. There is always the chapter of accidents to be considered, and it seems to me that one ought to consider that some accident or other may happen which will delay them in carrying out that part of their duties for which the Court prescribes a time limit, and if they choose to rely upon everything going absolutely smoothly and wait till the very last moment, I think they have only themselves to blame if they should find that something has happened which was unexpected but which ought to be reckoned with, and are not entitled in such circumstances to the indulgence of the Court.

For these reasons I think this appeal must be allowed upon the first point which has been raised. It is, therefore, not necessary to go into the merits of the appeal, whatever these merits in this particular case may be. The appeal will be allowed with costs here and in the lower Appellate Court. The judgment of the District Judge will be set aside, and the decree of the Subordinate Judge against the appellants as well as the other defendant will be restored.

ROE, J.—I agree. The District Court's order made upon the facts found is directly contrary to the principle that the master is responsible for the negligence of his servant. I also desire to associate myself entirely with the views of the learned Chief Justice with regard to the most objectionable practice of putting off to the last moment what ought to be done at leisure. Those who take this course must accept the consequences of an accident at the eleventh hour.

Appeal allowed.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

SECOND APPEAL PETITION No. 75 OF 1917-18.

November 7, 1918.

Present:—Mr. Lovett, S. M., and Mr. Ferard, J. M.

SHER ALAM KHAN—APPELLANT

versus

MUHAMMAD SAID KHAN AND OTHERS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 4 (3), (5), 95 (b)—Lessee of right to cut grass, whether tenant—Occupancy rights, acquisition of—Ejectment—Suit for declaration of class of tenancy, maintainability of.

Under section 4 (3), read with section 4 (5), of the Agra Tenancy Act the lessee of a right to cut thatching grass is a "tenant", though not a tenant of an agricultural holding. He cannot acquire occupancy rights or be ejected by a Revenue Court, but he can sue for a declaration as to the class of tenant to which he belongs under section 95 (*b*) of the Act. [p. 229, col. 1]

Second appeal from the order of the Commissioner, Allahabad Division, dated the 22nd April 1918, in the case of declaration of tenancy.

JUDGMENT.

FERARD, S. M.—The respondent sued the appellent Sher Alam Khan in the Civil Court as a trespasser. The Civil Court, under section 202, Tenancy Act, directed appellant to file a suit in the Revenue Court within three months to obtain a decision as to whether he was a tenant or not. The Civil Court evidently regarded the plot in suit No. 190/48, area 4 acres, to be an agricultural holding. The Commissioner finds, and it is clear from the pleadings, that it was let to the appellant for cutting thatching grass. This, it has been held, is not an agricultural purpose (the subject is discussed at page 12 of Mr. Agarwala's Commentary on the Tenancy Act, 5th Edition). So far the Commissioner's appellate finding is correct, but he goes on

to decide that the appellant could not in consequence bring a suit under section 95, which, in his opinion, covers agricultural holdings only. Here I am unable to agree with him. Section 4 (3) and section 4 (5) read together show that the lessee of a right to cut thatching grass is a "tenant", though he is not the "tenant" of an agricultural holding in view of the definition of "holding" and "land" in section 4 (9) and section 4 (2) of the Act. He cannot acquire occupancy rights or be ejected under section 58 by a Revenue Court (the proper *forum* for his ejectment is the Civil Court), but he is the tenant all the same within the meaning of the term in section 4 (5) and it is going too far to hold that this is not the sense in which the term is used in the opening words of section 95. We must assume that if the framers of the section intended it to apply to agricultural tenants exclusively they would have said so and as they did not, a man who is tenant under section 4 (5) read with section 4 (3) can have his class declared under section 95 (*b*). It is pointed out to me by appellant's Counsel that the Board expressed an opinion to this effect in the course of their judgment of April 1918 in *Chhote Lal* v. *Rani Dhan Devi Kuar*, Jaunpore district, and I think it is correct, though I admit that the wording of section 95 as a whole looks as if the tenant under section 4 (5) read with section 4 (3) was forgotten.

I would set aside the Commissioner's appellate order and restore that of the Assistant Collector declaring appellant to be a non-occupancy tenant under clause (*c*) of section 6, Tenancy Act. Costs to appellant throughout.

LOVETT, S. M.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NOS. 548, 734 AND 834 OF 1917.

July 8, 1919.

Present:—Mr. Justice Rafique and Mr. Justice Walsh.

MEWA RAMSINGH—PLAINTIFF—APPELLANT

versus

GANGA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption of proportionate share, when permissible.

When a mortgage is split up by the mortgagee buying up the equity of redemption from some of the heirs of the original mortgagor, anyone of the heirs of the mortgagor is entitled to redeem his share of the mortgaged property on the payment of a proportionate sum due on his share. [p. 230, col. 1.]

Second appeal against the decision of the District Judge, Badaun, dated the 3rd February 1917.

Mr. *S. Agha Haidar*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The three appeals Nos. 548, 734 and 834 are connected and arise out of one and the same suit brought by Mewa Ram for redemption of certain property. The claim was resisted on the grounds, among others, that the suit was premature and that the mortgage sought to be redeemed was barred by limitation. The learned Munsif decreed the claim for redemption on the payment of Rs. 325, $\frac{1}{4}$th of the mortgage money. Both parties appealed to the Court of the District Judge. The learned Judge varied the decree of the first Court by decreeing the claim of the plaintiff for some property in excess of that which was sought to be redeemed and upon payment of the full amount of the mortgage money. There are three appeals before us, as already stated, from the two decrees of the lower Appellate Court. No. 548 is the appeal of the plaintiff and the other two appeals are by Ganga Ram, the chief contesting defendant in the case. We shall dispose of the three appeals together. Mewa Ram, the plaintiff, contends that the lower Appellate Court should not have increased the sum for redemption or the property sought to be redeemed. He sued for the redemption of 2 *biswas* and 10 *biswansis* out of the mortgaged property, but when the case went to trial before the first Court it was found that he was entitled to re-

demption of 1 *biswa* 5 *biswansis* only, that is $\frac{1}{4}$th of the mortgaged property. If the learned Judge of the Appellate Court was of opinion that he, Mewa Ram, was entitled to redeem more than 1 *biswa* 5 *biswansis*, redemption should have been allowed on the payment of the proportionate sum payable on the property allowed to be redeemed. The learned Judge of the lower Appellate Court seems to have allowed redemption to Mewa Ram of $8\frac{1}{3}$ *biswansis* in addition to 1 *biswa* 5 *biswansis*. The decree for redemption, however, was granted on payment of Rs. 1,300, the full amount of the mortgage money. The learned Counsel for Mewa Ram is unable to explain how his client is entitled to redemption of any property in excess of 1 *biswa* 5 *biswansis*. The learned Counsel for Ganga Ram objects, and we think rightly, to that portion of the decree of the learned Judge of the lower Appellate Court which allows Mewa Ram to redeem $8\frac{1}{3}$ *biswansis* in addition to 1 *biswa* 5 *biswansis*. The contention for Mewa Ram with regard to the amount payable by him is, in our opinion, correct. Ganga Ram himself has been buying from time to time the equity of redemption from the other heirs of the original mortgagor. The mortgage seems to have been split up. Mewa Ram is, therefore, entitled to redeem on the payment of the proportionate sum due on his share. His share is $\frac{1}{4}$th and, therefore, he is entitled to redemption of 1 *biswa* 5 *biswansis* on the payment of Rs. 325. In the other two appeals the principal points urged are that the suit of Mewa Ram is premature inasmuch as one of the conditions of the deed of mortgage is that redemption will only be allowed in the month of Jeth; that no tender was made by Mewa Ram in the month of Jeth and hence the suit is premature and ought to fail. The second contention on behalf of Ganga Ram is that the claim of Mewa Ram for redemption of the mortgage of 1850 is obviously barred by limitation, unless he can show that there was an acknowledgment before the expiry of the limitation period by the mortgagees or their legal representatives; that Mewa Ram has not proved the acknowledgment of at least some of the legal representatives of one of the mortgagees. Hence the claim is barred by limitation. In support of the first contention the case of *Gokul Singh* v. *Saheb Singh* (1) is cited. We think that the facts of that case are quite different from those of this. In the present case the plaintiff came into Court on the allegation that the mortgage had been satisfied by the usufruct of the property long before the suit. As to the plea of limitation, we think that the *wajib-ul arz* was attested by Shib Lal, one of the original mortgagees, and by the two major sons of Khem Karan. Under these circumstances we think that the claim is not barred by limitation. The result is that the appeals of Ganga Ram fail with the exception of the objection as to the redemption of $8\frac{1}{3}$ *biswansis* in excess of 1 *biswa* 5 *biswansis*; and the appeal of Mewa Ram succeeds with regard to the amount of redemption money. We accordingly modify the decree of the lower Appellate Court by decreeing the claim of Mewa Ram for redemption of 1 *biswa* 5 *biswansis* on the payment of Rs. 325. The appeal of Mewa Ram is, therefore, allowed with costs. The appeals of Ganga Ram fail with the exception of the modification above mentioned. With regard to the costs of the appeals of Ganga Ram, that is appeals Nos. 734 and 834, we direct that the parties should receive and pay costs in proportion to success and failure. We understand that in pursuance of the decree of the lower Appellate Court the appellant has already paid into Court a sum in excess of that now awarded by this Court. Such excess must, therefore, be repaid to him and he will be entitled to redemption forthwith.

Decree modified.

(1) 38 Ind. Cas. 162; 15 A. L. J. 121.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 96 OF 1917-18.

January 16, 1919.

Present:—Mr. Ferard, S. M.

SPECIAL MANAGER, COURT OF WARDS, ANAPUR ESTATE—APPELLANT

versus

DEBI GHULAM—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s 44—Settlement Record, continuous entry in, whether controvertible.

GOBIND RAMANUJ DAS *v.* DEBENDRABALA DASI.

Continuous entries in a Settlement Record are not incontrovertible and can be shown to be incorrect.

Second appeal from the order of the Commissioner, Allahabad Division, dated the 10th August 1918, in the case of ejectment.

JUDGMENT.—The tenancy is a very old one dating back to the 1846 and 1838 Settlement, and the Commissioner in first appeal, on the basis of a compromise in a partition case in 1861 and a *parwana* to the respondent's ancestor in 1869, found that respondent held a portion as *muafi* or at a nominal rent. He, therefore, remanded the case to find out what land corresponded to land held by the respondent in 1838. The Assistant Collector who made the remand enquiry had a difficulty in making the comparison owing to difference in nature and scale of the older maps, but he found that at any rate some of the plots corresponded and the Commissioner has found substantial agreement between the plots in suit and those occupied in 1838. This is a finding of fact and I am not prepared to interfere with it in second appeal. If this were an Oudh case, I should hold that the respondent had sufficiently made out his case that the Zamindar had in the past given him land at a favourable rate of rent and that he was now an old tenant "at a favourable rate of rent" under the Oudh Rent Act. He was given it originally in *sir* land, and that accounts for the *sir* entry not having been corrected in the Settlement. The appellant landlord's strongest point is this continuous entry, having regard to section 12 (*a*), Land Revenue Act, the definition of *sir*. But it is settled law that such entries are not like the laws of the Medes and Persians incontrovertible—they can be shown to be incorrect—and I agree in the view of the case in this matter which the two Commissioners before whom this case came have taken. No other land is suggested as constituting the respondent's favourable grant and it is most unlikely that he would ever have given it up. I think a right and equitable decision has been come to in finding him an occupancy tenant of the land in suit and I decline to interfere.

Appeal dismissed.

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEAL FROM ORIGINAL DECREE No. 1 OF 1918.

April 11, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Roe.

Mahant GOBIND RAMANUJ DAS—PLAINTIFF—APPELLANT

versus

Rani DEBENDRABALA DASI—DEFENDANT—RESPONDENT.

Orissa Tenancy Act (II of 1913), ss. 3 (4), (6), 16, 31—Sarbarakari tenure, transfer of—Landlord, consent of, whether necessary—Suit to recover fees—Consent, whether can be implied—Deputy Collector, person vested with powers of, status of.

Section 16 of the Orissa Tenancy Act is applicable to cases in which a transfer is complete and valid as against the landlord, but a transfer of a *sarbarakari* tenure is not complete and valid as against the landlord until he has given his consent to it. [p. 233, col. 1.]

Where consent has not been given, the institution of a suit by the landlord to recover the amount of the fee payable to him for registration of a transfer is not an indication of consent, nor does any cause of action arise, and the plaint cannot be amended by adding a statement that the landlord is willing to acknowledge the transfer as valid against himself. [p. 234, col. 2.]

A person vested by the Local Government with powers to discharge any of the functions of a Deputy Collector under the Bihar and Orissa Act is a Deputy Collector within the meaning of section 3 (4) and (6) of the Act, and a Collector within the meaning of that section. [p. 234, col. 2.]

Appeal from a decision of the Sub-Deputy Collector of Puri, dated the 4th June 1918.

Sir *Rash Behari Ghosh*, Messrs. *J. N. Bose* and *M. S. Das*, for the Appellant.

Dr. *Dwarka Nath Mitter*, Messrs. *K. N. Chatterji* and *S. N. Chatterji*, for the Respondent.

JUDGMENT.—This is an appeal from a decision of the Sub-Deputy Collector of Puri, dated the 4th June 1918, decreeing the suit of the plaintiff, who represents the Paikpara Estate, against the defendant-appellant, Mahant Gobind Ramanuj Das, for a sum of Rs. 14,289-3-0, being the fee payable under section 16 of the Orissa Tenancy Act for the registration of the appellant's name in the respondent's registers, and interest on that sum at $12\frac{1}{2}$ per cent. per annum.

No oral evidence was adduced by either party at the trial, and the only documentary evidence put in was the deed of

transfer and certain settlement papers relating to the property. The facts, therefore, must be taken from the admission in the pleadings. The plaint, in so far as it is material, alleges that the property in question constitutes the Zemindari of the plaintiff; that the defendant purchased the property in suit under a registered *kobala* from certain persons who were *miadi sarbarakars* under the plaintiff, and on the 5th October 1917 applied for mutation of names in the plaintiff's *sherista*, praying also for exemption of mutation fees; that the plaintiff's officers in Puri asked the defendant and his officers to pay the mutation fee of Rs. 14,289-3-0 and that the defendant has not yet paid the same and is in possession of the property; that the defendant is liable to pay this sum to the plaintiff according to law and that the plaintiff is entitled to have it. It then alleges that the proportionate rent of the *miadi sarbarakari* tenure payable by the defendant is Rs. 2,381-8-6, the mutation fee claimed being six times that sum. It further alleges that the cause of action arose on the 12th July 1916 when the plaintiff came to know of the defendant's purchase.

The material part of the written statement alleges that the suit should be dismissed for want of cause of action; that the plaintiff is not entitled to the mutation fees claimed and the defendant is not liable to pay any mutation fee or any portion thereof. It denies that the defendant applied for exemption of mutation fees, but does not deny that he applied for mutation of names or that the plaintiff's officers in Puri asked the defendant and his officers to pay the mutation fee, nor does it deny that the property is in possession of the defendant. Upon these pleadings the following issues were framed:—

(1) Is the suit maintainable?
(2) Has the plaintiff any cause of action to bring the suit?
(3) Is plaintiff entitled to the fees claimed?
(4) Can plaintiff recover any amount from the defendant by suit?
(5) Is plaintiff entitled to any and what relief?

The learned Sub-Deputy Collector found on the first issue that the suit was maintainable under section 250 of the Orissa Tenancy Act. On the second and fourth issues he found that the landlord's offer to register the transferee's name, if the latter pays the requisite fee, is sufficient to give rise to a cause of action. On the third, that the fee payable was under section 16, clause (*b*), six times the annual rental, and on the fifth issue that interest at $12\frac{1}{2}$ per cent might be allowed.

Sir Rash Behari Ghosh for the appellant urged, in the first instance, that the Sub-Deputy Collector had no jurisdiction to try the suit; secondly, that section 16 of the the Orissa Tenancy Act does not apply to the transfer of a tenure which is not transferable without the consent of the landlord or, at all events, not until that consent has been obtained and the transfer thereby completed. On this point he argued that even if the section is applicable to a case in which the tenure is not transferable without the consent of the landlord, the plaintiff cannot bring a suit to recover the registration fee because when the Statute imposes an obligation on any person and prescribes the mode in which that obligation is to be discharged, the discharge of the obligation can only be enforced in the manner prescribed by the Statute. He next contended that the landlord cannot maintain a suit to recover a fee unless there has been an application for registration in his *sherista*. He further argued that the suit is premature for the reason that until a reasonable time had been given for the application for registration, it could not be said that the transferee of a tenure was liable for the fees leviable under section 16; and lastly, that the plaintiff is not entitled to claim interest.

We may deal first with the contention that section 16 does not apply to a transfer of a tenure which is not transferable without the consent of the landlord, for if this ground succeeds the suit must be dismissed upon this issue, and it will be unnecessary to discuss the remaining points covered by the argument on behalf of the appellant. Section 16 runs as follows:—

(1). In cases other than those covered by section 15, when any tenure or portion of a tenure is transferred by sale, gift or exchange, the transferee or his successor-in interest shall apply to the landlord to whom the rent of the tenure or portion

thereof is payable for registration of the transfer, and the landlord shall, in the absence of good and sufficient reason to the contrary, allow the registration of the transfer. The fee payable on such transfer shall be—

(*a*) In the case of a sale, Rs. 25 per centum of the consideration money, or the fee specified in clause (*b*), whichever is greater, and (*b*) in the case of gift or exchange, a fee six times the annual rental of the tenure or portion thereof, as the case may be, or, if rent be not payable in respect of the tenure or portion, then a fee of Rs. 10.

We must accept, on the pleadings before us, the fact that an application for registration has been made by the defendant in respect to the tenure, which is a *sarbarakari* tenure. A *sarbarakari* is a sub-proprietor, and as such is by section 6 (*iii*) deemed to be a tenure-holder for the purposes of sections 14 to 20 of the Act. This class of tenure is excluded from the operation of section 15. On a transfer of a *sarbarakari* tenure the transferee is, therefore, required by section 16 to apply to the landlord to whom the rent of the tenure or a portion thereof is payable for registration of the transfer. We have no doubt that that section would be applicable in cases in which a transfer is complete and valid as against the landlord, but a transfer of such a tenure as that under consideration is not complete and valid as against the landlord until the landlord has given his consent to it

It must, therefore, be determined whether such consent was given because if it was not, it follows that in our view there was no transfer of the tenure within section 16 (1). On a reference to the plaint it will be observed that it is not suggested that such consent has been given. All that is said is that the plaintiff's officers in Puri, upon the application for registration, asked the defendant and his officers to pay the larger mutation fee, which was refused. There is in this no suggestion that they, the officers in Puri, had authority to give consent, much less that they gave such consent.

The sequence of events contemplated by section 16 (1) seems to be that first the transferee shall apply to the landlord for registration, and that the landlord shall then allow the registration, and that upon his allowing the registration a fee shall become payable. The landlord is within his rights in refusing his consent in the case of a non-transferable tenure. If he should refuse no registration can be enforced by the transferee, and sub-section (3) of section 16 will not avail him. It should be inferred from the pleadings that registration was asked for and refused, which is tantamount to refusal of consent. How then can it be said that the landlord who has refused to consent to the transfer can claim that which is only payable on a transfer taking place? In the argument before us the learned Vakil for the appellant has intimated that he is quite willing to pay the fee prescribed in section 16 (1) (*a*) *viz.*, 25 per cent. of the purchase price, amounting to Rs. 3,000, contending that the alternative fee prescribed by sub clause (*b*), *viz.*, six times the annual rental does not apply as no rent is payable to the landlord by a *sarbarakar* but only revenue. This is, no doubt, the real dispute between the parties. The respondent, however, refused to accept this and contends that the matter is concluded by the pleadings. No doubt, the plaint alleges that rent is payable by the defendant, and there is no specific denial of this in the written statement. The appellant, therefore, takes his stand upon the position that there has been no transfer within the meaning of the section. There are many cogent reasons for holding that until the landlord's consent to registration has been obtained no fee is payable. Dr. Mitter, however, contends that registration being compulsory the landlord may, as soon as the transfer becomes known to him, although incomplete until his consent is obtained, call upon the transferee to apply for registration and deposit a fee. That does not seem to be the meaning of the section, for there may be many cases in which a transferee might have good reasons for not making such an application, as, for instance, he might know that his application would be rejected, and in that case the making of an application would merely put the tenants of the estate upon notice that the transferee's position was a precarious position, and result in their taking advantage of the fourth clause of section 16 to refuse all payment of rent;

or, again, it might be that the fee known to be payable would be so large that it would be better to risk the consequences of failure to make an application rather than to pay the requisite fee. It might turn out that the transferee had made a bad bargain and did not wish to complete his title by paying a large registration fee to the landlord, and it would be unreasonable to hold that in such a case he should be obliged to apply for the landlord's consent and thereby complete his title against his will, rendering himself liable to a further outlay for registration fees. It has been held in the case of *Mritunjoy Praharaj* v. *Sree Jagannath Jeu* (1) that a landlord is entitled to sue for the fee leviable upon an application for the registration of the transfer of an occupancy holding, even when the transferee has failed to make any application for such registration.

It should be noted, however, that the procedure to be followed in cases of the transfer of occupancy rights under section 31 is somewhat different from that prescribed by section 16. Under section 31 the ultimate arbiter upon the application of the transferee is not the landlord as in the case of a non transferable tenure, but the Collector, who shall decide whether the transfer shall be registered or not even in cases where the landlord objects; but, assuming that the decision given in that case in respect to the payment of registration fees under section 31 applies equally to the landlord's rights under section 16, it was there held that the landlord's right to levy a fee was contingent upon his consent to the transfer. This appears clear from the following passage from the judgment :—

" It is the duty of the tenant to apply to the landlord for his consent, and once the landlord has given his consent the tenant is clearly liable to pay the fee prescribed by the Act. In this case the landlord has voluntarily consented to a transfer of the tenancy to the defendant, and once he has done this his right to sue arises, even though the tenant may not have expressly applied for registration."

In the case now under consideration it does not appear that the landlord ever consented to the transfer. It seems clear on the sequence of events contemplated by the section that until the consent has been given no cause of action will arise. We are asked by Dr. Mitter to hold that the filing of the suit is in itself an indication of the landlord's consent; and it is suggested by him that if it is necessary definitely to state in the plaint that the landlord had given his consent to the transfer, he was prepared to make an amendment to his plaint to the effect that the landlord was willing to acknowledge the transfer as valid against himself. But he was not in a position to add to the plaint a statement to the effect that before the filing of the suit any intimation had been given to the defendant of the plaintiff's consent to the transfer. It is well settled that a cause of action must be antecedent to the institution of the suit and cannot arise from the pleadings themselves. It follows that the landlord's consent not having been given before the institution of the suit there was at the time of the institution of the suit no cause of action, and that the plaintiff's suit must be dismissed. It is not necessary, therefore, to consider the remaining issues. The objection to jurisdiction was not pressed, and we would note only that our attention has been drawn to a Notification in the Bihar and Orissa Gazette, vesting Babu Raghabananda Das by the Local Government with powers to discharge any of the functions of a Deputy Collector under the Act. He is, therefore, a Deputy Collector within the meaning of section 3 (4) and (6) and is, therefore, a Collector within the meaning of that section and, therefore. had jurisdiction to try this suit. We note further that upon the question of interest Dr. Mitter admits that he is unable to support the judgment of the Sub-Deputy Collector.

The result of our findings is that the suit must be dismissed as disclosing no cause of action The appeal will be allowed, the judgment and decree of the Sub-Deputy Collector will be set aside, and in lieu thereof judgment will be entered for the defendant with costs here and in the Court below.

Appeal allowed.

(1) 47 Ind. Cas. 34; 3 P. L. J. 351.

MAHABIR SINGH v. BEHARI SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 39 OF 1918.

June 4, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C.

MAHABIR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BEHARI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal to wrong Court under advice—Time spent in prosecuting appeal, exclusion of—Bona fides *of appellant.*

Where an appeal is preferred to a wrong Court in good faith and under advice that that Court has jurisdiction, the time spent in prosecuting the appeal should be excused or added under section 5 of the Limitation Act.

Appeal against the decree of the Subordinate Judge, Partabgarh, dated the 16th January 1918.

Mr. *Raja Prasad*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondents.

ORDER.—The affidavits filed show that the defendants-appellants filed the appeal in good faith in the Court of the District Judge, Rae Bareli, believing on advice rendered to them that the appeal lay there. Having regard to the decision of their Lordships of the Privy Council in *Brij Indor Singh* v. *Kanshi Ram* (1), where the time spent in making an application for review in good faith, although based upon a mistaken view of the law, was allowed to be added, and the decision in *Nistarini Dassya* v. *Sarat Chandra Mozumdar* (2), the time spent in prosecuting the appeal before the District Judge, Rae Bareli, should, I think, be added or excused.

The appeal is, therefore, within time. Let it be admitted.

Appeal admitted.

(1) 42 Ind. Cas. 43; 44 I. A. 218; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 45 C. 94 (P. C.).

(2) 29 Ind. Cas. 680; 20 C. W. N. 49; 22 C. L. J. 279.

JWALA PRASAD v. SHAMA CHARAN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 947 OF 1917.

July 16, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Walsh.

JWALA PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHAMA CHARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 73, 80—Promissory note, suit on—Agreement postponing date of payment—Limitation, commencement of.

The period of limitation applicable to a suit upon a bill of exchange or promissory note, accompanied by a writing postponing the right to sue for a definite period, is contained in Article 80 of Schedule I to the Limitation Act, and the period commences to run from the date when such bill or note becomes payable. [p. 236, col. 1.]

Second appeal against the decision of the Additional District Judge, Gorakhpur, dated the 25th May 1917.

Mr. *K. N. Katju*, for the Appellants.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit on the basis of a promissory note dated the 13th of June 1913. The defendant No. 1, one Shama Charan, owed money to the Kayastha Trading and Banking Corporation, Limited, Gorakhpur, and in liquidation of this debt he executed the promissory note for Rs. 700 on the 13th of June 1913 in favour of his creditor. This promissory note was payable on demand, and on the same day the executant of the promissory note wrote a letter to the Manager of the Kayastha Trading and Banking Corporation asking that the period for suing on the promissory note should be postponed for one year, within which time he promised to pay the amount due on the promissory note. The promissory note was subsequently assigned to defendant No. 3, a relation and *benamidar* of the plaintiff. The suit was filed on this promissory note on the 25th of November 1916. If the period of limitation is calculated from the date of the execution of the promissory note then the suit would be barred by time; but it is argued on behalf of the appellants that the period of limitation has to run from the date of the expiry of one year after the date of the execution of the promissory note as provided by the

writing which accompanied it. This was the view taken by the Court of first instance. But the lower Appellate Court was of opinion, relying on the decision in *Somasundaram Chettiar* v. *Narasimha Chariar* (1), that the suit was barred by limitation. That Court overlooked entirely the proviso in Article 73 to the Limitation Act, which specially lays down that the period of limitation starts to run on a bill of exchange or promissory note from the date of the bill or note, provided that it is not accompanied by any writing restraining or postponing the right to sue. In this case the promissory note was clearly accompanied by a writing restraining or postponing the right to sue for one year, and, therefore, the Article of the Limitation Act applicable to the suit is not Article 73 but Article 80, which lays down that the period of limitation for a suit on a bill of exchange, promissory note or bond begins to run from the date when the bill, note or bond becomes payable. In this case, therefore, the period of limitation began to run from the 13th of June 1914 and the suit was not barred by time. The ruling referred to by the learned Additional Judge in *Somasundaram Chettiar* v. *Narasimha Chariar* (1) was overruled by a Full Bench decision of the same High Court in *Annamalai Chetty* v. *Velayudu Nadar* (2). No other question was involved in this case. We accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

(1) 29 M. 212; 16 M. L. J. 103.
(2) 32 Ind. Cas. 869; 39 M. 129; 3 L. W. 38; 19 M. L. T. 62; 30 M. L. J. 51; (1916) 1 M. W. N. 93 (F. B.).

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 27 OF 1918-19.

April 14, 1919.

Present:—Mr. Ferard, S. M.

TEJ PRASAD—APPELLANT

versus

RAM JAS PANDE—RESPONDENT.

Landlord and tenant—Non-occupancy tenant obtaining mortgage of holding, effect of—Redemption—Tenant, position of.

Where a non-occupancy tenant of a holding obtains a mortgage of the holding, his tenancy falls into abeyance during the existence of the mortgage and, although he cannot reckon the period of the mortgage towards the acquisition of occupancy rights, on redemption he reverts to his position of tenant and is not a trespasser.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 9th October 1918, in the case of determination of tenure.

JUDGMENT.—The fields in suit are Nos. 1048 and 1155.

As regards No. 1155, the respondent was a 5 years' non-occupancy tenant at the settlement of 1307 *Fasli* at a rent of Rs. 2-12-0. Afterwards the fields were mortgaged to him. The mortgage was redeemed a year or two ago and he is still on the land. The appellant urges that he is a trespasser, but in the absence of rulings to the contrary I must go by the rulings quoted at page 86 of Agarwala's Tenancy Act, 5th Edition, and hold that respondent's tenancy was merely in abeyance during his mortgage and although he cannot count the period of the mortgage towards acquisition of occupancy rights, he has nevertheless reverted to his position of a tenant and is not a trespasser. I, therefore, agree with the Commissioner as regards this number.

As regards the other number 1048, the Commissioner has assumed that the case is the same, but I can find nothing on the record to show that as regards this number respondent was a tenant in the 1307 *Fasli* Settlement. The settlement extract is for No. 1044, not No. 1048, and the Assistant Collector seems to have been muddled also, as he first speaks of No. 1155 only being recorded as respondent's tenancy at settlement and afterwards speaks of two numbers. It is possible that No 1044 in the settlement extract is a clerical error for No.

1048. I would, therefore, call for a report as to whether No. 1048, the second number in suit, was recorded in respondent's tenancy at the 1307 Settlement. If so, respondent is a tenant of it similarly to No. 1155, and if not, he is a trespasser holding over after his mortgage has expired.

No fresh date will be fixed.

Report called for.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 495 OF 1918.

January 20, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

SARAT CHANDRA DAS—PETITIONER

versus

MATI LAL CHUCKERBUTTY AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 90—Civil Procedure Code (Act XIV of 1882), ss. 310A, 311—Bengal Tenancy Act (VIII of 1885), s. 170—Execution of decree—Sale of taluq—*Tenure-holder, whether entitled to apply to set aside sale.*

Petitioner, who held a permanent under-tenure in a *taluq* which was sold in execution of a decree for arrears of rent under the provisions of the Eastern Bengal and Assam Tenancy Act, applied under Order XXI, rule 89, of the Civil Procedure Code to have the sale set aside :

Held, (1) that section 170 of the Bengal Tenancy Act did not exclude from the operation of section 310A of the Civil Procedure Code of 1882, corresponding to Order XXI, rule 89, of the Civil Procedure Code of 1908, a tenure or holding attached in execution of a rent-decree and that, therefore, Order XXI, rule 89, Civil Procedure Code, was applicable to a sale held for arrears of rent in Eastern Bengal and Assam; [p. 237, col. 2]

(2) that the petitioner, holding an under-tenure in the *taluq* sold, had such interest therein as would entitle him to apply under Order XXI, rule 89, of the Civil Procedure Code to set aside the sale of the *taluq* in execution of a rent-decree. [p. 238, col. 2.]

Paresh Nath Singha v. *Nabogopal Chattopadhya*, 29 C. 1; 5 C. W. N. 821 (F. B.), *Narain Mandal* v. *Sourindra Mohan Tagore*, 32 C. 107, *Chandra Kumar Nath* v. *Kamini Kumar Ghose*, 11 C. W. N. 742 and *Abdul Aziz* v. *Tafajaddin*, 23 Ind. Cas. 839; 19 C. W. N. 326, relied on.

The scope of Order XXI, rule 89, of the Civil Procedure Code, 1908, is not narrower than that of section 310 A of Act XIV of 1882. [p. 238, col. 1.]

Rule against an order of the Additional Sub Judge, Backergunge, in Miscellaneous Appeal No. 76 of 1918.

Babu *Upendra Lal Roy*, for the Petitioner.

Babu *Abinash Chandra Banerjee*, for the Opposite Party.

JUDGMENT.—The petitioner in this Rule held a permanent under-tenure in a *taluk*. It was sold in execution of a decree for arrears of rent under the provisions of the Eastern Bengal and Assam Tenancy Act and the petitioner applied under Order XXI, rule 89, of the Civil Procedure Code to have the sale set aside on deposit of money under that section.

The case comes from the District of Backergunge.

Section 170 of the Eastern Bengal and Assam Tenancy Act does not exclude the operation of section 310A (corresponding to Order XXI, rule 89, of the present Code of Civil Procedure) to a tenure or holding attached in execution of a rent decree, as is done by section 170 of the Bengal Tenancy Act. Order XXI, rule 89, Civil Procedure Code, therefore, applies to a sale held for arrears of rent in Eastern Bengal and Assam, and the question for consideration is whether an under-tenure comes within that rule. Order XXI, rule 89, says: "Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside." We think that a person holding a permanent under-tenure in the property sold holds an interest therein. His rights are undoubtedly affected by the sale; in fact it can be annulled by the purchaser. In the case of *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (1) it was held by the majority of the Full Bench that a mortgagee of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it is entitled to make an application under section 310A of the Code of Civil Procedure as being a person whose immoveable property has been sold within the meaning of that section. That case is one of a simple mortgage, but it lays down the principle that a person having an interest in the property is entitled to come in under section 310A.

(1) 29 C. 1 (F. B.); 5 C. W. N. 821.

It is to be noted that under section 310A, the words were "any person whose immoveable property has been sold," and the Order XXI, rule 89, which has replaced that section says: "any person either owning such property or holding an interest therein etc." We think that these words are more comprehensive than the words of section 310A. In the case of *Narain Mandal* v. *Sourindra Mohan Tagore* (2) Brett and Mookerjee, JJ., held that when a *mokarari* tenure is sold in execution of a decree for arrears of rent, a *dar-mokarariдar* has a right to come in and make a deposit under section 310A of the Civil Procedure Code, being a person whose immoveable property has been sold within the meaning of that section. In the case of *Chandra Kumar Nath* v. *Kamini Kumar Ghose* (3) Maclean, C. J., and Fletcher, J., following the case of *Narain Mandal* v. *Sourindra Mohan Tagore* (2) held that an under-*raiyat* can apply under section 310A of the Civil Procedure Code as being a person whose immoveable property has been sold in execution of a decree for arrears of rent due in respect of the superior holding.

In any case, we do not think that the scope of Order XXI, rule 89, is narrower than that of section 310A of the old Code, under which it has been held that a person in the position of the petitioner can apply under that section.

Reliance is placed on behalf of the opposite party on the decision of the case of *Administrator General of Bengal* v. *Mahomed Kholil* (4). That case was decided before the Full Bench case of *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (1) and, therefore, cannot be accepted as an authority in support of the contention raised on behalf of the opposite party; and upon this ground the learned Judges in the case of *Narain Mandal* v. *Sourindra Mohan Tagore* (2) distinguished that case.

In the case of *Abdul Aziz* v. *Tafajaddin* (5) the learned Judges (Mookerjee and Beachcroft, JJ.) observed that "the rule formulated in rule 90, Order XXI, Civil Procedure Code, has a wider scope, and is of a more comprehensive character than the rule laid down in section 311 of the Code of 1882", because the expression "a person whose interests are affected by the sale" in Order XXI, rule 90, of the present Code has obviously a wider import than the expression "a person holding an interest in the property sold" in section 311 of the old Code. That may be so; but that does not affect the construction of Order XXI, rule 89, in any way: and so far as the scope of the present rule 89, Order XXI, goes, we think that it is at any rate not narrower than that of section 310A of the old Code. We are accordingly of opinion that the petitioner had *locus standi* to make the application under Order XXI, rule 89.

The order of the Court below must be set aside and the case sent back to the Court of first instance for disposal of the application according to law.

Costs, one gold *mohur*, to abide the result. The Rule is made absolute.

Rule made absolute.

(2) 32 C. 107.
(3) 11 C. W. N. 742.
(4) 5 C. W. N. cxxxii (132).
(5) 23 Ind. Cas. 839; 19 C. W. N. 326.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION PETITION No. 70 OF 1917-18.

March 5, 1919.

Present :—Mr. Ferard, S. M.

BHAGIRATHI SHUKUL—APPLICANT

versus

Sahabzada RABI PRATAP NARAIN SINGH—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 21—Mandidhari rights, purchaser of, position of—Right, whether transferable.

Mandidhari rights are not transferable, and a purchaser of such rights is in no higher position than a non-occupancy tenant. The fact that the purchaser of such rights has redeemed a prior mortgage of the same and has entered into cultivation himself would not improve his position. [p. 239, col. 2.]

Application for revision of the order of the Commissioner, Gorakhpur Division, dated the 8th April 1918, in the case of ejectment.

JUDGMENT.—This is an application for revision. The applicant suggests no

flaw in jurisdiction such as would justify interference in revision under the strict wording of section 185, Tenancy Act.

It is not a case in which I can stretch the section on the ground of equity. The fields were the Mandidhari of Partab Singh, etc. They were in occupation of Bhauna, their mortgagee, since long. The applicant purchased their Mandidhari rights in 1902. He could not do so under the law—Mandidhari rights not being transferable. The authority* for this is to be found quoted in note 14 on section 21 in Agarwala's Tenancy Act, 5th Edition. Had the applicant redeemed the prior mortgage and entered into cultivation himself when he made this illegal purchase of Mandidhari rights in 1902, he would have acquired occupancy right now by lapse of time. But the land remained in cultivation of the mortgagee Bhauna till 1908. The applicant then paid off Bhauna mortgagee and has cultivated himself since then, but his position can be no higher than that of a non occupancy tenant since 1908.

The Commissioner is right.

Application rejected.

No order as to costs as respondent is absent.

Application rejected.

**Kidar Nath Kasaundhan* v. *Naipal Singh*, 12 Ind. Cas. 922; 8 A. L. J. 1303, 34 A. 155—*Ed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1801 OF 1917.

December 5, 1918.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

CHOCKALINGA NAYAKAN—DEFENDANT—APPELLANT

versus

ARUNACHALAM CHETTIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Lease stipulating permanent rent—Reverter to waram, *landlord's right of—Grant, construction of, principles of—Transfer of Property Act (IV of 1882), s. 8, scope of.*

Where a lease-deed provided for a permanent rate of rent being paid by the lessee 'for ever and ever' and the same was coupled with words of inheritance, that the property shall descend to the heirs of the lessee:

Held, that the lease was not only for a fixed period, but conveyed an absolute estate, and that it was not open to the lessor or his assignee to revert to *waram*. [p. 240, col 1.]

Prima facie, the terms of a document must be looked at to ascertain the nature of the estate granted by it, and it is only where there is any doubt about its import that other considerations, as the extent of the right possessed by the grantor, can be taken into consideration. [p. 240, cols. 1 & 2.]

Boddington v. *Robinson*, (1875) 10 Ex. 270; 44 L. J. Ex. 223; 33 L. T. 364; 23 W. R. 925, explained.

Section 8 of the Transfer of Property Act is not a canon of construction but a rule relating to the legal effect of a grant. [p. 240, col. 2.]

Second appeal against the decree of the District Court, Ramnad, in Appeal Suit No 61 of 1916, preferred against the decree of the Court of the Special Deputy Collector, Ramnad at Manamadura, in S. S. No. 462 of 1915.

FACTS appear from the judgment.

Mr. *T. M. Krishnaswami Aiyar*, for the Appellant.—The plaintiff could not revert to *waram* as Exhibit I, the grant by Kolandaiswamy to defendant, was a permanent *patta*. It provides for a fixed rent, and that is what the defendant is bound to pay. The words in the document 'for ever and ever' and the use of words of inheritance clearly show that the document conveyed an absolute estate.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.—Kolindaiswamy Devar, the grantor under Exhibit I, was himself a lessee for a period of 30 years. He could not grant a larger interest than he himself had. Under section 8 of the Transfer of Property Act a grantor must be deemed to convey only what he is capable of granting. In considering the nature of the interest taken by the grantee, the extent of the grantor's interest may be taken into account: *Boddington* v. *Robinson* (1).

JUDGMENT.—One Kolandaiswamy Devar obtained a lease for 30 years of the village in dispute from the Zamindar of Sivaganga in 1882. In 1886 he executed Exhibit I to the defendant. Exhibit F is the *muchilika* from the defendant to Kolandaisawmy. In March 1887 the suit village and other villages were permanently assigned to Kolandaisawmy by the Zamindar. The right

(1) (1875) 10 Ex. 270; 44 L. J. Ex. 223; 33 L. T. 364; 23 W. R. 925.

of the assignee was purchased in Court-auction by the present plaintiff and he sues to recover arrears of rent from the defendant. The defendant pleaded that under Exhibit I he was bound to pay only the rent provided in the document and that plaintiff was not entitled to demand *waram*.

The main issue in the case was whether Exhibit I conferred a permanent right on the defendant. Both the Courts below were of opinion that it was not a permanent *patta* and that it was open to the plaintiff to revert to *waram*.

We are unable to agree with this conclusion. The document on the face of it fixes a permanent rate of rent for all time to come. The words "for ever and ever" occur in three places and are coupled further with words of inheritance, namely, the property shall descend to heirs. We are unable to hold that Exhibit I is merely a lease for a fixed period.

Mr. A. Krishnaswami Aiyar for the repondents referred to *Boddington* v. *Robinson* (1) and contended that the nature of the estate possessed by the grantor is a conclusive test of the nature of the grant made to the grantee. That decision does not support this extreme contention. No doubt, in considering the extent of the interest granted by a person, the nature of his right may be taken into account. Generally, if the language of the grant is ambiguous, such considerations may be of avail. But where the language is unambiguous and clear, we do not think in construing a grant the extent of the right possessed by the grantor should have any weight. Section 8 of the Transfer of Property Act was also relied on. That section lays down that the grantor must be deemed to have conveyed only what he was capable of conveying. It is not a canon of construction but a rule relating to the legal effect of a grant. The observations of the Judicial Committee in *Radhakant Lal* v. *Musammat Nazama Begum* (2) support this view. For these reasons we are of opinion that, *prima facie*, the terms of a document must be looked at to ascertain the nature of the estate granted by it and it is only where there is any doubt about its import that other considerations can be taken into account. In our opinion Exhibit I conveyed an absolute estate.

The further question is whether it is binding upon the plaintiff. On the one hand, Mr. T. M. Krishnaswami Aiyar for the defendant relied upon section 43 of the Transfer of Property Act and upon section 26 of the Estates Land Act. On the other hand, Mr. A. Krishnaswami Aiyar referred to the well known principle enunciated in *Patman* v. *Harland* (3) by Jessel, M. R., that where a man has notice of the document, he must be deemed to have notice of the terms of the document and contended that as both parties were cognizant of all the facts, no question of estoppel either under section 115 or section 43 of the Transfer of Property Act can arise. Without expressing any opinion whether constructive notice of the contents of a document would disable a party from relying upon an actual representation, we think that further facts ought to be ascertained in this case before applying the law. In the first place, we must know whether the facts alleged in paragraph 7 of the written statement are true and also whether the defendant was otherwise actually aware of the nature of the estate which Kolandaiswamy had at the time of Exhibit I. Also before applying section 26 of the Estates Land Act, Courts must know what was the state of the property at the time of Exhibit I and why a permanently low rate of rent was fixed at the time of the grant. It is only on the ascertainment of these facts that the law can be applied. The issues that must be tried are:—

1. Whether the plaintiff made any representation as stated in paragraph 7 of the written statement?

2. Whether the defendant was aware that Kolandaiswamy had only a limited estate?

3. Under what circumstances and why a favourable rate of rent was fixed in Exhibit I?

4. Whether by operation of section 26 of the Estates Land Act or by the principle of estoppel enunciated in section 43 of the Transfer of Property Act, the plaintiff is precluded from reverting to *waram*?

(2) 45 Ind. Cas. 806; 35 M. L. J. 99 at p. 102; 22 C. W. N. 649; 27 C. L. J. 632; 16 A. L J. 537; 5 P. L. W. 72; 23 M. L. T. 392; (1918) M. W. N. 386; 20 Bom. L. R. 724; 45 C. 733 (P. C.).

(3) (1881) 17 Ch. D. 353; 50 L. J. Ch. 643; 44 L. T. 728; 29 W. R. 707.

As the determination of these issues would involve the taking of further evidence and as the case was disposed of on a preliminary point, we think, in the circumstances of the case, it is desirable that the decrees of both the Courts should be reversed and the case should be remanded to the Court of first instance for disposal in the light of the above observations. Parties may be permitted to file additional statements. The Court may also frame further issues, if necessary, and give further opportunities to the parties for adducing evidence. We order refund of Court-fee; costs to abide.

M.C.P.

Appeal allowed; Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION NO. 145 OF 1917-18.

March 9, 1919.

Present:—Mr. Ferard, S. M.

TURAB KHAN—APPELLANT

versus

Raja BHUBNESH PARTAP SINGH—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 193 (a)—Appeal, whether lies from order.

Orders, as opposed to decrees, under the Agra Tenancy Act are not appealable

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 3rd September 1918, in the case of ejectment.

JUDGMENT.—The Assistant Collector dismissed the suit on a preliminary point that demarcation should precede suit. The Commissioner in first appeal overruled this, holding that there was sufficient definition in the plaint. He remanded the case for disposal on the merits. This was an order under rule 23, Order XLI, Civil Procedure Code, and is classed as an order in rule 1 (*a*), Order XLIII, Civil Procedure Code. It was not a decree within the definition of decree in section 2, Civil Procedure Code.

There are no appeals from *orders*, as opposed to *decrees*, under the Tenancy Act, inasmuch as section 193 (*a*), Tenancy Act, rules out Chapter XLIII, Civil Procedure Code, relating to appeals from orders. This appeal, therefore, does not lie and the appellant must await the final determination of the suit in the lower Court.

Different views have been taken on the question as to whether demarcation must in *all* cases precede a suit for ejectment—there are, I am aware some decisions supporting the line taken by the Commissioner, and I am, therefore, not prepared to consider whether I can or should exercise interference at the present stage by revisional jurisdiction.

Appeal dismissed. Costs on appellant.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 479 OF 1918.

July 9, 1919.

Present:—Mr. Justice Das.

DAWARKA PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MAKHU LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 9—Local investigation—Court, power of, to make local inspection—Duty of Court—Appeal, second—Appellate Court, judgment of, based on result of local inspection made by trial Court, legality of.

Order XXVI, rule 9, of the Civil Procedure Code gives no power to a Court to itself hold a local inspection. A Judge can only hold such inspection for the purpose of understanding the evidence and for no other purpose. He must decide the case on the evidence adduced before him, and, if he finds that complete justice cannot be done without a local investigation, he has power, under the rule above quoted, to appoint a commission for this purpose; the fact that the plaintiff has not applied for this to be done, does not relieve the Judge of the duty imposed upon him of having before him all the material available which is necessary for the determination of the point at issue between the parties. [p. 243, col. 1.]

The judgment of a lower Appellate Court, based entirely upon a local investigation conducted by the Judge of the Court of first instance himself, cannot be sustained in second appeal. [p. 243, col. 1.]

Appeal from a decision of the Subordinate Judge, Monghyr.

Mr. *Harendra Nath Sen*, for the Appellants.

Mr. *Jagannath Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the appellants for ejectment of the respondent from the land in dispute, on the ground that the defendant has used the land in a manner which

renders it unfit for the purposes of the tenancy. In other words, the suit was a suit under the provisions of section 155 of the Bengal Tenancy Act.

Now the complaint of the plaintiffs is that the defendant has erected a structure on 6 *cottahs* of agricultural land which the defendant purchased from one Phagu, who was the original tenant. The defendant on the other hand maintains that the structure was not raised on the 6 *cottahs* of land which he purchased from Phagu, but on one *cottah* of land which was let out to the defendant for building his house and which adjoins the six *cottahs*.

The Court of first instance thought that it was difficult to say exactly whether the disputed houses stand over the disputed land or over one *cottah* of land which was settled with the defendant. He, however, held a local inspection and, as a result of his local inspection, came to the conclusion that a portion of the house stood on the 6 *cottahs* of land but that the remaining portion of the house stood on the one *cottah* of land. In the result he granted a modified decree to the plaintiffs. There was an appeal by both parties to the lower Appellate Court. The respondent complained that the Court of first instance was incompetent to grant any decree at all in favour of the plaintiffs. The respondent's appeal succeeded before the lower Appellate Court. The appellants on the other hand maintained that the lower Appellate Court should have granted them a decree for ejectment under section 155 of the Bengal Tenancy Act. The lower Appellate Court says this: "The learned lower Court made a careful local enquiry and was satisfied that these other structures do not stand on the 6 *cottahs*. I do not see how the appellant's contention can be accepted." It is clear to me, therefore, that the lower Appellate Court relied entirely upon the local investigation conducted by the Court of the first instance.

The question, whether a Court is entitled, under the new Civil Procedure Code, to hold a local enquiry himself has been raised in several cases, but so far as I know, has not yet been decided. So far as the English cases are concerned, it is clear that a Court is not entitled to hold a local inspection inasmuch as it may hamper the Court in coming to a conclusion on the evidence before it. But the Civil Procedure Code of 1882 did undoubtedly, empower a Court to hold a local inspection but Order XXVI, rule 9, which, in my opinion, is a complete code on the subject, gives no power whatever to a Court to hold a local inspection. The point is an interesting one and it is interesting to compare the wording of section 392 of the Code of 1882 with the wording of Order XXVI, rule 9. Section 392 of the Code of 1882 provided as follows:—

"In any suit or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits, or damages or annual nett profits, and the same cannot be conveniently conducted by the Judge in person, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court."

Order XXVI, rule 9, however, provides that: "In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits, or damages or annual net profits the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court."

It will be noticed that the words occurring in section 392, *viz.*, "and the same cannot be conveniently conducted by the Judge in person" have been altogether omitted in Order XXVI, rule 9, and it is with reference to this that Mr. Justice Mookerjee in the case of *Rai Kishore Ghose* v. *Kumudini Kanta Ghose* (1) says as follows: "It may be pointed out, however, that Order XXVI, rule 9, of the Code of 1908, which corresponds to section 392, omits the words 'and the same cannot be conveniently conducted by the Judge in person' and when rule 9 requires to be construed, it may

(1) 14 Ind. Cas. 377; 15 C. L. J. 138.

be a matter for argument that the intention of the Legislature was to adopt the English rule." The English rule, as I have said before, does not allow a Judge to hold a local inspection himself.

But whether under the new Code a Judge is entitled to hold a local inspection or not, it is perfectly clear that he can only hold it for the purpose of understanding the evidence and for no other purpose. He must still decide the case on the evidence adduced before him and if he finds that it is impossible to decide the case on the evidence before him, he has ample power under Order XXVI, rule 9, to issue a commission to such person as he thinks fit to make such investigation and to report thereon to Court. The complaint of the Courts below has been that the plaintiffs did not apply for issue of commission, but, in my opinion, if the Court thought that it was impossible for it to determine the question at issue between the parties without a local investigation, it was not only competent to him to issue a commission but it was his duty to do so, and there can be no doubt that the Court of first instance undoubtedly thought it could not do complete justice between the parties without local investigation. The fact that he himself conducted the local investigation shews conclusively that in his opinion complete justice could not be done without such an investigation.

The learned Vakil appearing on behalf of the respondent argues that the Court of first instance decided this case not only on the result of his local inspection but on the evidence adduced before it. I am unable to agree with the learned Vakil on this point. But whatever may have been the opinion of the Court of first instance, it is to my mind clear beyond doubt that the lower Appellate Court based its decision on the local inspection held by the Munsif and on nothing else. In my opinion this judgment cannot be sustained. I would, therefore, allow this appeal and remit the case to the lower Appellate Court with a direction that the lower Appellate Court should remit it to the Court of first intance in order to enable it to decide the questions at issue between the parties. If the Court of first instance thinks that it is unable to decide the case without a local investigation or if the plaintiff makes an application before it for the issue of a commission, then the Court of first instance will have power under Order XXVI, rule 9, to issue a commission to such person as it thinks fit for the purpose of holding a local investigation and to make a report to the Court.

The appellants are entitled to the costs of this appeal and of the appeal to the lower Appellate Court. The costs incurred in the Court of first instance will abide the result and will be disposed of by that Court.

The parties will not be permitted to adduce any further evidence before the Court of first instance either on the question of damage or on any other question at all.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 67 OF 1918.

October 10, 1918.

Present:—Mr. Justice Seshagiri Aiyar.

MARUDAI MUTHIRIAN—DEFENDANT—PETITIONER

versus

CHINNAKANNU MUTHIRIAN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19, Sch. I, Art. 61—Joint mortgage-bond—Payment by plaintiff—Contribution, suit for—Limitation, commencement of—Acknowledgment of liability under bond, effect of—Civil Procedure Code (Act V of 1908), O. VII, r. 6—Plaint—Suit barred by limitation—Ground saving limitation, whether should be specifically pleaded.

A suit to recover excess payments made by the plaintiff towards a joint mortgage-bond executed by himself and the defendant, is a suit for contribution and must be brought within the period of limitation prescribed by Article 61 of Schedule I to the Limitation Act, the period counting from the date of the last payment made by the plaintiff; any payment made by the defendant subsequently thereto would be of no avail to the plaintiff. [p. 244, col. 1.]

Where a plaintiff, who is about to get a mortgage-bond assigned to himself, receives a notice from the defendant that "if you get an assignment, out of the sum of Rs. 100 that may still be due my liability will be only Rs. 50", the notice does not amount to an

acknowledgment of liability to the plaintiff. It is only an acknowledgment of liability under the bond.

Where a suit is brought after the prescribed period of limitation, it is incumbent on the plaintiff, under Order VII, rule 6, of the Civil Procedure Code, to state explicitly the ground on which the bar is saved.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Small Causes, Trichinopoly, in Suit No. 2804 of 1917.

Mr. *T. V. Muthukrishna Ayyar*, for the Petitioner.

Mr. *S. Venungopala Chettiar*, for the Respondent.

JUDGMENT.—I am unable to agree with the learned Small Cause Court Judge on the question of limitation. The facts are not in dispute. The plaintiff and the defendant had jointly executed a deed of mortgage to one Appaniengar. The amount secured by the mortgage was Rs. 300, which came to nearly Rs. 533 with interest thereon. The plaintiff paid admittedly Rs. 303 and the defendant only Rs. 227. This is a suit to recover from the defendant contribution for the amount which the plaintiff had paid in excess of the amount due from him. There were various pleas in the lower Court and I need not refer to all of them now. The only point is whether this suit was within time as one for contribution. The last payment by the plaintiff was made in January 1914 and the suit was instituted on the 2nd July 1917. *Prima facie*, it was more than three years since the accrual of the cause of action. The learned Judge in the Court below was of opinion that as the defendant made payment under the bond in September 1914, the bar of limitation was saved. He is clearly wrong in this view. It is not the payment of the defendant that matters, but it is the payment by the plaintiff that gives him the right to sue, as the plaintiff's claim is in respect of the excess payment made by him. To such a suit, Article 61 of the Limitation Act is clearly applicable and under that Article the suit must be brought within three years of the date of payment. If any authority were needed for this view, I may refer to the order of reference made by Bhashyam Ayyangar, J., in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz* (1). The learned Vakil for the petitioner did not support the judgment of the lower Court on this point. What he contended was that the claim against the defendant was saved by the acknowledgment under Exhibit IV. It was a registered notice sent on the 26th July 1914, before the defendant had made the last payment. At that time, defendant heard that the plaintiff was about to get the mortgage bond assigned to himself and he sent this notice saying that, "if you get an assignment, out of the sum of Rs. 100 that may be still due my liability will be only Rs. 50." This is not an acknowledgment of the liability to the plaintiff. It is only an acknowledgment of the liability under the bond. Apart from this there is another fatal objection to regarding Exhibit IV as an acknowledgment, because under Order VII, rule 6, it is incumbent upon the plaintiff who brings the suit after the prescribed period of limitation to state explicitly the ground on which the bar is saved. He has not stated that. There is no issue about it and there is no evidence connecting Exhibit IV with the liability which the defendant was under to the plaintiff. For all these reasons, Exhibit IV cannot be regarded as saving limitation. As I already mentioned, the suit was brought more than three years after the last payment made by the plaintiff and as such it is barred by limitation. The decree of the Subordinate Judge must be reversed and the suit dismissed with costs throughout.

M. C. P.

Appeal allowed.

(1) 26 M. 686.

YAKUB JAN *v.* RAHMAT NUR.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1332 OF 1918.

March 20, 1919.

Present :—Mr. Justice Abdul Raoof.

Musammat YAKUB JAN—PLAINTIFF—APPELLANT

versus

Musammat RAHMAT NUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 48—Priority—Gift by registered deed—Previous oral sale with knowledge of donee—Donee, whether can claim priority.

Plaintiff sued for possession by partition of half of a house, alleging that it had been given to her orally by her father-in-law as part of her dower. The defendants, the widow and daughters of the deceased father-in-law, pleaded a subsequent gift by registered deed of the entire house by him in favour of his wife, and contended that the oral transfer in favour of the plaintiff, even if proved, could not prevail. It appeared that the defendant widow was present at the *nikah* when the half share in dispute was given to the plaintiff:

Held, (1) that inasmuch as the oral transfer made in favour of the plaintiff was in consideration of a portion of her dower, it was a sale rather than a gift; [p. 246, col. 2.]

(2) that as the defendant widow had notice of the oral transfer previously made, it was not open to her to claim the benefit of the rule laid down in section 48 of the Registration Act. [p. 246, col. 2.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 21st March 1918, reversing that of the Subordinate Judge, Rawalpindi, dated the 1st January 1918, decreeing the claim.

Mr. *Nanok Chand*, for the Appellant.

Messrs. *Jai Gopal Sethi* and *R. Obbard*, for the Respondents.

JUDGMENT.—One Ghulam Hussain was married to *Musammat* Rahmat Nur. He had a son Nazar Hussain and two daughters Sardar Begam and Shahjehan Begam. His mother's name was Murad Begam. While yet his son Nazar Hussain was a minor, Ghulam Hussain got him married to Yakub Jan who too was a minor. This lady Yakub Jan has filed the present suit on the allegation that at the time of the marriage Ghulam Hussain gave her half of the house in dispute with Rs. 100 as part of her dower, that she came and occupied a portion of the house and lived in it for some time, that on the death of Ghulam Hussain unpleasantness having arisen between the members of the family who resided in the house, the plaintiff locked up the portion of the house occupied by her and left it and took residence with her husband in another house, that recently *Musammat* Rahmat Nur broke open the lock and took possession of the portion of the house in which the plaintiff used to live. She claimed possession over half of the house by partition. Ghulam Hussain's mother Murad Begam, *Musammat* Rahmat Nur and the two daughters of Ghulam Hussain, the father-in-law of the plaintiff, were made defendants to the suit. Nazar Hussain admitted the claim of the plaintiff. Rahmat Nur principally contested the claim and two main pleas were urged on her behalf, namely, (1) that the story of the transfer of the house in favour of the plaintiff as part of her dower was untrue and (2) that inasmuch as the transfer was made only orally and not by a registered deed, it could not prevail as against the deed of gift of the entire house made in her favour by Ghulam Hussain on the 13th July 1915, as it was a registered document and to be preferred under section 48 of the Registration Act. After the *nikah* (marriage ceremony) an entry relating to the marriage and to the giving of the house as part of the dower was made in the register of marriages. As regards this also a plea was put forward in defence in the alternative that as this entry was unregistered, it was inadmissible in evidence and the fact of the transfer could not be proved.

The Court of first instance framed two issues, namely, whether Ghulam Hussain deceased did give half share of the house in suit to the plaintiff in part payment of her dower, (2) if so, what was the effect of the deed of gift, dated the 13th July 1915, on the plaintiff's right.

On a consideration of the evidence on the record, the Court of first instance came to the conclusion that the transfer relied upon by the plaintiff was established. As regards the question of the want of registration of the entry in the marriage register, that Court held that the transfer which was relied upon was an oral one and the entry in the register was simply a memorandum of the arrangement or contract that had been effected between the parties. It, therefore, held that no registration was necessary. On the second issue it came to the conclusion that at the time Ghulam

Hussain executed the deed of gift on the 13th July 1915 in favour of *Musammat* Rahmat Nur, he was living under her influence and complete control and was ill. Therefore, the document was of no avail as it was not executed with the free will of the executant. In the alternative the Court also held that even if the executant was free and had willingly executed the deed relating to the entire house in favour of Rahmat Nur, he had no power or right to execute this deed of gift affecting the half share which had already been transferred to the plaintiff. Upon this finding the Court of first instance decreed the claim of the plaintiff. *Musammat* Rahmat Nur, Murad Begam, and the two daughters of Ghulam Hussain, namely, Sardar Begam and Shahjahan Begam preferred an appeal to the lower Appellate Court.

As regards the question of the transfer of half the house to the plaintiff in part payment of her dower, the lower Appellate Court agreed with the decision of the Court of first instance. It also agreed with the first Court as to the finding that the entry in the marriage register did not require registration, inasmuch as it only amounted to a memorandum of an oral agreement or contract.

As regards the question whether Ghulam Hussain was under the influence and control of *Musammat* Rahmat Nur the learned Judge came to a different conclusion. He held that the evidence on the record did not justify a finding that any kind of control or influence had been exercised by Rahmat Nur on Ghulam Hussain. As regards the effect of the deed of gift of the 13th July 1915 in favour of Rahmat Nur, he was of opinion that having regard to the provisions of section 48 the registered deed of gift was preferable to the oral transfer made in favour of the plaintiff. The learned Judge of the Court below treated the oral transfer in favour of the plaintiff as a transaction amounting to gift and held that as it was not followed by possession, it could not take effect as against the registered deed in favour of Rahmat Nur.

Taking this view the lower Appellate Court set aside the decree and judgment of the Court of first instance and dismissed the suit of the plaintiff. She has come up in second appeal to this Court,

The first question that has been argued before me by the learned Counsel for the appellant is that as found by the lower Appellate Court itself the plaintiff did get into possession after her marriage and that in any case she being a minor, the possession of Ghulam Hussain under whose guardianship she was living in the house must be looked upon as the possession of the minor. In my opinion there is force in this argument, but I need not base my judgment upon this ground alone. In my opinion the oral transfer made in favour of the plaintiff of half the house was in consideration of a portion of her dower. In other words, the transfer was made for consideration. Such a transfer more appropriately comes under the definition of a sale than that of a gift. The learned Judge of the Court below has relied upon the provisions of section 48 of the Registration Act in holding that the deed of gift in favour of *Musammat* Rahmat Nur was to be preferred and that the plaintiff was not entitled to succeed as against her. There is evidence in this case, and it has not been denied, that *Musammat* Rahmat Nur was present at the *nikah* when this half share was given to the plaintiff as part of her dower by her father-in-law Ghulam Hussain. The Court of first instance found clearly that the transfer in favour of the plaintiff was made with the knowledge of defendant No. 1, namely, *Musammat* Rahmat Nur. This finding is justified by the evidence on the record. The learned Judge of the lower Appellate Court, while applying the provisions of section 48 of the Registration Act, lost sight of the fact that as *Musammat* Rahmat Nur had had notice of the oral transfer, it was not open to her to claim the benefit of the rule laid down in section 48. There is authority for this proposition in reported cases, for example, see Punjab Law Reporter of 1916, (same case 29 Indian Cases page 305) [*Hardit Singh* v. *Behari Lal* (1)]. In my opinion the decree passed by the Court of first instance was a right decree. I set aside the judgment and decree of the lower Appellate Court and restore those of the first Court with costs in all Courts.

Appeal allowed.

(1) 29 Ind. Cas. 305; 9 P. L. R. 1916; 104 P. W. R, 1915,

PONNIAH NADAN *v.* DEIVANAI AMMAL.

MADRAS HIGH COURT.

APPEALS NOS. 241 TO 251 OF 1917.

August 15, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

V. PONNIAH NADAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

T. N. DEIVANAI AMMAL AND OTHERS—PLAINTIFFS—RESPONDENTS

Landlord and tenant—Ryotwari *village*—*Occupancy right, claim of, requisites of proof of*—*Burden of proof*—*Compulsory acquisition of land*—*Land Acquisition Act (I of* 1894*)*, *s.* 11—*Compensation, apportionment of, between* pattadar *and tenants from year to year.*

Where a person claims to have acquired occupancy rights under a *ryotwari pattadar*, the onus lies heavily on him to establish his claim. [p. 255, col. 1; p. 249, col. 2.]

Chandrasekharaswami v. *Nainar Ammal*, 43 Ind. Cas. 977; 7 L. W. 194; (1918) M. W. N. 219, dissented from.

Peria Karuppan v. *Annasawmi Iyer*, 12 Ind. Cas. 1; 21 M. L. J. 845; 10 M. L T. 185; (1911) 2 M. W. N. 162 and *Venkatachala Goundan* v. *Rangaratnam Aiyar*, 20 Ind. Cas. 374; 24 M. L. J. 571; 13 M. L. T. 450; (1913) M. W. N. 434, explained.

Mere continuity of possession for sometime, the payment of a uniform rate of rent where it is not inappreciable, or alienations made by the tenant behind the back and without the knowledge of the landlord, are not sufficient to establish a claim to occupancy rights. [p. 253, col. 2; p. 250, col. 2.]

History of *ryotwari* system and nature of the *ryotwari pattadar's* rights examined by Seshagiri Aiyar, J.

Where land is compulsorily acquired, under the provisions of the Land Acquisition Act, the tenants from year to year in respect of such land are entitled to have their share of the compensation apportioned. [p. 258, col. 1.]

Appeals against the decrees of the District Court, Tinnevelly, in Compensation References Nos. 42, 27, 28, 32, 33, 34, 39, 56, 57, 58 and 59 of 1916.

FACTS appear from the judgment.

Mr. *T. Narasimha Aiyangar*, for the Appellants.—The appellants, defendants, are entitled to the compensation money They have been paying a uniform rate of rent from generation to generation, at least from 1866. There is also the circumstance that the cultivators have been in continuous occupation. Also there have been instances of alienation by cultivators, and in one case a mortgage document was written by the *hukdar's kariasthan*.

The tenants had judgments in their favour supporting their claim to occupancy rights.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.—The rate of rent cannot be said to be nominal. In 1868 only the commutation from *waram* was made. Payment of Rs. 2-7 0 per acre of *nanja* after deducting *kist* is not low. There has not been continuous possession from generation to generation, or such long possession as will tend to an inference in favour of the rights. The majority of the cultivators agreed to hold their lands as tenants at-will. The judgments relied on are not available to them as *res judicata*, as the tenants have offered no proof that they derived their title under the tenants in those suits. Lastly the onus is heavily on the appellants, who are cultivators under *ryotwari patta*-holders to show that they have acquired occupancy rights, and they have not discharged it.

JUDGMENT.

WALLIS, C. J.—The question is whether the compensation awarded under the Land Acquisition Act for certain lands in a village in Tinnevelly should be apportioned between the Pattadar, a registered holder, which in this case is a temple, and the Ryots under it on the basis that the Ryots have occupancy rights in the lands, a claim which the District Judge has rejected.

The fifth report speaks of a practice in Tinnevelly under which land, which had been under cultivation by the Mirasidars or hereditary owners and had afterwards been left uncultivated by them, was cultivated by others who paid them 13 per cent. of the produce as Swami Bogam and divided the rest between the Government and themselves. There was a somewhat similar usage in Chingleput. Mr. Venkatarama Sastri for the respondent in this case says that it has not been proved that these lands were cultivated by the tenants in this way. All that we know is that in 1817 a pious founder acquired at a revenue sale a five-sixths interest in the lands in this village, and that he acquired the remaining one-sixth under Exhibit JJ. Exhibit JJ. is a sale of the one-sixth share of the land and does not refer to the existence of any persons on the land in the enjoyment of occupancy right. As regards the remaining five-sixths also, the presumption would appear to be that at the revenue sale what was purchased was the land. It may be that some, at any rate, of the predecessors of these tenants were on the land at that date but of that there is no evidence. Exhibit CO/1835 is an

order of the Board of Revenue to the Collector to resume the villages owing to diversion of the revenues to private purposes. It probably meant that the Collector was to manage under Regulation VII of 1817. Exhibit DD of 1842 ordered the villages to be banded over to the founder's son, who is to make arrangements to "manage the cultivation" and other business. Mr. Venkatarama Sastri relies strongly on this expression as negativing the existence of hereditary cultivators and showing that the trustee on behalf of the temple had the right to cultivate the land himself. If so, this would be against the claim to occupancy right. Exhibit FF is a Cadjan Muchilika executed by the tenants in 1856, in which they acknowledge they have received an Adaolai or lease from the temple. If they do not observe its terms they are to be liable to eviction. They are to wait on the trustee every three years and to receive an Adaolai like the one that had been granted to them, and in default were to abide his pleasure. This document does not seem to be conclusive either way, and was found not to have been proved by Mr. Goldie, the District Judge, in the appeal referred to below. Exhibit GG of October 1857 and the following documents show that there was a dispute as to the proper entries to be made in the village accounts. Till 1856, the Patta had been in the name of the temple and the names of the cultivators had been shown as in actual enjoyment but apparently without reference to separate plots. As he considered the cultivators had only the right of cultivation, the Karnam in the new accounts had not entered their names. The trustee was anxious that his name should be entered, but the Collector's Assistant thought it better that he should be shown as being in enjoyment as Hukdar. Exhibit GG 1, the register of personal complaints of 17th January 1859, shows that in that year the cultivators complained that "though the village had all along belonged only to the Ryots." it had been registered in the name of the trustee. The order refused to cancel the right of the Hukdar in the Patta or to register them as in enjoyment and referred them to a civil suit. Exhibit HH is a Razinamah setting forth a complaint made by the Hukdar's lessee against the Ryots which was settled in the lessee's favour

Exhibit 2, dated 12th October 1859, shows that the Hukdar filed a revenue suit against the tenants to enforce the acceptance of Adaolais, which was dismissed by the acting Collector for default. At the same time he passed an order with reference to the Ryots' claim to be entered as in enjoyment. They had admitted that the lands were the property of the Pagoda, but objected to the entry of the Hukdar as in enjoyment. The Collector observed that the entry of his name in the column of remarks tended to create disputes and mislead the authorities to the possible prejudice of the Royts' rights in the soil. He accordingly directed the trustee's name to be struck out and the names of the Ryots entered. For arrears of revenue the Ryots' crops were not to be liable but the land. This order was apparently confirmed by the Collector, and thereupon the Hukdar filed Original Suit No. 28 of 1859 in the Tinnevelly Munsif's Court. The plaint Exhibit A alleges in paragraph 4 that prior to 1856 the Hukdar had been in the habit of leasing the village to defendants Nos. 2, 5, 18, 43 and 46 who were cultivators in the village, and that these lessees let out the land to the other defendants for cultivation and cultivated it. It was very common for the landlord to arrange with a few leading villagers for the cultivation of the village and leave them to make their own arrangements with the other villagers and as pointed out in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) this, if established, would negative the existence of occupancy right. The plaint also relied on Exhibit FF in the present suit, the Muchilika executed on 25th November 1856 by 33 defendants said to be the leading villagers, and alleged that the 7th defendant had refused to execute the Muchilika and induced the other tenants not to pay their rents. Several of the defendants asserted that the lands had been reclaimed by them, and alleged that the temple was only entitled to the Swami Bogam. 71 defendants admitted the plaintiff's claim. The principal Munsif gave a judgment for the plaintiff. The District Judge confirmed the decrees as regards the 71 who had admitted the plaintiff's claim, but reversed it for misjoinder as

(1) 7 M L J. 1.

regards the other defendants. Exhibit A4 of 12th June 1861. Eighty-eight of the other defendants then compromised the case in the District Court, Exhibits B to B4 series, to avoid the expense of suits on the terms of accepting the decree of the Munsif's Court directing them to surrender possession. Twenty-eight defendants held out and after decrees had been passed against them by the Munsif succeeded in getting those decrees reversed by the District Court in Appeal Suit No. 110 of 1864, Exhibit V dated 2nd February 1865, and the connected suits, which were confirmed on second appeal by the High Court. The District Judge in Exhibit V gave reasons for not accepting the genuineness of Exhibit FF already referred to, and stated that the plaintiff's own witnesses admitted that the defendant had been in possession of the lands in suit for nearly 20 years and of the house for over 30 years, and considering the defendant had proved that the disputed lands had been in his and his family's undisturbed possession for a very long period and that his tenancy was a permanent tenancy dismissed the plaintiff's suit in ejectment. It had been previously ruled by Scotland and Holloway, JJ., in *Alagaiya Tiruchittambala* v. *Saminada Pillai* (2) that the question whether *ryots* under the Mirasidar have a title to the permanent occupancy of land subject to the payment of the Mirasidar's share for the most part depended on established usage and custom, which had to be proved. The High Court in the second appeals apparently accepted the findings of the District Judge that it had been proved in this case. We next come to Original Suit No. 31 of 1884 on the file of the Subordinate Court of Tinnevelly, another suit for ejectment and other similar suits. In his judgment H2 dated 17th December 1885, the Subordinate Judge gave judgment for the plaintiff on the ground that the defendant's father had admitted the plaintiff's right in the suit of 1859.

Exhibit T, dated 21st July 1886, is judgment in Original Suit No. 42 of 1884, a suit to fix the rent payable by plaintiff to defendant on account of defendant's refusal to receive rent at a rate alleged to have been fixed by his father in 1867 in one of the areas in which permanent tenure had been established in the litigation already mentioned. In Exhibit V (*c*) in Original Suit No. 9 of 1901 in the District Munsif's Court of Srivaikuntam, a suit by the Hukdar for ejectment, it was found by the District Munsif that the tenants were not entitled to occupancy rights by virtue of the decision in the previous suit but that their right of occupancy was established independently. In Exhibit VII (*c*), Original Suit No. 23 of 1905 in the District Munsif's Court, a suit for ejectment was allowed to be withdrawn with liberty to bring a fresh suit.

In Original Suit No. 637 of 1906 in the District Munsif's Court, another suit for ejectment, it was held to be *res judicata* as regards the particular land that there was no occupancy right.

The trustee also relies on NN series which he took in 1884.

The appellants rely on numerous transfers since 1884, sales both private and in execution and mortgages of their interests by tenants. The District Judge has held that these were not brought to the knowledge of the plaintiff. If the transfers were genuine, the plaintiff must have received the rents from the transferees, and I think the appellants are entitled to contend that his failure to produce his accounts raises an inference against him in this respect.

Now as to the presumption to be applied to the case, the reason that the Courts, even before the passing of the Madras Estates Land Act, 1908, raised a presumption of occupancy right in favour of *raiyats* holding under a permanently settled Zemindar, and not in favour of *raiyats* holding under a Ryotwari Pattadar, was, that there was no presumption in the case of the permanently settled Zemindar that he was the owner of the land except as assignee of the Government interest therein, whereas the scheme of the temporary Ryotwari settlements was to settle the revenue with the owner of the land himself. In neither case, it is well established, was there any intention to interfere with the legal relationship that might exist between the person with whom the revenue settlement was made and those holding under him. The presumption being that the Ryotwari Pattadar was the owner of the land, the Courts have proceeded on the view that the burden is on his tenants claiming a permanent right of occupancy to prove it. I have recently dealt in *Muna Muhammad*

(2) 1 M. H. C.R. 264.

Rowther v. *Muthu Alagappa Chettiar* (3) with the Tanjore temple cases in which this was laid down, and followed the ruling in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) which has been approved in subsequent cases. Those Tanjore cases had a special history and facts in common which differentiate them from cases such as the present, and led, except in one case, to the rejection of the claim to occupancy right. All that was laid down generally in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) and cases which followed it was that the onus was on the tenant and that mere length of enjoyment in the capacity of tenants or Purakudies, irrespective of other circumstances, did not raise a presumption of occupancy right. The qualification is important, because it shows that the inference as to occupancy right is to depend on a consideration of the whole circumstances of the case and among those circumstances are the continuance of the lands in the same hands at unenhanced rents, especially if they are low, the recognition of the tenant's right to transfer his holding, etc., as pointed out by the Privy Council in *Ram Chunder Dutt* v. *Jugesh Chunder Dutt* (4), *Naba Kumari Debi* v. *Behari Lal Sen* (5), *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (6) and *Nilratan Mandal* v. *Ismail Khan Mahomed* (7). The same thing was laid down in *Peria Karuppan* v. *Annasawmi Ayer* (8) and *Venkatachala Goundan* v. *Rangaratnam Aiyar* (9). These are facts which it is for the tenant to establish.

The task of drawing the right inference in the present case is one of some difficulty, which is increased by the fact that the claim is in respect of compensation awarded for land taken from different holdings, as to which, owing to the facts set out above, the rights of the tenants may be different, and because the evidence does not enable us to trace the history of the respective holdings from which the acquisition was made in the dispute about the existence of occupancy right which has been going on with varying fortunes in the village for the last sixty years. The fifth report shows that in Tinnevelly before the settlement of the revenue at the beginning of last century there were Ryots holding with rights of occupancy under the Mirasidars. If that was the case in the suit village, I do not think that it matters that a five-sixths share in the village was purchased for the temple at a revenue sale, because even if the land was sold free of incumbrances, the presumption in the circumstances would be that the temple continued the tenancies on the old footing. There is, however, no evidence that this was the state of things in the suit village, and the order of 1843 Exhibit DD as to the temple arranging for the cultivation points the other way. The fact that twenty-eight Ryots established their occupancy rights in the litigation which began in 1859, though it does not make the issue *res judicata* as regards the lands now in suit, is entitled to considerable weight, but the reversing judgment of the District Judge, which was confirmed by the High Court without comment on second appeal apparently as a finding of fact, does not appear to me to give reasons which would now be regarded as sufficient to establish the claim to occupancy rights. On the other hand, we have the fact that the great majority of the tenants had given up their claim to occupancy rights at an earlier stage of the litigation.

As regards the rates of rent, the sharing or Waram system seems to have prevailed until 1867 as regards Nunja or wet land and to have been commuted at that time. It is not shown that the temple's share was less than that of ordinary owners, or that the Punja money rates were unduly low. As regards the evidence that the rents have not been raised since, and the evidence, which is all of it fairly recent, that the tenants have been freely allowed by the temple to transfer their holdings, I do not think that in the present case it can be treated as a recognition by the temple of the existence of occupancy rights, because it is clear that for the last sixty years the temple has been openly

(3) 44 Ind. Cas. 894; 34 M. L. J. 234; 23 M. L. T. 161; 7 L. W. 380.
(4) 12 B. L. R. 229 (P. C.); 19 W. R. 352.
(5) 34 C. 902; 6 C. L. J. 122 (P. C.); 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 2 M. L T. 433.
(6) 32 C. 41 (P. C.); 31 I. A. 144; 8 C. W. N. 889.
(7) 32 C. 51 (P. C.); 31 I. A. 149; 8 C. W. N. 895.
(8) 12 Ind. Cas. 1; 21 M. L. J. 845; 10 M. L. T. 185; (1911) 2 M. W. N. 162.
(9) 20 Ind. Cas. 374; 24 M. L. J. 571; 13 M. L. T. 450; (1913) M. W. N. 434.

and notoriously contesting the existence of occupancy rights in the village in the numerous proceedings which I have mentioned above.

In these circumstances I have come to the conclusion that there are not sufficient reasons for differing on the main question from the conclusion on the evidence at which the learned District Judge has arrived and which has also been arrived at by my learned brother. In this and other respects I agree in the order proposed by him.

SESHAGIRI AIYAR, J.—These eleven appeals have been preferred against the judgments of the District Judge of Tinnevelly refusing compensation under the Land Acquisition Act to the appellants, and awarding it entirely to the respondents. The lands are situated in a village called Kachanavilai It is common ground that about the year 1817, five-sixths of the village was purchased at a revenue sale by one Vengu Mudalliar; and the other sixth at a private sale. The lands were dedicated as an endowment for the performance of a Kattalai in a temple. The respondents represent the founder of the Kattalai and claiming to be the sole trustees contended that the proprietary right in the lands belongs exclusively to the Kattalai.

The defendants, on the other hand, alleged that they and their ancestors have been in uninterrupted enjoyment of the lands paying the Sircar Kist either direct or through the Hukdar and paying the Hukdar a low and uniform rate of rent. They, therefore, claimed to have occupancy right in the lands. The District Judge held that the occupancy right was not established. Hence these appeals.

A brief narration of the previous litigation in connection with this village must be given in order to appreciate properly the arguments addressed to us on the present occasion. The Ryotwari Patta for the village stands in the name of the temple (*vide* MM series). As to when the first Patta was granted there is no reliable evidence. But we know from Exhibit DD, dated the 7th of September 1842, that the Collector ordered the Tahsildar to issue Patta to the temple. MM (1858-1859) is the earliest Patta that has been produced. A few years before MM the cultivators of the village executed a joint Muchilika in which they stipulated that they shall receive an Adaolai every three years in respect of the properties under their cultivation. There is a condition in it that if the cultivators failed to act properly, the Hukdar was entitled to resume the lands. This was on the 25th of November 1856. Then some correspondence passed as to whether the Hukdar's name should be entered in the Patta. The tenants apparently claimed even at this date that their names should be inserted as persons in occupation (*vide* GG series). In consequence of these disputes the Collector ordered that the name of Vengu Mudalliar should be struck out and that the cultivators' names should be entered instead (Exhibit II). This was on the 12th of October 1859. Thereupon Vengu Mudalliar brought a suit in the Court of the Sadar Amin, Tinnevelly, to eject the cultivators and to recover arrears of rent from them (*vide* Exhibit A dated the 17th of December 1859). The principal Sadar Amin gave a decree, as prayed for (Exhibit A4). It may be mentioned here that there was but one suit against all the cultivators, who numbered nearly 270. Seventy-one of them admitted the right of the plaintiff. A number of other defendants did not file any written statement. Sixty-five defendants alone contested the plaintiff's claim An appeal was preferred against the judgment of the Sadar Amin. Mr. Goldie, the then District Judge, without expressing any opinion on the merits held that the suit was bad for misjoinder of parties and causes of action and reversed the Sadar Amin's decision (Exhibit V). Even after this reversal a large number of the defendants entered into a Razinamah with Vengu Mudalliar by which they acknowledged the title of the Hukdar to eject them and agreed that if they failed to obey the condition of the Razinamah, they shall be bound by the decree passed by the Sadar Amin on the merits. The one suit was split up into a number of suits and the Sadar Amin once again went into the merits of the case and came to the same conclusion as before. Against his decree 28 cultivators preferred appeals to Mr. Goldie. He held that

as the cultivators had been in possession for 20 or 30 years they were entitled to occupancy rights. The special appeals preferred to the High Court were summarily dismissed. It is apparent from what I have stated that 28 of the defendants who were originally impleaded in the suit established their rights in the High Court. Exhibits D, E, F, G to S show that proceedings in ejectment were taken against some of the other cultivators.

The next litigation was in the year 1884 (*vide* Exhibit T), in which the question regarding the proprietary rights in the soil was not considered. The question was about the rates of rent that should be paid to the Hukdar. Then comes Exhibit V (*c*), which was a suit instituted in the year 1901 in the District Munsif's Court, Srivaikuntam. About 11 cultivators contested the right of the Hukdar to eject them. The Munsif came to the conclusion that they had acquired occupancy right. It is not clear whether there was any appeal in these cases. Matters seemed to have gone on smoothly until the Government proclaimed in 1915 that they intended to acquire the lands in dispute for the Tiruchandur Railway. As a consequence of this notification the cultivators have preferred claims to a share in the compensation on the ground that they have occupancy rights in the land.

Four of these appeals may be disposed of at once. They are Appeals Nos. 241, 245, 248 and 249. The District Judge in the last paragraph of his judgment says that the lands in respect of which compensation was claimed in these four appeals were delivered over to the respondents' predecessor-in-title by virtue of proceedings in execution taken by him. Exhibit C shows that a large number of the cultivators were evicted from their holdings for failure to comply with the conditions of the Razinamah embodied in Exhibit B. The District Judge has stated that the appellants in those four appeals were among those against whom proceedings were thus taken. There was no ground of appeal disputing the correctness of the statement made by the District Judge. We are not prepared to allow that question now to be re-opened We must, therefore, hold that the proceedings taken under Exhibit C are binding upon the appellants and that they are estopped from claiming occupancy rights.

Now we have to deal with the seven appeals on the merits. Mr. Narasimha Aiyangar for the appellants contended that the facts established in evidence are sufficient to warrant the conclusion that his clients have occupancy right in the lands. The first circumstance relied on for this purpose is the payment of a uniform rate of rent. It is clear from a reference to Exhibit T (1) that the present rate was fixed in 1866. We may, therefore, take it that for 47 years the same rate was continuously paid to the Hukdar. I do not accept the learned Vakil's contention that it was only a nominal rent that was paid. It was in the year 1868 that commutation from Waram was made regarding the rate of rent. The sum of Rs. 2 7 0 per acre of Nanja paid to the landlord after deducting the Sircar Kist cannot be regarded as a low rate. The next circumstance relied on was continuity of possession. There is evidence on the side of the Hukdar, which is to some extent specific, showing that the cultivators were changed from time to time. The District Judge has expressed no opinion upon this evidence, and I do not desire to base my judgment upon that deposition. But having regard to the usual *mamool* in this country of not changing a cultivator unless it be under very exceptional circumstances, I am not prepared to attach much weight to this contention. In the southern parts of this Presidency instances can be cited of persons cultivating the same land for generations. This is largely due to the feeling on the part of the proprietor that it is a sin to turn a cultivator out of the field which he has ploughed and enriched, and to the feeling and veneration which the latter entertains for his master. I am averse to basing any conclusion regarding rights in the soil upon continuous possession, even granting that the contention of the appellant is well founded. I must also point out that no attempt has been made in the Court below by the cultivators to prove that they, their fathers and their grandfathers have been continuously in occupation of the same land for any length of time. The next circumstance relied on was that the cultivators have been alienating

the lands as if they were the owners thereof. The District Judge points out that it has not been shown that any of those alienations were made to the knowledge of the Hukdar. Mr Narasimha Aiyangar has drawn our attention to one single instance in which the Hukdar's Kariasthan is said to have written the deed of mortgage. This is not enough to bring home to the Hukdar the fact that the cultivators were dealing with the property as if they were the proprietors. Moreover, most of these transactions are of a very recent date, and I do not think they are of any consequence in determining the rights of the parties. There is no doubt of the fact that some of the tenants did succeed in obtaining a decision in their favour establishing their occupancy right.

In the present case no attempt has been made to show that any of the appellants derived title under these cultivators. Therefore, the plea of *res judicata* is not available to them. Nonetheless those judgments are evidence of the right now put forward. But their probative value is not much as the judgment of Mr. Goldie solely proceeded upon possession for 20 or 30 years, a fact which the Judicial Committee in *Mayandi Chettiyar* v. *Chokkalingam Pillay* (10) and the High Court in recent cases have held to be insufficient to prove occupancy right. On the other side Mr. Venkatarama Sastriar referred us to the fact that a majority of the cultivators accepted the position of tenants-at-will by executing Muchilikas. He also referred us to certain compensation proceedings of 1868 in which the right of the Hukdar was accepted by the Government to the total exclusion of the cultivators. (See evidence of P. W. No. 8.)

Both the learned Vakils relied upon the use of the word "Swami Bogam" in support of their contentions. It is true that the expression denotes that the person receiving it is the owner and proprietor of the land. Wilson in his Glossary gives this as the correct rendering of the expression. On the other hand Mr. Hodgson seemed inclined to the view that the expression connoted that the cultivators had an interest in the land. (See Fifth Report, Volume III, page 346.)

(10) 27 M. 291 (P. C.); 8 C. W. N. 545; 31 I. A. 83; 14 M. L. J. 200; 8 Sar. P. C. J. 587.

To sum up, the facts in favour of the appellants are:—

(*a*) Payment of a uniform rate of rent for nearly 50 years;

(*b*) an alleged continuous occupation from father to son for the same period;

(*c*) alienation of the property in their possession without the knowledge or consent of the Hukdar during recent years;

(*d*) two judgments on two different occasions in their favour establishing occupancy right after contest.

The circumstances against their contentions are:—

(1) the majority of cultivators in the village have agreed to hold their lands as tenants at-will;

(2) in a previous land acquisition proceeding some of the tenants did not set up a right of occupancy; and

(3) they are cultivators under Ryotwari Patta holders.

I have held as regards (*a*) that the rent paid is not insignificant; as regards (*b*) I am not satisfied that there has been continuous occupation from father to son; as regards (*c*) no weight can be attached to it as the transactions were behind the back of the Hukdar; as regards (*d*) it cannot be disputed that the judgment of Mr. Goldie, if it comes up for consideration before the High Court to-day, will not be upheld on the grounds mentioned by him. As regards the judgment of the District Munsif he was largely influenced by the judgment of Mr. Goldie and had referred to a few other circumstances which do not advance the case of the tenants any further. The circumstances referred to as being against them detract very much from the value to be attached to the points established in their favour.

My decision would, therefore, largely depend upon the view I take as to onus of proof in this case. If I come to the conclusion that the burden is upon the cultivators to establish their right of occupancy, I shall have no hesitation to decide that they have failed to discharge it. If, on the other hand, I hold that it is for the Hukdar to show that he has the sole proprietary right, I would hesitate before holding that they have proved their case. Therefore, it becomes necessary to consider the question of the burden of proof.

In order to come to a proper conclusion on

this point it is necessary to consider the nature of the right which a Ryotwari Pattadar has in the soil. Contemporaneous with the permanent settlement under Regulation XXV of 1802, the question was considered on what basis the remaining land should be settled. There were a number of conflicting views. Some Revenue Officials recommended the Mutta system, that is, a system by which a number of villages were intended to be granted to a single owner making him responsible for the Government assessment. Others were in favour of the village system, by which it was expected that each village would be handed over to the headman or some respectable person in the village who would parcel out the lands to the cultivators and would also be responsible to the Government for *kist*. And lastly, there were others who advocated the Ryotwari system by which it was intended that small holdings should be allotted to a large number of persons. Sir Thomas Munro was a strong advocate of the Ryotwari settlement. In the Ceded Districts to which he was appointed Principal Collector after the war with Tippu, he tried the experiment and succeeded beyond expectation in showing that both the Ryots and the Government were benefited by the Ryotwari system. Although the Government of the day recognised the success of the experiment in these districts, they were not prepared to give effect to it in the other districts. In a letter addressed to Sir George Barlow, the then Governor of Madras, by the Board of Revenue, the Board, while remarking that "under the Ryotwari settlement the officers of Government were supposed to settle and collect the rent from each farmer," pointed out that what was achieved by Colonel Munro in the Ceded Districts could not be expected of other officers in the other districts and that the system was fraught with danger to Government revenue. This letter was signed by Mr. Hodgson as a member of the Board of Revenue. Thereupon the Governor-in-Council accepted the recommendation of the Board, and ruled that the Ryotwari system should not be introduced in the other districts. Meanwhile Sir Thomas Munro went to England, and was invited to give evidence before a Select Committee of the House of Commons on the 15th of April 1812. He strongly advocated the Ryotwari settlement. This is what he said in his evidence:—"Every Ryot, who is likewise a cultivating proprietor of the land which he holds, is permitted to hold that land at a fixed assessment as long as he pleases; he holds it for ever without any additional assessment. If he occupies any waste or additional land, he pays the assessment that is fixed upon that land, and no more; his rent undergoes no alteration." Apparently his view prevailed, as we find that the Court of Directors agreed to introduce the Ryotwari settlement in Madras. On the 16th December 1812, the Court wrote:—"It remains for us to signify our directions that in all the provinces that may be unsettled when this despatch shall reach you, the principle of the Ryotwari system, as it is termed, shall be acted upon, and that where village rents upon any other principle shall have been established, the leases shall be declared to be terminable at the expiration of the period for which they may have been granted."

The next question that I propose to consider is, what was the nature of the right that was secured by the Ryotwari system. I have already referred to the evidence of Sir Thomas Munro before the Select Committee. In one of his minutes dated the 15th of August 1807 this is what he says about the Ryotwari system:—

"That it is better adapted to preserve simplicity of manner and good order, because every Ryot will, on his own estate, be at once proprietor, farmer and labourer; because the division of property by engaging men in labour for their maintenance is favourable to quiet". Baden Powell in his Land System of British India gives this definition of the Ryotwari system:—"A system of land revenue administration in which there is no middleman or landlord over the individual Ryots who are severally liable for the land revenue assessment on the holding".

Again, quoting from the Settlement Manual for Madras he describes the Ryotwari system thus, Volume III, page 130:—"Under the Ryotwari system every registered holder of land is recognised as its proprietor. He is at liberty to sublet his property or to transfer it by gift, sale or mortgage. He cannot be ejected by Government, so long as he pays the fixed assessment, and has the option of diminishing his holding or of entirely abandoning it. The Ryot under this system is virtually a proprietor on a simple

and perfect title, and has all the benefits of a perfect lease without its responsibilities." It is clear from the extracts which I have quoted that the settlement by the Government under the Ryotwari system was with the actual cultivator of the soil, whereas in settlements under Regulation XXV of 1802, the proprietor had only the right to receive rent from persons who were in occupation of the lands. Of course there are cases under the Ryotwari system in which certain classes of the community who are not in the habit of tilling the soil have been given a Ryotwari Patta. But in such cases a Pattadar is the undoubted proprietorof the land with liberty to get it cultivated by leasing it to cultivators. This being the history of the system and the incidents of the system being what I have already described them to be, it seems to me that if a person claims to have acquired occupancy right under a Ryotwari holder, burden lies heavily upon him to establish it. One other aspect of the question will also lead to the same conclusion. Under Madras Act II of 1894 the land for which the Patta is given is held liable for the payment of revenue. If the Patta-holder makes default in paying the revenue, the holding can be sold irrespective of the fact that cultivators are on the soil for generations together. There can be no question that the rights of these cultivators would be swept away by the sale for arrears of revenue. This is an indication that the Legislature and the Government of the country do not recognise a permanent occupancy right in the soil under a Ryotwari Pattadar.

It is not easy to say what would be the residue of interest that would be left to the Ryotwari Pattadar, if he has the Government above him who can sell the lands under the Patta straightaway for arrears and if he must recognise an occupancy Ryot under him whose interest in the soil must be very considerable. The conception is opposed to the recommendations of those who advocated the Ryotwari system. Virtually the occupancy Ryot in a Ryotwari village deprives the Pattadar of all rights save that of being the recipient of a permanent rent.

Before dealing with the cases which have been quoted at the Bar, I shall refer very briefly to the history of the Ryotwari settlement in the Tinnevelly District. Contemporaneous with Sir Thomas Munro in the Ceded Districts Mr. Hodgson was apparently the Collector of Tinnevelly. As I pointed out before, he was very much against the Ryotwari system. Sir Thomas Munro had induced the Court of Directors to accept his view in preference to the view of the Board of Revenue; subsequently when he was appointed to the Governorship of the Presidency, he directed that the Ryotwari system should be introduced in all the Districts. So far as Tinnevelly was concerned, we are told attempts were made to introduce this system from 1827 onwards. By the year 1834 it was introduced in a number of villages (*vide* the Tinnevelly Gazetteer). But apparently no further progress was made for sometime. It was in the year 1861 when Mr. Puchle was the Collector, the Government of the day decided that the district should be surveyed and that the Ryotwari tenure should be introduced at once. From the fact that in 1842 a Ryotwari Patta was given to the temple, we may take it that this was one of the villages upon which the principle was experimented between the years 1827 and 1834. In all probability the predecessors-in-title of Vengu Mudalliar were themselves cultivators of the lands when they were sold to the temple. There is nothing in the history of the system as applied to the Tinnevelly District to lead to the conclusion that, prior to the acquisition of the property by the temple, the present cultivators had acquired any interest in the lands. That being in short the position of the Ryotwari Pattadar in the district, it seems to me that no special considerations arise in dealing with the lands situated in Tinnevelly different from those which would apply to lands in Tanjore or Trichinopoly. At any rate there is nothing on the record in this case to lead me to hold that the Tinnevelly cultivator should be treated differently from the cultivator in the other districts of the southern part of the Presidency.

The facts referred to above establish at least this much, that at the time when five-sixths of the lands were sold for arrears of Revenue to Vengu Mudalliar the interest of the cultivators, if any, ceased to exist. Consequently it is clear that they had no subsisting rights when the Mudalliar acquired the property for the

temple. Secondly, when the Collector in 1842 directed that Ryotwari Patta should be granted to the Hukdar, he must have had before him the instructions of the Madras Government contained in the Settlement Manual and in the minutes of Sir Thomas Munro. The inference is that at this time persons who were cultivating the soil had no occupancy right in it. It follows from the above two conclusions that the present cultivators must have been let into possession either by Vengu Mudalliar or by his descendants. Mr. Goldie in the judgment already referred to speaks of 20 or 30 years' possession in 1864. This lends support to my view that the appellants' predecessors probably came in as cultivators after the issue of the Ryotwari Patta to the Hukdars of the temple. Their occupation was not immemorial as was suggested in the course of the arguments in these appeals.

Now I proceed to consider the decisions that have been quoted. Most of these decisions have been reviewed fully in the judgment which the learned Chief Justice delivered in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (3). Therefore, I shall not attempt to deal with every one of them. A few of them, however, require consideration in the light of the history of the Ryotwari settlement which I have sketched above. *Krishnasami Pillai* v. *Varadaraju Ayyangar* (11) was a decision of the Full Bench and in view of the fact that Mr. Justice Muthuswami Aiyar who took part in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) was also a party to this decision, it should be considered with some care. Sir Charles Turner, with whose judgment Mr. Justice Muthuswami Aiyar concurred, says at page 357:—"Without attempting to define what period of occupation should confer a right of occupancy—a matter which can be only dealt with by the Legislature—we consider ourselves at liberty to say that an occupation for upwards of seventy years is sufficient, *under the circumstances of this case*, to throw upon those who seek to disturb it the burden of showing that the tenancy was not accompanied with a right of occupancy and that the plaintiff has not succeeded in doing so." This passage shows that the learned Chief Justice laid the burden in the first instance upon persons who asserted the right of occupancy, but that, in his opinion, the facts proved in that case shifted the burden on to the Pattadar. In the judgment of Mr. Justice Kindersley the facts are fully set out and I find that there was a previous litigation in which the right of the tenants to remain on the lands so long as they paid rent regularly was upheld. The learned Chief Justice refers to a number of documents which, according to the evidence, constitute an engagement not to eject the tenants from their holdings. It is true that there are observations in the judgment tending to show that a cultivating Ryot is entitled to some interest in the soil. In page 357 reference is made to the custom of the country and of the district. No such custom has been sought to be established in this case and I, therefore, do not think that this decision, which proceeded upon the special features of that case and which did not in the first instance throw the burden upon the proprietor, is an authority for the proposition contended for by Mr. Narasimha Aiyangar. That this is the correct interpretation of the decision is clear from a reference to *Chidambara Pillai* v. *Thiruvengadathiengar* (1), to which Mr. Justice Muthuswami Aiyar was a party. In that case the law is laid down in these terms:—"The claim of an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character, and as such it is one which the party, seeking to derogate from the ordinary incidents of property is bound to establish"....."Mere length of enjoyment in the capacity of tenants or Purakudies irrespective of other circumstances is not *prima facie* proof of occupancy right." I have shown already what the incidents of a Ryotwari tenure are, and the judgment in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) entirely supports the view I have taken. When we remember that Muthuswami Aiyar, J., was first a Deputy Collector, and afterwards an Inam Commissioner, the value of his pronouncement acquires very great weight. This view of the burden of proof was accepted unreservedly by Shephared and Subramania Ayyar, JJ., in

(11) 5 M. 345 (F. B.); 2 Ind. Dec. (N. S.) 240.

Cheekati Zamindar v. *Ranasooru Dhora* (12). In *Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi* (13) Mr. Justice Subramania Aiyar and Mr. Justice Moore acted on that view. Mr. Justice Moore quotes the passage which I have already cited and accepts it as good law. Mr. Justice Sadasiva Aiyar and Mr. Justice Napier in *Naina Pillai* v. *Ramanathan Chettiar* (14) have examined the case-law very fully and have accepted the conclusions stated in *Chidambara Pillai* v. *Thiruvengadathiengar* (1). We have a very full discussion by the learned Chief Justice and Sadasiva Aiyar, J., in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (3), wherein the principle enunciated in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) is accepted and restated. As against these decisions Mr Narasimha Aiyangar quoted *Peria Karuppan* v. *Annasawmi Iyer* (8), *Venkatachala Goundan* v. *Rangaratnam Aiyar* (9) and *Chandrasekharaswami* v. *Nainar Ammal* (15). As regards *Peria Karuppan* v. *Annasawmi Iyer* (8) it is enough to say that the proposition therein laid down is not disputed by those who allege that the burden of proof is upon the person claiming occupancy right. What the learned Judges say is that it should not be laid down that in all cases of Ryotwari lands a cultivating tenant cannot have a right of occupancy in the lands. This contention is not advanced now. It is no doubt an anomalous position. But it is easy to conceive of a grant of occupancy right which is only in other words a permanent lease by a Ryotwari holder in favour of a cultivator. Such leases are very common in South Kanara. It is also imaginable that the limited right of holding the land on payment of a fixed rate of rent with the incidents of occupancy right may be acquired by a cultivator. Therefore it is not necessary to say that under no circumstances can an occupancy right be acquired against the Ryotwari proprietor. Therefore the proposition which is stated in *Peria Karuppan* v. *Annasawmi Iyer* (8) seems to be unexceptional as far as it goes. It is in *Venkatachala Goundan* v. *Rangaratnam Aiyar* (9) that a further extension seems to have been attempted. In this latter case the learned Judges, quoting without disapproval the *dictum* of Muthuswami Aiyar, J., in *Chidambara Pillai* v. *Thiruvengadathiengar* (1) and also the statement of law contained in *Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi* (13) and *Cheekati Zamindar* v. *Ranasooru Dhora* (12), say:— "There is nothing in the observations above cited to warrant the opinion that in the case of every Ryotwari village there is necessarily a presumption that a Ryot holding under a Mirasidar has no occupancy right." If the judgment stood there, no exception can be taken to it. But almost towards the end, the learned Judges seem inclined to hold that the burden is upon the proprietor to show that a cultivator who has been long on the land has not acquired a right of occupancy. It seems to me that this proposition is not warranted by the decisions which the learned Judges have quoted without dissent in the body of their judgment. I will not examine this case any further, as we were told that it is under appeal to the Privy Council. Now I come to the last case quoted before us, *Chandrasekharaswami* v. *Nainar Ammal* (15). There are two statements in it; one is that the second Appellate Court is bound by the findings of fact on the question of occupancy right at which the District Judge has arrived. If the judgment has been based upon that view of the functions of the second Appellate Court, no exception could be taken to the conclusion arrived at in this case. But the learned Judges also proceed to lay down the principles upon which the case should be decided. I cannot help observing that in the body of the judgment the use of the words tenant and landlord, which is the very fact to be established by the evidence, has to some extent clouded the issue to be decided. The expressions tenant and landlord have special meanings assigned to them in our legislative enactments. One feels, on reading the decision, as if the principle applicable to cases under the Estates Land Act had been unconsciously adopted in the disposal of the case. No doubt *Chandrasekharaswami* v. *Nainar Ammal* (15) is based upon *Peria Karuppan* v *Annasawmi Iyer* (8) and

(12) 23 M. 318; 8 Ind. Dec. (N. S.) 624.
(13) 22 M. 264; 8 Ind. Dec. (N S.) 188.
(14) 41 Ind. Cas. 788; 33 M. L J. 84.
(15) 43 Ind. Cas. 977; 7 L. W. 194; (1918) M. W. N. 219.

KELU NAMBIR *v.* CHATHU NAMBIAR.

Venkatachala Goundan v. *Rangaratnam Aiyar* (9). I have stated my opinion about these two decisions. With all respect, I am not prepared to accept the principle as to onus enunciated in *Chandrasekharaswami* v. *Nainar Ammal* (15). I prefer to follow the view taken by Collins, C. J., Muthuswami Aiyar, J., Shephard, J., Subramania Aiyar, J., Sadasiva Aiyar J., Napier, J., as well as, by the learned Chief Justice. In my opinion the burden is upon the cultivators to show that they have got an occupancy right in these Ryotwari lands which have been taken up by Government under the Land Acquisition Act and the evidence they have let in is not sufficient to discharge that burden. I, therefore, agree with the District Judge that they are not entitled to compensation on the footing of being occupancy tenants. At the same time I think that in respect of their interest in the land as tenants from year to year, they are entitled to have their share of the compensation apportioned and we fix it at one anna in the rupee. Subject to this modification, we dismiss the appeals with costs. The Vakil's fee will be Rs. 352 in all the appeals together.

M. C. P.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 908 OF 1917.

September 11, 1918.

Present :—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

MEETHALA VEETIL KAITHERI KELU NAMBIAR—PLAINTIFF—APPELLANT

versus

NARIKOTT PARAMBATH KAITHERI CHATHU NAMBIAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Dismissal of suit—Finding in favour of plaintiff, whether* res judicata—*'Matter substantially in issue,' 'final decision,' meanings of*—Res judicata *between co-defendants.*

A decision on a question in an appealable suit, when the decree is in favour of the party against whom that decision is given, is not a final decision within the meaning of section 11, Civil Procedure Code. [p. 260, col. 2.]

To constitute a finding on an issue *res judicata* in a later suit between the parties it is necessary, under section 11, Civil Procedure Code, that the matter should have been directly and substantially in issue between them and should also have been heard and finally decided. Where a finding has been arrived at on a matter which is not necessary for the disposal of the suit and it is not made the basis of the decree which is given in spite of it, that matter cannot be said to have been substantially in issue between the parties, it can only be said to have been incidentally in issue. Such findings are more in the nature of *obiter dicta* than of *res judicata*. Nor can the question be said to have been finally decided by such a finding. [p. 260, cols. 1 & 2.]

Where a decree is given to a party in spite of a finding against him, that finding is not *res judicata* in subsequent litigation. [p. 260, col. 1.]

Run Bahadur Singh v. *Lucho Koer*, 11 C. 301 (P.C.) 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960, followed.

Muthaya Shetti v. *Kanthappa Shetti*, 45 Ind. Cas. 975; 7 L. W. 482; 34 M. L. J. 431; 23 M. L. T. 291; (1918) M. W. N. 334, explained.

For a matter to be in issue under section 11, Civil Procedure Code, it is not necessary that an express issue should be framed about it. It is enough if a decision about it is necessary for the decree. [p. 261, col. 2.]

As between co-defendants there must be an active controversy *inter se* before a finding can be treated as *res judicata*. [p. 262, col. 1.]

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 239 of 1916, preferred against the decree of the Court of the Principal District Munsif, Tellicherry, in Original Suit No. 533 of 1914.

FACTS appear from the judgment.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.—The finding in Original Suit No. 3 of 1895 about the existence of Meethala Veetil Tavazhi is *res judicata*. See the judgment of Seshagiri Aiyar, J., in *Muthaya Shetti* v. *Kanthappa Shetti* (1). It was necessary to find whether the Tavazhi did exist before its Karnavan could be removed. The finding is distinct and is the ultimate decision of a competent Court and it cannot be re-agitated in the present suit.

As to the effect of the decree in Original Suit No. 203 of 1893, as the Karnavan, the 1st defendant, was *ex parte* and as the question arose between the Tarwad and the Tavazhi as co defendants and as there was no active contest between the Karnavan of the Tarwad and the members of the Tavazhi, the finding on the question of the existence of the Tavazhi is not *res judicata*.

(1) 45 Ind. Cas. 975; 7 L. W. 482; 34 M. L. J. 431; 23 M. L. T. 291; (1918) M. W. N. 334.

There was also no separate issue on the question.

Mr. *C. Madhavan Nair*, for the Respondents —The finding in Original Suit No. 3 of 1895 is not *res judicata* for in spite of that finding, the plaintiff's suit was dismissed. The finding was not necessary for the disposal of that suit. See the Privy Council ruling in *Run Bahadur Singh* v. *Lucho Koer* (2). It was decided that there were no good grounds for removing the Karnavan and that was enough. The finding was also not embodied in the decree. The question is not finally decided by the finding. *Ahmedbhoy* v. *Sir Dinshaw* (3).

The finding in Original Suit No. 203 of 1893 is *res judicata*. The question of the existence of the Tavazhi was involved in the issue whether the plaintiff had a valid Melcharth right in the plaint Paramba. The Karnavan of the Tavazhi could alone grant a valid Melcharth. There was addition of parties on notice issued under the old section 30. All the members took an active part in the matter and the finding must be held to operate as *res judicata*.

JUDGMENT.—The question for decision in this case is one of *res judicata*.

By the suit from which the second appeal arises plaintiff, one Kelu Nambiar, sought to recover as Karnavan of one Meethala Veetil Tavazhi certain lands and arrears of rent from the tenant in possession, the 1st defendant. It was stated that this was a separate and distinct Tavazhi under the Mani Madathil Kaitheri Tarwad, having its own properties and its own Karnavan, and that the plaint lands were some of its properties. The tenant denied the existence of any such Tavazhi and pleaded that the lands belonged to the main Tarwad of which one Chathu Nambiar was the Karnavan and not the plaintiff, and that the latter was not entitled to sue; he also pleaded payment of rent to the Karnavan Chathu Nambiar. On these pleas Chathu Nambiar was added as the 2nd defendant; and he supported the 1st defendant's contentions.

The first issue in the case was "whether a Tavazhi called Meethala Veetil Tavazhi existed with separate properties and management."

As, however, both the plaintiff and the 2nd defendant claimed that this question was *res judicata* by reason of previous decisions between the parties, two further issues were framed, *viz.*, "whether the plaintiff was estopped from setting up the Meethala Veetil Tavazhi by reason of the decrees in Original Suits Nos. 38 of 1890 and 203 of 1893 of the Courts of the District Munsifs of Nadapuram and Panur respectively and their appeals" and "whether the main Tarwad of which the 2nd defendant was the Karnavan was estopped from denying the existence of the Meethala Veetil Tavazhi by reason of the decrees in Original Suit No. 168 of 1893 of that Court (Court of the Principal District Munsif of Tellicherry) and of Original Suit No. 3 of 1895 on the file of the Sub-Court, North Malabar."

On these issues both the lower Courts have agreed that the decree in Original Suit No. 168 of 1893 was of no value on the question of *res judicata* and the point has not been re-agitated before us. But they have differed in their opinions as regards the effect of the other judgments; and both the plaintiff-appellant and the defendants-respondents have contended before us that the judgments in his or their own favour constitute *res judicata* whereas the judgments against him or them do not. We have, therefore, to examine each of those judgments separately to see its effect on the question at issue.

Before doing so it may be observed that the question as to *res judicata* has to be considered as between the Tavazhi and the Tarwad and not as between the plaintiff and the 2nd defendant personally, as they are parties to this suit in their representative capacities as Karnavans. Taking the judgment in Original Suit No. 3 of 1895, Exhibit L, first, which is relied on by the plaintiff as settling that the Meethala Veetil Tavazhi does exist, it will be seen that the suit in which that judgment was given was one brought by one Sankaran Nambiar, a junior member of the family, to remove one Ambu Nambiar from Karnavanship for alleged misconduct and for recovering from the Tarwad certain properties said to have been improperly alienated by him. Permission was asked for under section 30

(2) 11 C. 301 (P. C.); 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960.

(3) 3 Ind. Cas. 124; 11 Bom. L. R. 366 & 545; 6 M. L. T. 200.

of the old Code of Civil Procedure to sue on behalf of the Tarwad and on the publication of the notice required by the section a large number of the members of the Tarwad had joined as defendants. Plaintiff had asserted in the plaint that Ambu Nambiar was the Karnavan of the Meethala Veetil Tavazhi also and had asked him to be removed from that position as well. Ambu Nambiar as well as several other defendants had, among other pleas, denied the existence of such a Tavazhi and an issue was framed as to "whether there was in fact an independent branch called Meethala Veedu subordinate to the Meethil Tarwad." The finding on this issue was, no doubt, in plaintiff's favour that such a Tavazhi did exist. But in spite of that finding the suit, so far as it prayed for the removal of the Karnavan, was dismissed and Ambu Nambiar was not removed from the Karnavanship of either the Tarwad or the Tavazhi. Nor was the finding embodied in the decree. The finding was not necessary for the disposal of the suit, and we agree with the District Judge that it cannot be held to have the force of *res judicata* against the Tarwad. It has been settled by the ruling of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer* (2) that where a decree is given to the party in spite of a finding against him, that finding is not *res judicata* in subsequent litigation. This view has been consistently followed since, see *Thakur Magundeo* v. *Thakur Mahadeo Singh* (4), *Parbatti Debya* v. *Mathura Nath Banerjee* (5), *Ahmedbhoy* v. *Sir Dinshaw* (3), *Venkatasuryanarayana* v. *Shiva Sankara Narayana* (6) and *Mittar Poddar* v. *Jadab Chandra* (7).

To constitute the finding on an issue *res judicata* in a later suit between the parties it is necessary under section 11 of the Code that the matter should have been directly and substantially in issue between them and should also have been heard and finally decided. Where a finding has been arrived at on a matter which is not necessary for the disposal of the suit and it is not made the basis of the decree which is given in spite of it, that matter cannot be said to have been substantially in issue between the parties; it can only be said to have been incidentally in issue. Such findings are more in the nature of *obiter dicta* than of *res judicata*. Nor can the question be said to have been finally decided by such a finding. As observed by Beaman, J., in *Ahmedbhoy* v. *Sir Dinshaw* (3) above cited, "a decision upon any question that does not open the door to the parties aggrieved to carry it to the next Court (in appeal) is not in any sense a final decision, unless the Court which has decided it is itself the Court of final jurisdiction for that suit." Otherwise, as pointed out by the learned Judge, it would lie with his adversary to decide whether a finding against a party when the decree is in his favour should remain *res judicata* against him or not; for if he, the adversary, appealed, as he could do, the finality would be gone. We must, therefore, hold that a decision on a question in an appealable suit, when the decree is in favour of the party against whom that decision is given, is not a final decision. Explanation II which has been newly added to section 11 of the present Code, Act V of 1908, does not affect this question, as it deals only with the competency of the Court and not with the finality of its decision. That explanation was added to put an end to the controversy whether a finding arrived at or a decree passed by a Court in a suit is or is not *res judicata* in the same Court in a subsequent suit, when the decree in the first suit is not appealable to the same tribunal as that in the second suit. That happens, for example, in the Subordinate Judge's Court when the first suit is below Rs. 5,000 in value and the second suit is above that value.

The learned Vakil for the appellant relied on the judgment of Seshagiri Aiyar, J., in *Muthaya Shetti* v. *Kanthappa Shetti* (1) and contended that this was a case which fell within the fourth class of cases referred to by the learned Judge and, therefore, the finding was *res judicata*. It seems to be very doubtful if there is such a fourth class of cases at all distinct from the first class; the cases which seem to fall in that class will probably, on careful examination, be found to fall in the first class. In the very

(4) 18 C. 647; 9 Ind. Dec. (N. S.) 432.
(5) 15 Ind. Cas. 453; 40 C. 29; 16 C. W. N. 877; 16 C. L. J. 9.
(6) 27 Ind. Cas. 861; 17 M. L. T. 85; 2 L. W. 101.
(7) 38 Ind. Cas. 211; 2 P. L. J. 159; 1 P. L. W. 221.

case which the learned Judge had before him it would seem, with all respect to him, that on the facts stated in page 484* it was quite immaterial for the District Judge to decide if the alienation was a mortgage or a sale so long as it was valid against the plaintiff; for in the view taken by him the suit failed whether it was a mortgage or a sale. It has been pointed out to us that Bakewell, J., who sat with Seshagiri Aiyar, J., in that case did not adopt this classification, and we are not prepared to follow the learned Judge's view as to the fourth class of cases. Moreover, we think the present case falls in the first class. It is argued that it was necessary to decide in this case if a Tavazhi existed at all before deciding whether its Karnavan should be removed. It was not strictly necessary to do so, as in any event the suit failed as the Court found there were no grounds for his removal. In any view therefore the ruling in *Muthaya Shetti* v. *Kanthappa Shetti* (1) is no authority in the plaintiff's favour. The judgment in Original Suit No. 3 of 1895 cannot thus be held to render the first issue in this case *res judicata*.

Passing on to the decree in Original Suit No. 38 of 1890 we think the District Judge is wrong in holding that it operated as *res judicata* in favour of the Tarwad. It has not been relied on by the learned Counsel for the respondents. That was a suit brought by some junior members of the Tarwad for maintenance against Ambu Nambiar as the Karnavan of the Tarwad. The District Judge considers that Ambu Nambiar might and ought to have pleaded that some of the properties belonged to Meethala Veetil Tavazhi and their income should have been excluded from calculation in assessing the rate of maintenance and as Ambu Nambiar was the Karnavan of the Tavazhi according to the plaintiff's case and as he failed to set up the Tavazhi's claim, the Tavazhi should be taken as barred by *res judicata*, presumably under Explanation IV of section 11, Civil Procedure Code, from setting up its existence thereafter. This view cannot be supported. Ambu Nambiar was sued only as the Karnavan of the Tarwad and not as the Karnavan of the Tavazhi and as he was always strenuously denying the very existence of the Tavazhi, he could not be expected to raise any pleas in its favour and his failure to put forward any particular plea cannot be treated as concluding the Tavazhi as to it.

The last two judgments we have to deal with are those in Original Suit No. 203 of 1893 on the file of the Court of the District Munsif of Panoor and its appeal, Exhibits I and II. The suit was brought by one Chappari as the holder of a Melcharth granted by the Tarwad Karnavan, the same Ambu Nambiar, to redeem a Kanom and recover possession of a Paramba from the Kanomdar, the 2nd defendant. The Karnavan, the 1st defendant remained *ex parte* but the 2nd defendant, though he admitted the Kanom, pleaded that the property belonged to the Tavazhi of which Sankaran Nambiar was the Karnavan, and not to the Tarwad and the Melcharth by the Tarwad Karnavan was, therefore, invalid. Sankaran Nambiar was added as the 3rd defendant and he supported the 2nd defendant's case. As notice of suit was published in the District Gazette and in a local paper, 50 other members including the present plaintiff and the 2nd defendant joined as defendants. 28 of them supported the 3rd defendant while the rest opposed the claim of the Tavazhi. The issue framed in the case was "Has plaintiff a valid Melcharth right in the plaint Paramba? and can he maintain this ejectment suit on the strength of it?" No separate issue was framed about the existence of the Tavazhi but as the validity of the Melcharth was challenged solely on the ground that the Karnavan of such a Tavazhi alone could have granted a valid one, the question of the existence of the Tavazhi was involved in the issue framed and was clearly a matter in issue within the meaning of section 11, Civil Procedure Code. For a matter to be in issue under that section it is not necessary that an express issue should be framed about it; it is enough if a decision about it is necessary for the decree.

The District Munsif found that there was no such separate Tavazhi as Meethala

*Page of 7 L. W.—*Ed.*

Veedu as alleged by the 3rd defendant and his party and he overruled the plea of the invalidity of the Melcharth and gave a decree in plaintiff's favour. Third defendant and his party thereupon appealed to the District Judge making the plaintiff and the 1st defendant and his supporters respondents and again raised the same contentions. The District Judge, however, confirmed the findings in appeal. It would, therefore, seem that the question of the existence of the Tavazhi is *res judicata* against the Tavazhi. Both the Karnavans were parties to the suit as well as a large number of members of the family. We must, therefore, hold that both the Tarwad and the Tavazhi were properly represented in that litigation. Mr. Ananthakrishna Aiyar, however, points out that the 1st defendant, the Karnavan of the Tarwad, remained *ex parte* and he argues that as the question arose between the Tarwad and the Tavazhi as co defendants in the suit and as there was no active contest between the 1st defendant, the Karnavan of the Tarwad, and the members of the Tavazhi, the finding should not be treated as *res judicata*. He relies on *Kandiyil Cheriya Chandu* v. *Zamorin of Calicut* (8). In that case it was held that the matter was *res judicata* as the defendant against whom the plea was urged took an active part in the controversy as against his co-defendant. We think it must be taken as the view of our High Court that as between co defendants there must be active controversy *inter se* before a finding can be treated as *res judicata*. See also *Ramanuja Ayyangar* v. *Narayana Ayyangar* (9). In this case, however, there are good reasons why the appellant's argument cannot be accepted. The Tarwad was represented not merely by the Karnavan but by all or nearly all the members of it, who certainly took an active part in the dispute; the *res judicata* pleaded is against the Tavazhi the Karnavan, and members of which undoubtedly actively disputed the claim of the plaintiff and the other defendants. Furthermore, the controversy did not stop with the first Court. The Karnavan and members of the Tavazhi, as already stated, appealed to the District Court making the plaintiff as well as the 1st defendant and the other members of the Tarwad respondents. When the District Judge confirmed the finding that there was no Tavazhi, he did so as between the two sets of members on opposite sides of the record. With reference to his finding which is a final one in the case no question of *res judicata* between co respondents arises.

We must, therefore, hold that the District Judge was right in considering that the finding that there was no Tavazhi is binding on the appellant in this suit.

A question was raised that the 1st defendant, the tenant, was estopped from disputing the title of the plaintiff as his landlord. But this plea, even if valid, is of no effect in this case as the 2nd defendant is also a party and against him there can be no such estoppel.

The second appeal fails and must be dismissed with costs.

M. C. P.

Appeal dismissed.

(8) 29 M. 515.
(9) 18 M. 374 at p. 377; 6 Ind. Dec. (N. s.) 609.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISON NO. 17 OF 1919.
April 4, 1919.
Present :—Mr. Stuart, J. C.

VAKIL KHAN—PLAINTIFF—APPLICANT
versus
B. ANAND BEHARI LAL AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 64—Acknowledgment, whether statement of account—Endorsement promising to pay, whether agreement.

A mere acknowledgment is not a statement of account, and an endorsement expressed as follows:—"Will pay early next August" is not an agreement in writing of the nature contemplated by Article 64 of Schedule I to the Limitation Act. It is nothing more than a proposal. [p. 263, col. 2]

Application for revision of the decree of the Additional Judge, Small Cause Court, Lucknow, dated the 8th August 1918.

Mr. *A. Rauf*, for the Applicant.

Mr. *Zahur Ahmad*, for the Opposite Party.

ORDER.—The point raised in this revision is whether the provisions of Article 64, First Schedule, Act IX of 1908, can apply to the following case :—

Muhammad Fazal Khan wrote in 1914 to Anand Behari Lal demanding the payment of a certain sum of money. Anand Behari Lal endorsed on the letter, "Will pay Rs. 250 early next August 1915. Signed Anand Behari Lal, dated the 13th October 1913," 1913 being written by a clerical error for 1914. The suit was brought in the Small Cause Court on the 16th July 1918. If it be held that accounts had been stated in writing signed by Anand Behari Lal and the debt by a simultaneous agreement in writing signed as aforesaid had been made payable in August 1915 the suit was within limitation. If the contrary view be taken the suit is time-barred. The learned Counsel for the applicant has argued that if the decision in *Manjunatha Kamti* v. *Devamma* (1) be followed, it must be considered that there was an account stated within the meaning of Article 64 and that there was also a simultaneous agreement to pay the amount at a future time. There is much to be said in favour of the view that if that decision of the Madras High Court is followed, the facts disclose an account stated. But the view taken by the Madras High Court on this point has not been accepted by other High Courts. A year previous to the Madras decision the Allahbad High Court in *Ganga Prasad* v. *Ram Dayal* (2) arrived at the opposite view and a view different from the view of the Madras High Court was taken in *Shankar* v. *Mukta* (3). These decisions of the Allahabad and the Bombay High Courts did not find favour in the eyes of the Madras High Court, but they appear to me to lay down the correct law upon the subject. This point has never been absolutely decided in this Court, although the decision in *Musammat Jhaptan* v. *Ram Dayal* (4) shows that the view taken in Allahabad and Bombay was regarded favourably by a Bench of this Court in 1904. Apart from any other point it appears to me impossible on the meaning of the language to hold that a mere acknowledgment is a statement of account and it is impossible to hold that the endorsement here, "Will pay Rs. 250 early next August 1915," is an agreement in writing of the nature contemplated by the Article. It is nothing more than a proposal. If the other side had accepted Anand Behari Lal's proposal to pay the money in August 1915 and not before, they would have been debarred from suing until that date. There was nothing in the fact that he made the proposal, which the other side neither accepted nor refused to accept, to have prevented them, had they so wished, from suing before August 1915. If they had accepted the proposal and if an agreement in writing had been arrived at, there would have been force in the contention that the cause of action did not accrue until August 1915. But this was not the case upon the facts. For the above reasons I find that the learned Small Cause Court Judge was right in his decision that the suit was time-barred and I dismiss this application with costs.

Application dismissed.

(1) 26 M. 186; 12 M. L. J. 444.
(2) 23 A. 502; A. W. N. (1901) 150.
(3) 22 B. 513; 11 Ind. Dec. (N. S.) 923.
(4) 7 O. C. 166.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 129 OF 1918.
June 26, 1919.
Present:—Mr. Justice Piggott and Mr. Justice Walsh.

ABDUL AZIZ—DEFENDANT—APPLICANT
versus
SHEKHAR CHAND—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Adjournment, refusal to grant—Dismissal of suit for default—Reversal of order and grant of adjournment, legality of—Irregularity.

In a suit before a Munsif, the plaintiff and the Pleader for the defendant appeared on the date fixed for the hearing, the plaintiff asked for an adjournment on the ground that his witnesses were

ABDUL AZIZ *v.* SHEKHAR CHAND.

not present; the defendant's Pleader stated that his witnesses, too, had not come. The Munsif refused the adjournment and dismissed the suit for want of prosecution. Later in the day the plaintiff with his Pleader appeared before the Munsif and called his attention to the fact that the burden of proof had been laid on the defendant. The Munsif, thereupon, treating the application as one for setting aside an *ex parte* decree, in the presence of the Pleader for the defendant set aside his previous order and granted the adjournment which he had previously refused. On the adjourned date, the defendant did not appear, and an *ex parte* decree was passed against him. On an application for revision to the High Court:

Held, that the Munsif had not only acted in the exercise of his jurisdiction with material irregularity but had acted without jurisdiction in his attempt to correct his first erroneous order, and that neither of his orders nor the *ex parte* decree could be upheld. [p. 265, cols. 1 & 2.]

Civil revision against the order of the Munsif, Nagina, dated the 13th June 1918.

Mr. *S. A. Haidor*, for the Appellant.

Dr. *Surendro Nath Sen*, for the Opposite Party.

JUDGMENT.—This was a suit on a promissory note. We find that three issues were framed, as to which we should not have been prepared to say that there was not one issue at least on which the burden of proof would, in the ordinary course of things, lie on the plaintiff. However that may be, the learned Munsif who framed the issues recorded at the time a note to the effect that the burden of proof was placed on the defendant. He then fixed the 13th of June 1918 for the hearing. On that date the plaintiff was present in person and the defendant was represented by Pleader. The plaintiff in effect asked for an adjournment of the hearing on the ground that his witnesses were not present. The defendant's Pleader made a statement to the effect that his witnesses also were not present. The Court refused to grant an adjournment. On this state of facts it is beyond question that the learned Munsif's duty was to take into consideration the plaint and the written statement and the frame of the issues. He would also have had jurisdiction, if he thought proper, to reconsider the note made by his predecessor in office, to the effect that the burden of proof was laid on the defendant, although it is reasonable to add that, if he had taken it upon himself to reconsider that point, it would have formed a strong argument against his decision to refuse an adjournment, because it would be tantamount to deciding that the parties had been misled as to their position by his predecessor's order. However, the learned Munsif adopted neither of these courses. He came to the conclusion, erroneously beyond question, that the suit was liable to dismissal for want of prosecution on the part of the plaintiff. He passed an order to that effect. Five days later a decree was prepared in accordance with that judgment and was signed by the Munsif. In the meantime, however, other things had happened. On that same date, namely, the 13th of June 1918, the plaintiff re-appeared in Court, this time accompanied by his Pleader. An affidavit was put in which in itself contained nothing very material; but the point of the proceeding was that the Pleader for the plaintiff now called the attention of the learned Munsif to his predecessor's order by which the burden of proof on the issues had been laid upon the defendant. The learned Munsif then came to the conclusion that his order dismissing the suit for want of prosecution was a bad order and he took it upon himself to endeavour to correct the mistake. He treated the application made to him by the plaintiff, through his Pleader, as an application for setting aside an *ex parte* order. He took cognizance of it there and then, in the presence of the defendant's Pleader, and passed an order setting aside his previous order of the same date, and granted the adjournment which he was probably ill-advised to have refused, fixing the 2nd of July 1918 for the trial of the issues on the merits. We are informed that on some subsequent date, the suit came up for trial, but the defendant did not appear. The plaintiff tendered sufficient evidence to justify an *ex parte* decree in his favour and such decree has been passed. In the meantime the defendant had presented before this Court the application in revision with which we are now dealing. The defendant's contention is that the second order of the 13th of June 1918 was wholly without jurisdiction and is liable to be set aside. In our opinion, as we have already pointed out, the learned Munsif began by misunderstanding the position of the parties and the law applicable to that position.

Under this double mistake he passed an order dismissing the suit, which as it stands is a bad order, for it purports to be a dismissal of the suit for want of prosecution, and no order to that effect could legally have been passed in the position in which the parties stood. In an endeavour to correct this mistake the learned Munsif has committed another one. His second order of the 13th of June 1913 is also a bad order and liable to be reversed by this Court in revision. On behalf of the applicant stress has been laid on one of the latest reported decisions of this Court, the case of *Hingu Singh* v. *Jhuri Singh* (1). That was a first appeal from order and the jurisdiction of this Court was limited by its jurisdiction in dealing with appeals from orders. The only point decided in that case, which is relevant to the case now before us, is authority for the proposition that the first order passed by the learned Munsif on the 13th of June 1918, although in form purporting to be an order dismissing the plaintiff's suit for default, had nevertheless in law the effect of a dismissal of the suit on merits. It is this which makes the Munsif's second order of the 13th of June 1918 a bad order in law. Now the question is, what ought this Court to do on the above state of facts? The applicant wishes us to set aside the second of the two orders passed by the Court below and to leave him the full benefit of the erroneous decree dismissing the suit for default passed earlier on the same date. The jurisdiction of this Court in revision can only be limited by the words of section 115 itself. This Court has called for the record of this case, which has been decided by a Court of subordinate jurisdiction, namely, the Court of a Munsif. We have found on examining the record, that the learned Munsif has acted in the exercise of his jurisdiction with material irregularity and has acted without jurisdiction in his attempt to correct the first erroneous order. The result is that we have power to make such order in the case as we think fit. We readily concede to the learned Counsel for the applicant that our order must be based upon legal principles and must be directed towards the interests of justice. Looking at the matter from this point of view, we are satisfied that the only correct order for us to pass is one setting aside all the orders passed by the learned Munsif, beginning with his order and decree of the 13th of June 1918 dismissing for want of prosecution a suit in which both parties were present before him. We set aside, first of all, the *ex parte* decree which has since been passed in favour of the plaintiff. We also set aside the order in respect of which this application in revision has been made, namely, the second order of the 13th of June 1918. We also set aside the erroneous order and the decree passed earlier on the same date by which the plaintiff's suit was dismissed for want of prosecution. A similar order was made by this Court in *Gobind Singh* v. *Kalyan Dass* (2). The result is that the record of the suit will go back to the trial Court, to be tried on the merits on the issues originally framed, after due notice to both parties of the date fixed for trial. It is, of course, open to the trial Court to amend the issues, or to fix further issues, if it thinks necessary; but the suit must be tried on the merits. The costs hitherto incurred by both parties, including in this Court fees on the higher scale, will abide the result of the suit.

Case sent back.

(1) 46 Ind. Cas 390; 40 A. 590; 16 A. L. J. 462.

(2) 38 Ind Cas. 673; 15 A. L. J. 24.

CALCUTTA HIGH COURT.

CIVIL REVISION CASE NO. 450 OF 1918.

February 14, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

SAHERALI MOLLA AND OTHERS—PLAINTIFFS—PETITIONERS NOS. 1 to 3

versus

BHOLA MOLLA AND OTHERS—DEFENDANTS NOS. 1 TO 6—OPPOSITE PARTIES.

Damages, suit for—Title, question of, whether can be gone into—Jurisdiction of Small Cause Court.

Plaintiff brought a suit in the Small Cause Court for damages against the defendant for wrongfully taking away fish from the tank in which the plaintiff said he had an 8-annas share and of which he was in possession. The defendant having raised issues on

the questions of title and possession, the plaint was returned by the Small Cause Court for presentation to the ordinary Court. The first Court decided those questions, but the lower Appellate Court threw out the suit on the ground that the question of title could not be gone into in such a suit:

Held, that the Court could go into the question of title in such a suit, though it could not finally determine it. [p. 267, col. 1.]

In a suit for damages for trespass on land a Small Cause Court is competent to investigate the question of title for the purpose of determining the defendant's liability for damages, though it cannot determine the question of title finally. [p. 266, col. 2.]

Rule against an order of the Sub-Judge, second Court, 24-Pergannas in Money Appeal No. 502 of 1917 (Money Suit No. 153 of 1917 of the Munsif, 3rd Court, Diamond Harbour.)

Babu *Sarat Chandra Mukherjee*, for the Petitioner.

Babu *Atindra Nath Mukherjee*, for the Opposite Party.

JUDGMENT.—The petitioner before us brought a suit for damages against the defendant for wrongfully catching and taking away fish from a tank in which the plaintiff said he had 8-annas share of which he was in possession.

The suit was instituted in a Court of Small Causes. The defendant denied the title and possession of the plaintiff and set up various defences to the action, which it is unnecessary to refer to except that contained in the third paragraph of the written statement, where the defendant pleaded that the suit was not maintainable in a Small Cause Court as there were complicated questions of title involved in the suit. Upon this objection the plaint was returned by the Small Cause Court Judge to the petitioner for presentation to the proper Court. Probably the Court intended to proceed under section 23 of the Provincial Small Causes Courts Act, which provides that when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immoveable property or other title which such Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title. However that may be, the suit was tried by the Munsif in his ordinary jurisdiction. Several issues were raised, two of them being whether the plaintiff had title to the disputed property and whether the story of plaintiff's possession was true. Both parties adduced evidence on the questions of title and possession and those questions were gone into by the Munsif, who decided them in favour of the plaintiff.

The defendant then appealed and the learned Subordinate Judge held that the question of title ought not to have been gone into in such a suit and dismissed the suit.

It is true that the decision on the question of title in a suit for damages cannot be binding on the parties. But the Small Cause Court is no doubt competent to investigate the question of title for the purpose of determining the defendant's liability for damages. See *Elahi Buksh Mandal* v. *Ram Narayan Ghose* (1), though it cannot determine the question of title finally.

The learned Subordinate Judge refers to the case of *Lep Singh Khasia* v. *Nimar Khasia* (2), as supporting his view that the question of title cannot be gone into in a suit for damages. But that case does not support the proposition for which it is cited by the Court below. The learned Judges in that case (Banerji and Rampini, JJ.) held that the plaintiff in a suit would be entitled to a decree for damages without proof of title if it is found, first, that he has been in possession from before and up to the date of the institution of the suit, and secondly, that the defendant has failed to make out a better title to the property than the plaintiff. The learned Judges further pointed out that "if the first point is decided in favour of the plaintiffs, they will be entitled to a decree, unless the defendants make out a better title; and if the first point is decided against the plaintiffs, they will not be entitled to a decree, unless they make out their title."

It is clear, therefore, upon that decision that the plaintiff in such a suit is entitled to succeed if he shows that he was in possession from before and up to the date of the institution of the suit unless the defendant can show a better title, and that if the question of possession is decided against the plaintiff, the plaintiff can show that he has got title to the land better than that of the defendant.

The learned Subordinate Judge has also relied upon the case of *Giri Narain Chatterji*

(1) 10 Ind. Cas. 117; 16 C. W. N. 288.
(2) 21 C. 244; 10 Ind. Dec. (N.S.) 795.

v. *Modhu Sudan Mukerji* (3), where the decision in the case of *Lep Singh Khasia* v. *Nimar Khasia* (2) was considered. But in the case of *Giri Narain Chatterji* v. *Modhu Sudan Mukerji* (3) the plaintiff had already obtained a decree declaring his title and in execution of the decree had obtained symbolical possession against the judgment-debtor which as between them amounted to actual possession. The plaintiff, therefore, was entitled to damages in that case. The observations made with reference to the case of *Lep Singh Khasia* v. *Nimar Khasia* (2) were by way of explaining that decision and in any case were *obiter*.

As pointed out in the case of *Elahi Buksh Mandal* v. *Ram Narayan Ghose* (1), "It is notorious that before embarking on litigation as to title, litigants in this country frequently endeavour to obtain an advantage, or what they think will be an advantage, by securing in their favour a decree of a Small Cause Court or a decree under section 9 of the Specific Relief Act or an order of a Criminal Court. That has no doubt been the object of the present plaintiff and it is not one which should be encouraged."

But then, as pointed out above, it was upon the objection of the defendant that the case involved intricate questions of title that the plaint was returned from the Small Cause Court to the ordinary Court. The defendant raised issues on the question of title and possession; evidence was gone into on the points on both sides; and the Court of first instance decided those questions. In these circumstances, we think that the lower Appellate Court ought not to have thrown out the suit on the ground that the question of title could not be gone into. As already pointed out, the Court can go into the question of title, though it cannot finally determine it.

The learned Pleader for the opposite party has relied upon certain observations of the learned Subordinate Judge on the question of possession. The learned Subordinate Judge says: "Even if the plaintiffs are allowed to maintain the suit in the present form, it should be decided mainly on the evidence of possession and the plaintiff should not be allowed the advantage of any finding on the question of title in a suit like this....." And again he observes: "Turning to the question of possession I do not consider it to be so very satisfactory and strong as would entitle the plaintiffs to a decree without coming to a finding upon the question of title."

There is, therefore, no definite finding on the question of possession, because the learned Subordinate Judge was of opinion that it could not be decided without going into the question of title.

In these circumstances we think that the order of the lower Appellate Court should be set aside and the case sent back to that Court in order that the appeal may be disposed of upon all the questions raised in the case.

Costs, one gold *mohur*, to abide the result.

Case sent back.

(3) 18 Ind. Cas. 751; 17 C. W. N. 324.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 20 AND 21 OF 1918.

June 13, 1919

Present:—Mr. Justice Atkinson.

No. 21 OF 1918

BALAK MAHTON AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MATHURA RAM DUBEY AND OTHERS—PLAINTIFFS AND RAJANI KANTA RAM DUBEY AND OTHERS—DEFENDANTS—RESPONDENTS.

No. 21 OF 1918

PADARATH MISSER—DEFENDANT—APPELLANT

versus

MATHURA PRASAD RAM DUBEY AND OTHERS—PLAINTIFFS AND RAJANI KANTA RAM DUBEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Land Registration Act (VII B. C. of 1876), s. 78—Landlord and tenant—Rent, suit for—Non-registration of name of proprietor, effect of—Registration before decree, whether cures defect—Bengal Tenancy Act (VIII B. C. of 1885), s. 71 (4)—Appraisement of crops—Crops removed by tenant—Method of appraisement—Presumption.

Non-registration of a person as the recorded proprietor of land in accordance with the provisions of section 78 of the Bengal Land Registration Act is not a disqualification which would deprive him of a cause of action; it is merely an impediment against his right to recover rent by a decree until the provisions of section 78 are complied with.[p. 268, col. 2.]

Where a plaintiff in a suit for rent was not registered as the recorded proprietor up to the date of the first Court's decree in his favour but was so registered prior to an appeal to the District Judge:

Held, that he was entitled to the benefit of a

decree from the District Judge if the facts otherwise justified a decree being granted in his favour. [p. 268, col. 2.]

Section 71, clause 4, of the Bengal Tenancy Act contemplates that, where tenants remove a crop without having the same properly appraised, a presumption arises against them and the landlord is entitled to the full measure of the crop as of the best crop in the neighbourhood of a similar character for that harvest. [p. 269, col. 2]

Appeal from a decision of the District Judge, Shahabad.

Mr. *D. N. Sirkar*, for the Appellants.

Messrs. *Huda* and *Jatendra Nath Gupta*, for the Respondents.

JUDGMENT.—The plaintiffs sue to recover from the defendants Nos. 1, 2 and 3 rent on the Danabandi system for the years 1320 and 1323. The plaintiffs are four in number and are co-sharers, as landlords, in respect of the lands in suit. *Pro forma* defendants Nos. 4 and 5 are the other co-sharer landlords of the plaintiffs. It is stated as between the respective landlord co-sharers that the collection of their respective shares of the rent has been separated.

The main argument advanced by the defendants why the plaintiffs should not succeed in obtaining a decree for the rent claimed in this suit is that the plaintiffs were not at the time of the institution of the suit registered in the Collectorate under the provisions of section 78 of the Land Registration Act

Section 78 of the Land Registration Act provides: "No person shall be bound to pay rent to any person claiming such rent, unless the name of the person claiming the rent shall have been registered under the Land Registration Act."

The defendants contend that the plaintiffs were not duly registered in accordance with the provisions of the Land Registration Act prior to the institution of this suit.

This point was suggested before the learned Munsif who tried the case; but I gather from the form of his judgment that it was not seriously pressed in argument before him.

However in the lower Appellate Court a different attitude was adopted by the defendants and the point as to non-registration of the plaintiffs as the recorded proprietors in the Collectorate prior to the institution of the suit was strenuously pressed before the learned District Judge.

Up to the time that the Munsif granted a decree for rent claimed in favour of the plaintiffs as against the defendants, the plaintiffs were not registered in accordance with the requirements of the Land Registration Act. Therefore the learned Munsif in my opinion ought not to have awarded the plaintiffs a decree.

The plaintiffs and the defendants respectively appealed to the learned District Judge, and pending the determination of the appeal the plaintiffs complied with the provisions of section 78 of the Land Registration Act and had themselves recorded as proprietors of the lands in suit in the Collectorate.

The learned District Judge was of opinion that non-registration was not a disqualification which in point of law would be deemed to deprive the plaintiffs of a cause of action; but that it was merely an impediment against their right to recover the rent they claimed by a decree until the provisions of the Registration Act were complied with, and that thus inasmuch as the plaintiffs prior to the appeal to the District Judge were duly registered and recorded as proprietors of the lands in suit that, therefore, they were entitled to the benefit of a decree from the learned District Judge, if the facts otherwise justified a decree being granted in their favour.

With the view I agree. It appears to me that the law on this point is covered by express authority which will be found in the rulings reported as *Alimuddin Khan* v. *Hira Lal Sen* (1), *Abul Khair* v. *Meher Ali* (2), *Pramada Sundari Debi* v. *Kanai Lal Shaha* (3) and *Belchembers* v. *Nawab Sir Syed Hussan Ali* (4), and in addition there appears to me to be an authority in this Court to support the contention that even after the trial Court has granted its decree, it would be open to the landlord seeking to recover rent to comply with the terms of section 73 of the Land Registration Act and to have his name recorded so as to be entitled to a decree from the Appellate Court even

(1) 23 C. 87 (F. B.); 12 Ind. Dec. (N. S.) 59.
(2) 26 C. 712; 13 Ind. Dec. (N. S.) 1055.
(3) 27 C. 178; 14 Ind. Dec. (N. S.) 117.
(4) 2 C. W. N. 493.

though the decree of the trial Court may have been illegal. The ruling reported as *Narayan Prosad* v. *Gajo Mahton* (5) appears to me to lead to this conclusion in point of law.

I agree with the learned Judge in thinking that the learned Munsif should not have awarded the plaintiffs a decree in this case. The learned Judge was justified in appeal in granting the plaintiffs a decree, the plaintiffs having complied with the law as to registration.

This disposes of the main contention addressed to me on the part of the defendants-appellants.

It is conceded that on the question of payment no point can arise in second appeal; the finding of fact by the learned Judge that no payment of rent was in fact made by the tenants is a conclusive finding of fact by which I am bound.

The rent claimed by the plaintiffs for the years in suit is a rent according to the Danabandi system. The rent has since been commuted into a cash rent; but prior to the institution of the suit the Danabandi system prevailed, and applies to the years for which rent is sought to be recovered.

Both the trial Court and the first Court of Appeal were unable to assess the value of the crop owing to the crop having been cut and removed by the defendants, and consequently means did not exist of actually appraising the value of the crop as between the plaintiffs on the one hand and the defendants on the other; and, therefore, both the Courts adopted the system of taking an average between the figures stated by the plaintiffs and by the defendants respectively as to the actual value of the crop as the basis upon which the plaintiffs should be entitled to recover the rent due. Strictly speaking, in point of law I think this was an erroneous method for the Courts to have adopted; but it is difficult to see what either of the Courts could have done; having regard to the fact that the crop which required to be appraised had been removed by the defendants rendering the appraisement impossible by reason of their conduct, which conduct might amount to a criminal offence under certain conditions. I do not think the plaintiffs should be allowed to suffer by reason of the wrongful conduct of their tenants; and section 71, sub-section 4, of the Bengal Tenancy Act seems to me to contemplate that where tenants do remove a crop without having the same properly appraised that the presumption arises against them and the landlord is entitled to the full measure of the crop as of the best crop in the neighbourhood of a similar character for that harvest. This system of valuation was not adopted by either of the Courts below; as I have pointed out, the average was applied. The result no doubt is probably fair and reasonable as between the parties; but it would be quite senseless and futile to remand the case for further consideration as to the value of the crop, inasmuch as the crop has long ceased to exist and no good can be gained by any attempt to remand and re-open the case now for further consideration.

Accordingly I will dismiss these appeals but without costs owing to the very defective way in which the plaintiffs presented their case in these appeals.

Appeals dismissed.

(5) 42 Ind Cas. 833; 2 P. L. J. 701; 2 P. L. W. 181.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1698 OF 1917.

April 10, 1919.

Present:—Justice Sir Asutosh Chowdhury, KT.

KANOK DASI—PLAINTIFF—APPELLANT

versus

SRIHARI GOSWAMI AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 29, 30—Limitation Act (IX of 1908), s. 28, Sch. I, Art. 44—Sale of immoveable property by guardian in contravention of sanction, validity of—Minor, suit by, to set aside sale—Purchaser from minor, position of—Transfer of Property Act (IV of 1882), s. 55—Limitation Act (IX of 1908), Sch. I, Art. 116—Registered conveyance—Covenant for title, whether implied—Breach of covenant.

KANOK DASI *v.* SRIHARI GOSWAMI.

A sale by the certificated guardian of a minor not in accordance with the Court's sanction is voidable, but it is good until it is avoided. [p. 270, col. 2.]

Where a minor does not, within three years after attaining majority, take action for repudiating a sale made by his certificated guardian, his right to set aside the sale and recover possession of the property is barred by the provisions of Article 44 of Schedule I and section 28 of the Limitation Act, and, therefore, a transferee from him cannot successfully sue the purchaser from the certificated guardian for recovery of possession of the property after declaration of title. [p. 270, col. 2.]

Under section 55, clause (2), of the Transfer of Property Act, there is an implied covenant for title and possession in all registered conveyances, and a breach of that covenant is the breach of a contract in writing registered within the meaning of Article 116 of Schedule I to the Limitation Act. [p. 271, col. 1.]

Appeal against the decree of the Subordinate Judge, First Court, of Sylhet, dated the 21st April 1917, reversing that of the Munsif, First Court at that place, dated the 1st September 1916.

FACTS appear from the judgment.

Babu *Gopal Chandra Das*, for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for recovery of possession on declaration of title. Plaintiff purchased the property from defendant No. 3 in 1319. The defence of defendant No. 1 was that his father had purchased the property from the certificated guardian of defendant No 3 in 1311. Defendant No. 3 attained majority in 1318. The present suit was brought in 1915. The first question to be considered is whether the sale has been repudiated by the minor when he has within one year of his attaining majority sold to plaintiff. My submission is that it must be taken to be a sufficient indication of the minor's repudiation of the sale. See Trevelyan on Law relating to Minors (4th Edition), page 202. The previous sale is avoided by the subsequent transaction. The question is whether a fresh suit is necessary to avoid the sale. My submission is that the sale is not void but voidable, as some consideration passed. The present suit is not barred as it is brought within three years of the purchase. See *Dattaji Sakharam Rajadhiksh Kalba Yese Parabhu* (1). My contention is that the subsequent transaction avoids the previous one. Then as to the refund of the purchase-money, see *Krishnan Nambiar* v. *Pannan* (2). Section 55 of the Transfer of Property Act applies.

Babu *Krishna Kishore Bysack*, for the Respondents.—I appear for defendant No. 1. My only submission is that since the sale to me I have been all along in possession of the lands. The subsequent transaction is no repudiation of the previous sale.

JUDGMENT.—The plaintiff claims title by purchase from defendant No. 3 on $\frac{\text{20th Jaisto 1319}}{\text{10th June 1912}}$. Defendant No. 1 on the other hand also claims on the strength of a purchase by his father from defendant No. 3's certificated guardian in April 1905. It has been found by both the Courts that the sale by the certificated guardian was not in accordance with the Court's sanction. They are right in holding that the sale was, therefore, voidable. The sale, however, is good until it is avoided. Defendant No. 3 attained majority in $\frac{\text{Jaisto 1318}}{\text{May-June 1911}}$. No action for repudiating the acts of the guardian was taken by him within three years after attainment of majority under Article 44 of the Limitation Act. Defendant No. 3 could not have instituted such a suit after the lapse of three years. Defendant No. 1 has been in possession of the property ever since his purchase. In the conveyance in favour of the plaintiff there is no reference to the sale by the guardian. I think the learned Subordinate Judge was right in coming to the conclusion that the plaintiff is also barred from instituting this suit for cancellation of defendant No. 1's conveyance, and that he has no right to possession without such cancellation. He has also held that inasmuch as defendant No. 3 did not take any steps to repudiate the acts of his guardian within three years it ought to be presumed that the sale by his certificated guardian was ratified. Mere abstention from taking steps may not amount to ratification or acquiescence, but it is quite correct that defendant No. 3 could not institute a suit to set aside the sale having regard to Article 44 of the Limitation Act and he was not entitled to possession having regard to the operation of Article 28: see *Latchiah* v. *Mukkalinga* (3). The plaintiff cannot have any higher rights than defendant No. 3, his vendor.

(1) 21 B. 749; 11 Ind. Dec. (N. S.) 504.

(2) 21 M. 8; 7 Ind. Dec. (N. S.) 362.

(3) 30 M. 393; 17 M. L. J. 220; 2 M. L. T. 351.

The plaintiff in this action asked in the alternative for refund of the consideration money by defendant No. 3. The learned Subordinate Judge has held that as there is no indemnity clause in the Kobala, Article 116 is of no avail and that Article 97 also does not operate in his favour. Article 97 operates from the date of the failure of consideration. The sale to the plaintiff was on the 10th June 1912. The plaint was filed on the 27th November 1915. It states that when the plaintiff attempted to take possession after her purchase, she was ousted by the defendants in the month of Pous 1319—December-January 1912-1913—but there is no finding as to when this took place. Under Article 97 the date runs from the time when the plaintiff was ousted from or failed to get possession [*Hanuman Kamat* v. *Hanuman Mandur* (4), see also *Tulsiram* v. *Murlidhar Chaturbhuj* (5).] So far as Article 116 is concerned, although there is no express indemnity in the plaintiff's Kobala, yet under section 55 of the Transfer of Property Act there is an implied covenant for possession. Thus there was a breach in this case of that implied covenant. Defendant No. 3 averred that he was in possession when he sold the property to the plaintiff and failed to give possession. I hold, therefore, that the plaintiff's Kobala being a registered document, he had six years under Article 116 to get compensation. See *Arunachala Aiyar* v. *Ramasami Aiyar* (6), in which it was held that in all registered conveyances executed after the Transfer of Property Act came into force, a covenant for title is implied by section 55, clause (2), of that Act and that the registered conveyance should be read as if it expressly embodied that covenant and that breach of that covenant is the breach of a contract in writing registered, within the meaning of Article 116. I, therefore, hold that the plaintiff is entitled to a decree for compensation for Rs. 40 against defendant No. 3 with interest thereon at 6 per cent. from date of suit.

The appeal, therefore, is dismissed as against defendant No. 1 with costs and decreed as against defendant No. 3 with costs.

Appeal partly allowed.

(4) 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.).

(5) 26 B. 750; 4 Bom. L. R. 57'.

(6) 25 Ind. Cas. 618; 38 M. 1171; 27 M. L. J. 517; 16 M. L. T. 397; 1 L. W. 849.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 657 OF 1917.

July 10, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

GANESH RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEO SARAN AHIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Debt created by decree, whether illegal or immoral—Necessity, proof of.

A debt created by a decree against a Hindu father of a joint family is not an illegal or an immoral debt, especially when there is a finding that there was legal necessity for incurring the debt so created, and it may be recovered from the ancestral property belonging to the joint family. [p. 272, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Mr. *Baranasi Prasad Jhunjhunwala* for Mr. *Parmeshwar Dayal*, for the Appellants.

Messrs. *Bhagwat Prasad* and *Atul Krishna Roy*, for the Respondents.

JUDGMENT.

MULLICK, J.—In this case the *pro forma* defendants Nos. 5 to 7, the fathers of the plaintiffs Nos. 2 to 4, having been entered in the Record of Rights as in possession of a certain plot of land, defendants Nos. 1 to 3 sued them for declaration of title, recovery of possession and for mesne profits. That suit ended in a decree for defendants Nos. 1 to 3 with mesne profits and costs, and in execution some ancestral property belonging to the joint family consisting of plaintiffs Nos. 2 to 4 and defendants Nos. 5 to 7 was attached.

The plaintiffs thereupon preferred a claim, but being unsuccessful they have brought the present suit for declaration of their right to have the property released from attachment.

The Subordinate Judge has found on appeal that the suit was contested by defendants Nos. 5 to 7 *bona fide* and in the interest of the joint family; in other words,

that there was legal necessity for incurring the debts which have been created by the decree.

In second appeal it is contended on behalf of the plaintiffs that the debt was illegal and immoral inasmuch as defendants Nos. 5 to 7, being perfectly aware that they had no title to the property, committed trespass thereon and thereafter defended the suit when in fact there was no necessity for defending it.

Now the balance of opinion seems to favour the view that a debt created by a decree against a father cannot be regarded as an illegal or immoral debt. The authorities are reviewed in the case of *Chakouri Mahton* v. *Ganga Proshad* (1), and their Lordships therein cite a decision of the Punjab Court in *Kartar Singh* v. *Harji Mal* (2). The following passage in the latter case seems to me to put the law very clearly:—

"If the principle of the decision is applicable to a judgment debt as well as to a debt voluntarily contracted by the father, and the position of the son can be in no wise bettered by the circumstance that the original liability has merged in a decree, the son can escape liability only upon the ground that the judgment-debt is in the position of a debt contracted for an illegal or immoral purpose. Granting that the son may go behind the decree, it is impossible to hold that the debt created by the decree is a debt contracted for an illegal or immoral purpose, merely because the act from which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral. It is needless to consider whether a son could be held responsible in a suit against himself to compensate a plaintiff, out of ancestral property, for the loss occasioned to the plaintiff by the illegal or immoral acts of his father. The most analogous case would be that of a father who had voluntarily contracted to compensate the person whom he had by a criminal offence deprived of property. A debt created by such a contract could not without an utter perversion of language be styled a debt contracted for an illegal or immoral purpose; on the contrary, it would be a debt contracted for a highly moral as well as lawful purpose, and the case of a debtor enforcing an obligation to pay an ascertained sum by way of such compensation stands upon at least as sound a basis, though the obligation be unwillingly contracted under lawful compulsion."

In *Chakouri Mahton's case* (1) as also in *Gadadhar Ramanuj Das* v. *Ghana Shyam Das* (3) the decretal debt was held to be neither illegal nor immoral because no criminal offence involving a moral stigma had been disclosed. It was not necessary in either of these cases to consider the wider question whether the Hindu Law ceases to operate as soon as the debt becomes merged in a decree.

But it is clear that even upon the narrower view suggested in *Chakouri Mahton's case* (1) the defendants cannot succeed.

The learned Vakil for the appellants, however, contends that assuming that the debt was neither illegal nor immoral and that it was a personal debt incurred by defendants Nos. 5 to 7 which their sons are liable to pay, the attachment in the present case is illegal during the lifetime of these defendants.

The answer to this is that the lower Appellate Court has not merely held that the debt was neither illegal nor immoral but has gone further and found that it was incurred for family necessity.

The learned Vakil contends that he is entitled to challenge this finding on the ground that it is a mixed question of law and fact. Admitting that to be so, in my opinion the learned Subordinate Judge was perfectly correct in his conclusion. Having regard to the fact that the Record of Rights was in their favour the defendants Nos. 5 to 7 were fully justified in defending their possession; and it is impossible to hold in these circumstances that there was no *bona fides* either in entering upon the land or in defending the suit.

The result is that the appeal is dismissed with costs.

ATKINSON, J.—I concur.

Appeal dismissed.

(1) 12 Ind. Cas. 609; 39 C. 862; 16 C. W. N. 519; 15 C. L. J. 228.

(2) 128 P. R. 1879.

(3) 47 Ind. Cas. 212; 3 P. L. J. 533.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE NO. 15 OF 1919.

May 7, 1919.

Present: - Mr. Justice Das.

BASHIR ALI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Error of judgment, whether ground for transfer—Refusal to supply accused with copies of confidential documents, effect of.

The mere fact that a trial Court has committed an error of judgment in admitting evidence, is no ground for transferring a case from such Court. [p. 274, col. 1.]

Similarly, it cannot be said that the trial Court entertains any bias against the accused, or that the accused should reasonably apprehend that there is such bias, if, when addressed by that Court, the District Magistrate refuses to produce papers called for by the defence on the ground that some are missing and that the rest are confidential. [p 274, col. 2.]

Criminal application for transfer of a case from the file of the Sub-Divisicnal Officer, Araria.

FACTS of the case briefly are that the accused were put upon their trial for an offence under section 161, Indian Panal Code, or in the alternative section 409, Indian Penal Code, in respect of the discharge of certain postal cash certificates of the first Indian War Loan. When the trial commenced, the Court allowed the prosecution to examine 48 witnesses, all of whom deposed to distinct offences which the accused were alleged to have committed. The accused objected that the prosecution were entitled to prove only one or at most 3 of the offences which it was alleged they had committed and ought not to be allowed to adduce evidence in a haphazard way simply to prejudice the Court against the accused, and they prayed the Court to direct the prosecution to confine the evidence to the items which it was intended to make the subject-matter of the charge in the case. Upon this the Court passed the following order: "At this stage I cannot rule out any evidence. The evidence objected to is admissible under sections 14 and 15 of the Evidence Act and there are several rulings on that point." The trial proceeded and the accused asked for production of the report of the C. I. D. Officers as well as the evidence of witnesses recorded by Mr. Sircar, who had enquired into the matter at an earlier stage. On this the Court passed the following order: "I cannot call for the report of Mr. Sircar, as the District Magistrate says that it is confidential and cannot be produced. Under section 123, Evidence Act, the decision whether the report should be produced or not rests with the District Magistrate. *Re* the statements recorded by Mr. Sircar the prosecution reports that the papers have been stolen. I am not in a position to do anything in the matter."

Mr. *Athar Husain*, for the Petitioners, argued that the trial Court admitted evidence which was inadmissible under sections 14 and 15 of the Evidence Act. I protested against this but I was overruled. The result is that the mind of the trial Court will be prejudiced against me when he hears this mass of irrelevant evidence.

[DAS, J.—But if you are convicted, there is a Court of Appeal which will set the error right.]

Mr. *Athar Husain*.—But I do not want to be convicted, and my apprehension is that by the admission of this irrelevant evidence the chances of my acquittal at the hands of the trial Court are very much diminished now and in the event of my conviction and appeal, the Appellate Court will be chiefly guided by the appreciation of the evidence by the trial Court, which must be prejudiced by the admission of this evidence. My second grievance is that I have not been supplied with copies of C. I. D. reports and the evidence in the enquiry held previous to this trial. It was my right to know the nature of the information received against me.

Mr. *Sultan Ahmad* (Government Advocate), for the Crown, submitted that even if it be assumed that the trial Court is in error in law in admitting this evidence, that does not show that it is prejudiced against the accused. If this astounding proposition be upheld, there will be no end of petitions for transfer and the work of trying Courts will be dislocated. As to the second point, here again the trying Court is not to blame in the least. It cannot supply the accused with documents which are not in its possession.

JUDGMENT.—This is an application for transfer of a case from the file of the Sub-Divisional Magistrate of Araria to the file of some other Magistrate subordinate to the

District Magistrate of Purnea. Having given my most anxious consideration to the able arguments advanced by Mr. Athar Husain on behalf of the petitioners, I have come to the conclusion that no case has been made out for a transfer.

It appears that certain villagers sent a petition to one Mr. Duff complaining that the petitioners were in the habit of taking illegal gratification in connection with their official duty. Mr. Duff appears to have forwarded the petition to the Sub-Divisional Officer. Other petitions to the same effect were sent to the Postmaster-General and Director General of Post Offices. All these petitions appear to have found their way to the District Magistrate. The Sub-Divisional Officer himself made an enquiry and sent his report together with the petition forwarded by Mr. Duff to him to the District Magistrate. Upon all these informations received by the District Magistrate of Purnea, he directed the trial of the petitioners in the Court of the Sub Divisional Officer of Araria under section 161, Indian Penal Code, or in the alternative under section 409, Indian Penal Code.

The first point taken on behalf of the petitioners is that though they have been put on trial in respect of three specific items, the trial Court has admitted evidence of similar but unconnected instances of alleged offences on behalf of the prosecution in spite of the petitioners' protest. Mr Athar Husain says that the petitioners have been seriously prejudiced by the reception of this inadmissible evidence, but he very fairly and properly admits that he cannot show that in admitting the evidence, the learned Magistrate was unfair or partial in any way. It is a problem of some nicety whether evidence of similar but unconnected instances is admissible in a case where the petitioners have been put on trial in respect of three items only, but I do not think that I should fetter the judgment of the trial Court in any manner, specially as it is not suggested that in this matter the Court has been in any way unfair to the petitioners. The Court may have committed an error of judgment in admitting the mass of evidence, but an error of judgment is no ground for a transfer.

The next point urged is that the Court has consistently refused to give the petitioners informations relating to their alleged offence. The complaint is that the evidence recorded by the Sub-Divisional Officer and the Criminal Investigation Department and their reports have not been produced in the case. It appears that the Court did write a letter to the District Magistrate asking him if he would produce the papers called for by the defence. The reply of the District Magistrate was to the effect that the evidence was missing and the reports were confidential. This may be true or false, but it does not show that the Court has any bias against the petitioners or that there should be a reasonable apprehension in the mind of the petitioners that there is such bias. I express no opinion on the question whether the petitioners are entitled to the copies of such reports. If they are so entitled, the failure to furnish them with copies of such reports would undoubtedly affect their conviction, if ultimately they are convicted, but they do not affect the present application.

One or two other small points have been argued but, in my opinion, they are not material for the purpose of this application. I would reject this application.

Application rejected.

OUDH JUDICIAL COMMI SIONER'S COURT.

CRIMINAL REFERENCE No. 15 OF 1919.

April 29, 1919.

Present :—Pandit Kanhaiya Lal, A. J. C.

EMPEROR—PROSECUTOR

versus

RUPA—ACCUSED.

Penal Code (Act XLV of 1860), s. 448—Criminal house-trespass—Annoyance, causing of—Intention—Offence.

A person who has no intention of causing annoyance to any one and takes measures to avoid it cannot be convicted of an offence under section 448 of the Penal Code, even though a feeling of annoyance be the inevitable consequence of his being found out. [p. 275, col. 1 & 2.]

A house was occupied, only by the owner and his concubine who had an intimacy with the accused. The accused entered the house at her invitation in the absence of the owner and took measures to conceal himself as soon as the owner arrived, who, however, arrested him:

EMPEROR *v.* RUPA.

Held, that the accused was not guilty of an offence under section 448 of the Penal Code. [p. 275, col. 1.]

Reference against the order of the First Class Magistrate, Lucknow District, dated the 1st March 1919.

JUDGMENT.—The complainant is a Lohar by caste. He has in his keeping a woman of the Kurmi caste. On the 27th February 1919 at 7 P. M. the complainant returned home. The woman asked him to go to the liquor shop and have a drink. He replied that he would go after taking a betel leaf. He lighted a lamp and noticed a cap on a cot. He entered the room and saw the accused concealed there. He arrested him, took him to the Police Station and made a report.

The statement of the accused was that he had an intimacy with the woman who was in the keeping of the complainant and had gone into his house on her invitation. The woman admitted that she had invited him. He was tried summarily and convicted under section 451 of the Indian Penal Code and sentenced to rigorous imprisonment for three months. The learned District Magistrate recommends that the conviction should be set aside, as no lawful marriage between the complainant and the woman who was in his keeping was established.

It is clear from the circumstances proved that the woman was living with the complainant as a concubine, and that being so, it cannot be said that the accused entered the house of the complainant with the intention of committing an offence, if the woman had invited him for immoral purposes. The Hindu Law does not forbid marriages between different sections of the same primary caste, but in this case there was no proof that any marriage ceremonies had been gone through. The woman was living purely as a concubine of the complainant and neither section 451 nor section 498 of the Indian Penal Code can be applied to the case.

It has been suggested that the conviction may be altered into one for house-trespass under section 448 of the Indian Penal Code. But it cannot be said that the intention of the accused in entering the house was to commit an offence or to intimidate, insult or annoy the complainant or any of the inmates. In fact he concealed himself as soon as the complainant arrived and was anxious that the complainant should not know of his presence or the object with which he had come. A feeling of annoyance may be the inevitable consequence of the discovery, but such annoyance was not his object. It could not have formed part of his primary or secondary intention. In *Jiwan Singh* v. *Emperor* (1) an entry in the house of the complainant with the intention of having illicit intercourse with his widowed sister was held to amount to a criminal trespass, inasmuch as the particular object could not be attained except by causing great annoyance to the owner of the house, if the entry was discovered. An intention to cause annoyance by a certain act is, however, inconsistent with an intention to do it stealthily or to conceal it by every possible means. In fact as pointed out in *Queen-Empress* v. *Rayapadayachi* (2) and *Gaya Bhar* v. *Emperor* (3), a trespasser who commits an act, knowing that that act, if discovered, was likely to cause annoyance does not necessarily do it with that intention. He undertakes a risk according as the possibility of the discovery may be near, slender or very remote. If the discovery is probable as where there are other inmates in the house or reasonably certain, he may be presumed to have intended the inevitable or natural consequences of what he was doing. In *Balmakand Ram* v. *Ghansamram* (4) and *Mulla* v. *Emperor* (5) such an intention was presumed. In *Emperor* v. *Lakshman Ragunath* (6) and *Sellamuthu Servaigaran* v. *Pallamuthu Karuppen* (7) the intention was treated an inference of law resulting from the doing of an act and the circumstances attending it. Here the trespass was committed in the absence of the owner from the house on the invitation of his concubine. There was no other inmate in the house, whose modesty or privacy could have been invaded. The accused effectively concealed himself before the

(1) 17 P. R. 1903 Cr; 32 P. W. R. 1908 Cr, 8 Cr. L. J. 488.
(2) 19 M. 240; 1 Weir 537; 6 Ind. Dec. (N. S.) 872.
(3) 35 Ind. Cas. 979; 38 A. 517; 14 A. L. J. 719; 17 Cr. L. J. 419.
(4) 22 C. 391; 11 Ind. Dec. (N. S.) 262.
(5) 29 Ind. Cas. 67; 37 A. 395; 13 A. L. J. 625; 16 Cr. L. J. 435.
(6) 26 B. 558; 4 Bom. L. R. 280.
(7) 9 Ind. Cas. 152; 35 M. 186; 21 M. L. J. 161; 9 M. L. T. 283; 12 Cr. L. J 30.

owner entered in the house and was only discovered by chance and an intention to insult or annoy the owner cannot, in the circumstances, be presumed.

The reference is accepted and the accused acquitted of the offence charged. His bail-bond will be discharged.

Reference accepted.

PATNA HIGH COURT.
CRIMINAL REVISION NO. 153 OF 1919.
June 23, 1919.
Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.
HARI SINGH AND OTHERS—PETITIONERS
versus
KANCHAN MAHTO—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 430—Mischief—Guilty knowledge, whether necessary—Riparian owners, rights of, extent of.

Guilty knowledge is essential to a conviction for the offence of mischief, and, in the absence of any consideration or discussion of the circumstances and the reasonableness or otherwise of the act of an accused person, it is impossible to uphold a conviction for that offence. [p. 278, col. 2.]

A riparian proprietor can only take for the purpose of irrigation so much water as is necessary without materially diminishing what is to be allowed to descend, and the quantity of water that can be abstracted and used without infringing that essential condition must in all cases be a question of circumstances, depending mainly upon the size of the stream and the proportion which the water taken bears to the entire volume. [p. 278, cols. 1 & 2.]

Criminal revision against the order of the District Magistrate, Monghyr, dated the 24th April 1919, upholding in appeal the conviction and sentence passed on the petitioner by the Sub Deputy Magistrate, Monghyr, dated the 4th April 1919.

FACTS of the case appear sufficiently from the judgment of the District Magistrate, which was as follows:—

"This appeal is preferred against the conviction by Maulvi Shah Ahmad Hussain, Sub-Deputy Magistrate, of the accused under section 430, Indian Penal Code, for throwing a *bund* across a river called the Bagra and thus causing wrongful loss by the diminution of water for agricultural purposes to the complainant.

The fact of throwing the *bund* across the river is admitted and the question arises whether this is a wrongful act on the accused's part or not. The river Bagra rises in certain low hills which are an off-shoot of the Kharagpore hills in Pergana Sahroi, the said Perganna being the property of the Banaili Estate. After passing through various villages of this estate, it runs into Perganna Haveli Kharagpore which is the property of the Darbhanga Raj, the river forming the eastern boundary of the Perganna. It is also admitted that from where the river enters Perganna Kharagpore the villagers of the Banaili Estate have no right to draw off water for irrigation, though in fact the estate runs along the eastern bank of the river. The question is, whether the villages of the Banaili Estate have any right to take water for irrigation above this point where the land on both sides belongs to the Banaili Estate or to its tenure ho'ders. The only real evidence brought forward on this point consists in the judgment by the Assistant Settlement Officer during the last Survey and Settlement operations regarding the boundary between Perganna Haveli Kharagpore and Perganna Sahroi. Though the point in issue in that case was merely the boundary between these two Pergannas, the question of the irrigation rights in the river formed a very important factor in the case and the only conclusion to be drawn from the Assistant Settlement Officer's judgment is that the Banaili Estate has had no right to draw off water from the river above the point where it enters the Darbhanga Raj. This is not so contrary to the principles of justice as it sounds, for these petty hill streams contain very little water and if the Banaili Estate had the right to take up the water above, no water whatever would reach the villages of the Darbhanga Raj. Further the two Pergannas were up till above 1840 in the possession of the same family, the Rajas of Kharagpore, and no doubt up to that time there was no dispute whatever. The irrigation right of Perganna Sahroi was the first to be alienated, and it is reasonable to suppose that some arrangement was come to at that time between the Banaili and the Kharagpore Estates as to which

should take the water. The essential point in the subsequent litigation is the judgment of the High Court, which is described in the judgment of the Assistant Settlement Officer but which has not been placed before me as it should have been. But on the whole I think the evidence on the record justifies me in finding that the villagers of the Banaili Estate have no right to draw off water for irrigation purposes from this river.

This being so, it is clear that the accused have been rightly convicted and even if one accepts their version of the case, they took the bulk of the very scanty supply of water and in so doing they must have known that they would cause loss and in view of the well-known rights of the case, wrongful loss to the inhabitants of the Darbhanga Raj villages. The sentences are not excessive. I accordingly uphold the convictions and sentences and dismiss the appeal."

Messrs. *Manuk*, *Jayaswal* and *L.M. Ganguly*, for the Petitioners.

The Assistant Government-Advocate, Messrs. *Purnendu Narayan Sinha* and *Murari Prasad*, for the Crown.

JUDGMENT.

MULLICK, J.—This application for revision arises out of a dispute regarding irrigation rights in a natural stream called the Bagra, which flows northwards from the Kharagpore hills and passes at one stage of its course through Perganna Sahroi, which belongs to the Raja of Banaili.

In this portion the villages both on the right and left bank of the river are in the possession either of the Banaili Raj itself or in that of the Mokararidars of the Banaili Raj, and those claiming under the Mokararidars.

The river then leaves Perganna Sahroi and enters Perganna Haveli Kharagpore, which is the property of the Maharaja of Darbhanga.

It has been found as a fact that as soon as it enters this Perganna, the bed of it lies wholly within the boundaries of that Perganna and that the villages on its east bank appertaining to Perganna Sahroi have no claim to any portion of the bed of the river.

In October last the Mokararidar and his tenants put up a *band* across the river at a place called Jamhat and by cutting a channel from the eastern bank of the river irrigated certain villages belonging to the Mokararidar.

Thereupon a tenant of a village upon the bank of the river in that portion which flows through Perganna Haveli filed a complaint before the Magistrate charging the Mokararidar and his tenants with mischief under section 430, Indian Penal Code.

The result was that the accused were convicted and sentenced to a fine of Rs. 25 each.

The learned Sub Deputy Magistrate who tried the case found that the Mokararidar had no right to use any of the water of the stream for irrigation purposes anywhere above the point at which the river entered Perganna Haveli Kharagpore and that the construction of the *bund* was made with the intention of causing wrongful loss to the lower riparian proprietors.

On appeal the learned District Magistrate has affirmed that finding, but in the concluding portion of his judgment he says "that even if the version given by the accused is true they are guilty of mischief, because they have taken the bulk of the water in the stream."

The case for the accused in the trial Court was that the stream had two branches one of which alone they had obstructed and that their user was, having regard to the nature and circumstances, reasonable and sanctioned both by Common Law and by prescription.

There is no finding by the trial Court on any of these points. But the conviction proceeds mainly upon the finding that the Banaili Raj had no right whatever to take water for irrigation purposes from the river at all.

The learned Sub-Deputy Magistrate and the learned District Magistrate have both based their decisions upon a judgment of the Assistant Settlement Officer given in 1907.

Now if this decision were correct, it would probably be easy to say that the accused could not have had any *bona fide* belief that they were entitled to use the water at Jamhat. But I am unable to see from the judgment of the Assistant Settlement Officer that there was any clear finding that the bed of the river above the point at which it enters Per-

ganna Haveli was the property of the Maharaja of Darbhanga, or that the Raja of Banaili had no right to exercise his rights as a riparian proprietor over any portion of it.

The Assistant Settlement Officer was concerned to decide the boundary between certain villages lying on the west in Perganna Haveli, and on the east in Perganna Sahroi, and he came to the conclusion that as in the Revenue Survey Map the river was within the former Perganna, the Maharaja of Darbhanga had a better title than the Raja of Banaili to the whole of it.

In order to support his decision upon the question of title with regard to this portion of the river, the Assistant Settlement Officer went into the question of irrigation rights, and he found that the tenants of the Banaili Raj were not entitled to exercise any of the rights of riparian proprietors in respect of this portion. But I cannot find any clear finding that in respect of every other portion of the river the Maharaja of Darbhanga and he alone was entitled to exercise irrigation rights to the exclusion of other riparian owners.

Therefore, in my opinion, in the absence of any authority for holding that in regard to that portion of the river which is now in dispute the riparian owners have lost their rights, it seems to me that the case must be judged upon the Common Law of this country.

The case as to prescription has not been established, but it certainly has to be shown that the accused are not entitled to exercise the ordinary rights which are enjoyed by riparian owners in this country in respect of natural streams flowing past the lands occupied by them.

The law in this respect has been laid down in a number of rulings of which it is necessary only to cite *Belbhadur Pershad Singh* v. *Sheikh Barkat Ali* (1).

Their Lordships in this case approve of the general principle that a riparian proprietor can only take for the purpose of irrigation so much water as is necessary without materially diminishing what is to be allowed to descend and the quantity of water that can be abstracted and used without infringing that essential condition must in all cases be a question of circumstances, depending mainly upon the size of the stream and the proportion which the water taken bears to the entire volume. And Mookerjee, J., cites in support an American case, *Harris* v. *Harrison* (2), in which occur the following observations:—

"A riparian owner is entitled only to the reasonable use of natural water for irrigating his land, although such use may appreciably diminish the flow down to the lower riparian proprietors; the larger the number of riparian proprietors whose rights are involved, the greater the difficulty of adjustment; the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these and many other considerations must enter into the solution of the problem, but one principle is surely established, namely, that no proprietor can absorb all the water of the stream so as to allow none to flow down to his neighbour."

In this case there is no finding by the trial Court that the accused have absorbed the whole of the water. The learned District Magistrate does find that the accused have absorbed the bulk of it, but in the absence of any consideration or discussion of the circumstances and the reasonableness or otherwise of the user made by the accused, it is impossible for us to say that they acted with that guilty knowledge which is essential to a conviction for the offence of mischief. Indeed the Courts below appear to have been mainly influenced by their decision that no part of the water could legally be used by the accused. In our opinion this finding is not based upon any legal evidence, and, therefore, the convictions and sentences must be set aside. The fines, if paid, will be refunded.

JWALA PRASAD, J.—I agree.

Convictions set aside.

(1) 11 C. W. N. 85; 4 C. L. J. 370.

(2) 93 California 676; 29 Pacific 325.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 335 OF 1919.

July 8, 1919.

Present:—Mr. Justice Walsh.

KADHORY AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Government of India Act (5 & 6 Geo. V, C. 61), s. 107—Criminal Procedure Code (Act V of 1898), s. 435—Munsif, order by, calling upon party to show cause why he should not be committed for contempt of Court—Revision—High Court, power of interference of—Contempt of Court—Proceeding described as contrary to law, whether contempt.

Although the Court of a Munsif is not an inferior Criminal Court within the meaning of section 435 of the Criminal Procedure Code, the High Court has ample power under section 107 of the Government of India Act to entertain an application for revision of an order made by a Munsif in a proceeding in which a suitor is called upon to show cause why he should not be committed for contempt of Court. [p. 280, cols. 1 & 2.]

An appiication was made to a Munsif by a Vakil on behalf of certain minor plaintiffs to set aside an order dismissing their suit in default, the said order being described in the application as one "against rules and against law." The Munsif stigmatised this as contempt of Court and issued notice to the minors to show cause why they should not be committed for contempt of Court in respect of the application. On an application made to the High Court in revision:

Held, that there was nothing in the application for restoration to which exception could possibly be taken. [p. 280, col. 1.]

Criminal revision against the order of the Munsif, Mainpuri, District Etawah, dated the 21st May 1919.

Mr. *Uma Shanker Bajpai*, for the Applicants.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—In this case the Munsif of Etawah was holding his ordinary Court on a certain Friday, the 2nd of May 1919. It is alleged, and not denied, that he announced that miscellaneous cases only would be taken that day and the following day, which was a Saturday. Certain minors represented by their guardians were plaintiffs in a suit pending in the Court. They were represented by a Vakil and after waiting until 4-30 P. M. they left the Court. The ordinary sitting of the Court is 10-30 A. M. to 4 P. M. and speaking from my limited experience of this country, I should say that anybody who began a civil case after 4-30 P. M. in the month of May would be extremely foolish, and that the parties engaged would have a right to object. Next day the plaintiffs' Vakil discovered that the case had been dismissed for default. The Munsif has not condescended to explain what this means, why the case was called on and what the default was, for which it was dismissed It is obvious on the facts before me, unless there is a great deal more behind it, that that is an improper order which ought to be set aside. And if it came before me, it would certainly be set aside in revision. It may be that there is some reason for it, but whether there be, or whether there be not, the Vakil, finding what had happened, did what it was his obvious duty to do, indeed the minimum which he could do on behalf of his clients; he applied for restoration. All I know is that on that first application no order was made and a second application was put in asking for a day to be fixed for the new hearing. Here again I am left entirely in the dark so far as the Munsif's view of the case is concerned, because I do not know whether he refused to restore it and if so why, or whether he has made any order, or was willing to make any order, restoring the case to his pending file. But upon these applications he proceeded to pass an order which really is one of the most remarkable orders I have ever read. He treats the applications made to him to restore the suit to his list as having been utilised as a vehicle for criticising and threatening him and, having rightly remarked that if he, the Judge, had neglected his duty he must be dealt with elsewhere, he proceeded to stigmatize the remarks and so-called threats as "contempt of Court" and gave notice to the minors to show cause why they should not be committed for contempt of Court in respect of an application which had clearly been made on their behalf by their Vakil, and asked the Vakil for an explanation. I am inclined to think that whatever the contents of the application, the Munsif could not have made the order he did; but except that an expression is used in the application which is somewhat cumbersome and forcible for describing the order dismissing the suit which was objected to, but which is not unusual or unfamiliar in style having regard to the language frequently used in pleadings in the Mufassil,

there is nothing in the application to which exception can possibly be taken. The expression to which I have referred is to the following effect, that the order which had been made the day before, and which was objected to, was "against rules and against law." I really do not know what the Munsif meant by what he said. It is one of the commonest grounds adopted in a memorandum of appeal objecting to a decree or an order to say that it is contrary to rule or that the decision is contrary to law, and the codes in this country in more than one place speak of matters being contrary to some rule having the force of law, and how an application based upon the ground that the previous order of the Court had been contrary to rule, or contrary to law, can be regarded as a threat or as improper, I am at a loss to understand. People sitting to administer justice and to hear the complaints of contending parties and alleged grievances of all sorts and kinds which come into Courts of Law, and liable to have their own decisions challenged, and sometime severely criticised, in the Courts of Appeal, must not be too thin-skinned. If the Munsif really thought that the Vakil had said anything in the application beyond what the occasion demanded, the proper course was for him to deal with the application on the merits, and to communicate privately with the Vakil as to any personal matter which he thought arose. As a matter of fact I cannot see that there was anything personal in the application from first to last, and it is extremely unfortunate that the Munsifs should from time to time somewhat impetuously jump to the conclusion that some offence is meant where none is intended. The order is a perfectly childish one and must be quashed.

Under what jurisdiction precisely this Court has power to quash it is a matter which may be open to argument. I do not think it really matters because it is an order which, if brought before this Court, in any reasonable form, is bound to be set aside It has been admitted as a criminal revision by a very experienced Judge of this Court, but there is a difficulty about that inasmuch as the Munsif is not an inferior Criminal Court within the meaning of section 435. It might be held to be a case decided by the Munsif from which there was no appeal within the meaning of section 115, Civil Procedure Code, being a decision of his upon the application made to him on the 3rd of May so as to entitle this Court to interfere in civil revision. But the matter having been brought before the Court, it matters not how, I have not the slightest doubt that this Court has power under section 107 of the Government of India Act, if under no other section, to make the order which I make.

Order quashed.

PATNA HIGH COURT.
CRIMINAL REVISION NO 16 OF 1919.
June 23, 1919.
Present:—Mr. Justice Atkinson.
SUKHDEO MISSIR—PETITIONER
versus
MONOOLAL SAHU—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute, application for—Notice to accused, whether necessary—Failure to give notice, effect of—Proceedings, validity of.

Although the issue of a notice to the accused is not legally essential to validate a sanction granted under section 195, Criminal Procedure Code, nevertheless in common moral propriety it is desirable, as a matter of practice and prudence and in common fairness, that a person who is sought to be prosecuted should have notice of the fact that an application has been made for his prosecution under the provisions of that section, and it is in accordance with the traditions of the administration of justice that such person should be permitted to show cause against the grant of sanction for his contemplated prosecution, but an omission to give such notice is not an illegality which would wholly vitiate an order granting sanction. [p. 281, cols. 1 & 2.]

Criminal revision against the order of the District Magistrate, Purneah, dated the 7th January 1919, granting sanction to prosecute the petitioner under section 195 (6), Criminal Procedure Code.

Mr. *S. P. Varma*, for the Petitioner.

Mr. *A. Majid*, for the Opposite Party.

JUDGMENT.—The petitioner Sukhdeo Missir seeks in this application to have the order of the District Magistrate of Purnea, dated the 7th January 1919, set aside.

The order of the District Magistrate was an order under section 195 of the Code of Criminal Procedure granting sanction for the prosecution of the petitioner with another

under section 211 read with section 109 of the Indian Penal Code.

It appears that the petitioner and one Mahabir Sahu instituted a suit against one Manoo Lal Sahu for wrongful confinement and extortion of money. The suit was dismissed and Monoo Lal Sahu applied to the learned Sub Deputy Magistrate who tried the case for sanction to prosecute Mahabir Sahu and Sukhdeo Missir under section 211, Indian Penal Code.

The learned Sub Deputy Magistrate on the 23rd November 1918 declined to grant the sanction applied for. Accordingly Monoo Lal Sahu applied to the District Magistrate of Purnea for sanction to prosecute the petitioner and Mahabir Sahu; and the learned Magistrate, by the order to which I have referred, granted the sanction in the form requested by the petitioner before him.

The learned District Magistrate, however, passed the order of the 7th January 1919 without serving any notice upon the parties to be affected thereby requiring them to show cause why such sanction should not be granted.

Strictly speaking, in my opinion on the true interpretation of section 195 of the Code of Criminal Procedure the service of a notice upon the person against whom a sanction to prosecute is applied for is not essential as a legal necessity to validate a sanction granted by the authorities specified in section 195.

The trend of authority seems to be in favour of this view. The rulings in support of this conclusion are reported as *Queen Empress* v. *Sheik Beari* (1), *Govindu, In the matter of* (2), *Mangar Ram* v. *Behari* (3), *Inayat Ali* v. *Mohar Singh* (4), *Bal Gangadhar Tilak, In re* (5), *Emperor* v. *Tabarak Zaman Khan* (6) and *Krishnanund Das* v. *Hari Bera* (7).

No doubt although notice is not legally essential to validate a sanction granted under section 195, nevertheless in common moral propriety it is desirable as a matter of practice and prudence and in common fairness that a person who is sought to be prosecuted should have notice of the fact that an application has been made for his prosecution under the provisions of section 195, Criminal Procedure Code, and it is in accordance with the traditions of the administration of justice that such person should be permitted to show cause against the grant of sanction for his contemplated prosecution.

The learned District Magistrate failed in this case to give the petitioner notice of the application for sanction made to him; but, in my opinion, that omission, although it may have been improper, was not an illegality which wholly vitiated his order, sanctioning the prosecution of the petitioner for an offence under section 211, Indian Penal Code.

Monoo Lal Sahu instituted criminal proceedings against the petitioner and Mahabir Sahu on the 15th March 1919 under section 211 read with section 109 of the Indian Penal Code.

The petitioner was arrested owing to his non-appearance under a warrant and brought before the Court. The petitioner alleges that this was the first time that he became aware that sanction for his prosecution had been granted. The petitioner was admitted to bail and from time to time thereafter he seemed to recognise that the Criminal Court was legally and properly seised of the prosecution against him, because he applied from time to time for adjournments; and it was not until the 14th of May that an application was filed by the petitioner asking for time, when for the first time he expressed his intention to apply to the High Court to quash the order sanctioning his prosecution dated the 7th January 1919. Eventually on the 27th May the petitioner applied to two Judges of this Court, who directed that notice should issue with a view to setting aside the order of the District Magistrate and staying proceedings in the criminal matter pending the disposal of this application.

In my opinion to grant this petition would serve no useful purpose. If indeed the sanction had been granted owing to some technical *legal* error, I would have yielded to the argument of Mr. Varma. However, inasmuch as only a moral impro-

(1) 10 M. 282 (F. B.); 2 Weir 181; 3 Ind. Dec. (N. S.) 914.
(2) 26 M. 592; 2 Weir 297.
(3) 18 A. 358; A. W. N. (1896) 113; 8 Ind. Dec. (N. S.) 945.
(4) 28 A. 142; A. W. N. (1905) 231; 2 Cr. L. J. 598.
(5) 4 Bom. L. R 750.
(6) 30 A. 52; A. W. N. (1907) 288; 4 A. L. J. 790; 6 Cr. L. J. 396.
(7) 12 C. 52 (F. B.); 6 Ind. Dec. (N. S.) 40.

priety in the manner and method of procedure has been committed, I do not feel justified now, having regard to the very great lapse of time that has taken place, in staying the criminal proceedings that have been instituted from continuing, by setting aside the order sanctioning the petitioner's prosecution. In my opinion the petitioner acquiesced in the order that was made and between the 6th of April and the 14th of May he never suggested directly or indirectly that any infirmity attached to the order of the learned District Magistrate.

The petitioner seeks to justify his delay in applying to this Court from the 6th of April to the 27th May on the ground that he was seriously ill. Beyond this loose and general statement referred to in the petition and corroborated by the affidavit to the petition, there is no evidence to show what was the ailment the petitioner was suffering from, nor has any medical evidence been adduced to show that the petitioner was in fact ill.

Giving due consideration to the various topics addressed to me by the learned Counsel appearing on behalf of the petitioner, I am satisfied that this is not a proper case in which I should set aside the order sanctioning the petitioner's prosecution. Accordingly I refuse this application.

Order set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 86 OF 1918.

May 14, 1918.

Present:—Justice Sir Ali Imam, KT.

D. SUNDER—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 182—Criminal Procedure Code (Act V of 1898), s. 195—Letter to District Magistrate containing imputations as to conduct of enquiry by Sub-Inspector of Police—Report as to falsity of allegations contained in letter, whether sufficient material for sanction—Sanction to prosecute, when to be granted.

A sanction under section 195 of the Criminal Procedure Code must be based on materials on the record before the Court. Where there is nothing to show that the information given by the accused was false to his knowledge or that he believed it to be false, no sanction for prosecution for an offence under section 182, Indian Penal Code, should be given. [p. 288, col. 1.]

Rule calling upon the District Magistrate, Monghyr, to show cause why the trial proceedings of the accused under section 182, Indian Penal Code, in pursuance to sanction under section 195, Criminal Procedure Code, be not quashed or in the alternative the case be transferred to the file of some other Magistrate.

FACTS of the case are fully set out in the judgment of Imam, J.

The first letter from Mr. Sunder was as follows:—

No. 1815.

FROM

Donald Sunder, Esqr., F.L.S., F.R.G.S.,
Sub-Manager, Raj Darbhanga, Haveli Kharagpur.

To

H. T. S. Forrest, Esqr., I.C.S.,
District Magistrate,
Monghyr.

Haveli Kharagpur, dated the 12th September 1917.

Sir,

I am directed to inform you as follows:—

2. A Mela is held every leap year at Rishi Kund hot springs which are within Pergana Haveli Kharagpur, which is the property of the Darbhanga Raj. The boundary between the lands belonging to the Darbhanga Raj and the lands belonging to the Banaili Raj runs to the east of the hot springs. This boundary was determined by Mr. D. J. Macpherson, C. I. E., Commissioner of the Bhagalpur Division, and was laid down under his orders by the Survey of India Department on the 31st January 1908. The entire boundary is marked by masonry pillars as will be seen from the trace map, which has been copied from the original map, herewith enclosed. The lands which are west of the boundary line belong to Darbhanga Raj. The lands which lie to the east of the boundary line belong to the Banaili Raj. The Malamas Mela is being held this year which is leap year. It began on the 19th August 1917, it will close on Sunday next, the 16th September. When the Mela began, there was correspondence between the Darbhanga Raj and the Banaili Raj in which it was mutually agreed that each Raj and their Amlas and servants would keep on their respective sides of the boundary line. This agreement has been strictly adhered to and

no dispute, quarrel or misunderstanding of any sort has occurred. From the 19th August up to the present no disturbance of the public tranquillity has occurred. There has been absolute peace in the place. But I regret to bring to your notice that in consequence of the improper proceedings of the Sub Inspector in charge of the Khargpur Thana at Rishi Kund yesterday, it is feared that there will be a disturbance of some sort on Sunday next, the 16th September 1917, and that trouble and annoyance will arise.

3. Last month the Mahant of Burhanath temple, which is in Bhagalpur, submitted a petition to the Maharaja Bahadur of Darbhanga asking that he may be permitted to sit within Darbhanga Raj lands on the west side of the boundary line and do Pujas there; but it was considered inexpedient to allow him to do so, and he was so informed. He has kept away from Darbhanga Raj lands up to the present and has not given trouble of any sort.

4. But yesterday the Sub-Inspector of Kharagpur Thana visited Rishi Kund and called up some of the Darbhanga Raj servants and peons who are on duty there, saying that he had come to enquire into allegations contained in a petition which the Mahant has filed at Monghyr. I am informed that the Sub-Inspector lost his temper and became violent, threatening and intimidating the Darbhanga Raj servants, although he was repeatedly assured that there had been no breach of peace of any sort and that everything is perfectly quiet in the place, also that the representatives of each Raj are keeping to their own side of the boundary. The Mahant also confirmed this.

5. Notwithstanding this, however, the Sub-Inspector, I am told, has arranged to help the Mahant with reference to his petition, and I learned that he will again visit Rishi Kund springs on Saturday next, the 15th September, and try to forcibly put the Mahant in possession of them on Sunday morning. I am further informed that the Mahant himself is arranging for men of bad character to attend on Sunday morning and disturb the public tranquillity and, with the help of the Sub-Inspector, obtain forcible possession of the hot springs, in lands which belong to the Darbhanga Raj.

6. Therefore, in order that this may not occur I am directed not only to bring the matter to your notice, but also to ask you to kindly cause immediate orders to be sent to the Sub Inspector of Kharagpur Thana ordering him to refrain from visiting Rishi Kund on Saturday and Sunday next, the 15th and the 16th September. I am also instructed to ask you to kindly depute some responsible Police Officer from the Sadar to be present at Rishi Kund on Saturday and Sunday next to see that there is no disturbance of any kind. And I am further instructed to ask that, if it be possible, a Deputy Magistrate or other Gazetted Officer may be deputed to attend and see that there is no breach of the peace by the Mahant at the instigation of the Sub-Inspector of Kharagpur Thana.

7. I am to say that the Darbhanga Raj will be exceedingly obliged for any help that you may be pleased to give for averting any breach of the public tranquillity under the encouragement and with the passive help of the Kharagpur Police Sub-Inspector and I am further to inform you that all travelling and other expenses connected with the deputation of the officers herein asked for will be gladly paid by the Darbhanga Raj and on its behalf by the Raj Pleader at Monghyr, Babu Upendra Chandra Banerjee, who has been ordered to do so.

I have the honour to be,
Sir,
Your most obedient servant,
(Sd.) D. Sunder.
Sub Manager, Raj Darbhanga, Haveli
Kharagpur.

The second letter of Mr. Sunder was as follows:—

From
Donald Sunder, Esqr. F.L.S., F.R.G.S.,
Sub-Manager, Raj Darbhanga, Haveli
Kharagpur.

To
H. T. S. Forrest, Esqr., I.C.S.,
District Magistrate, Morghyr.

Haveli Kharagpur, dated the 19th September 1917.

Sir,

I have the honour to thank you for your letter No. 3193J, dated the 14th September 1917, and in reply to the enquiry made therein to say that my letter No. 1815 of the 12th September 1917 was

written under the authority of the Hon'ble Maharaja Bahadur of Darbhanga.

2. I also wish to thank you for your kindness in sending a guard of one head constable and 8 constables to Rishi Kund on Sunday, the 16th September 1917. They did their duty and no disturbance occurred. The fair at Rishi Kund closed on that day quite peacefully.

3. Under the circumstances as they were known to us, we felt that no other course was left to the Raj but to lay the facts before you as head of the District, and await help from you for maintenance of the public tranquillity.

4. I now ask you to allow me to give you the following further information about Rishi Kund.

5. The Mahant of Barhanath temple, a resident of Bhagalpur, holds some Sibotar lands granted to him by the Banaili Raj within Mauza Birojpur, Pergana Sakharabadi. He is in possession of the Kund which means a *pool* or tank. The Kund is within plot No. 77 mentioned in the order under section 144 of the Criminal Procedure Code issued by you on the 14th September 1917. The Mahant also holds a temple, dedicated to the God Mahadeo, on plot No. 79, which is mentioned in your order of the 14th September 1917 under section 144 of the Criminal Procedure Code. Both plots are within Mauza Birojpur, Pergana Sakharabadi. Both plots are on the east side of the boundary line between Darbhanga Raj lands and Banaili Raj lands, as determined by the Commissioner of the Bhagalpur Division (Mr. D. J. Macpherson) and demarcated on the ground by masonry pillars, and also shown on the map of Raunkabad, Pergana Haveli Kharagpur, prepared by the Survey Department at last Survey and Settlement Operations in 1906 and 1907, and bearing Touzi No. 283. I beg that you will kindly compare this map with the map of Birojpur, Pergana Sakharabadi, Thana Kharagpur, made and published by the authority of the Government by the Survey Department in season 1906-1907.

6. The possession by the Mahant of the above mentioned two plots, *viz.*, Nos. 77 and 79, has never been questioned or in any way disturbed. The Darbhanga Raj has no concern with the Mahant or with the two plots mentioned because Mauza Birojpur, Pergana Sakharabadi is the property of the Banaili Raj. The order of the 14th September 1917 directing the servants of the Darbhanga Raj to refrain from trespassing upon plots Nos. 77 and 79 was fully complied with, and the Raj servants have kept within the boundaries of Pergana Haveli Kharagpur, and have maintained those boundaries.

7. There are springs (Jharna or Chasma) which give out hot water from the hill sides. These springs are on the west side of the demarcated boundary line and within Pergana Haveli Kharagpur, which is the property of the Darbhanga Raj. The Raj was put in possession of the hot springs and all lands which lie to the west of the demarcated line, and which pertain to Pergana Haveli Kharagpur, by order of the Sub-Judge, 1st Court, Monghyr, on on the 23rd and 24th October 1908. Since then the Darbhanga Raj has been in peaceful possession of the lands, including the hot springs, and such possession has not been disturbed up to the present. The Lachmeshwarnath Mahadeo temple lies on the west side of the demarcated line, within Pergana Haveli Kharagpur, and in possession of the Darbhanga Raj.

8. The Mahant named in your order of the 14th September 1917, having no title to the hot springs and also having no right to enter upon Darbhanga Raj property except with the approval and the consent of the proprietor, *viz.*, the Hon'ble Maharaja Bahadur of Darbhanga, has tried, with the help of the Kharagpur Police, to establish such title and right; but his efforts to do this were stopped and he completely failed in his endeavours to give the Raj annoyance and trouble. The money and other offerings made by the public at the hot springs and on lands belonging to the Darbhanga Raj during the fair were not taken by the Mahant.

9. I beg to apologise for the length of this letter but it is necessary to make clear to you all the facts as head of the district.

I have the honour to be,
Sir,
Your most obedient servant,
(Sd.) D. Sunder,
Sub-Manager, Raj Darbhanga, Haveli Kharagpur.

SUNDER *v.* EMPEROR.

Mr *Hasan Imam*, for the Petitioner.
The Government Pleader, for the Crown.

JUDGMENT.—The petitioner is undergoing trial under section 182 of the Indian Penal Code before the Sadar Sub-Divisional Officer of Monghyr. The circumstances which have culminated in this prosecution are shortly these.—

The petitioner is a Sub-Manager in the Darbhanga Raj and is in charge of the Kharagpur Circle, which is situated in the Monghyr district. It appears that there is a Kund known as Rishi Kund with a temple in plots Nos. 77 and 79 respectively in village Birojpur in the Zemindari of the Banaili Raj and in the possession of the Mahant of Bhola Nath. Contiguous with the Baraili Raj property is the Zemindari of the Darbhanga Raj. The two estates are demarcated by a line of pillars since 1908 and there has been since then no kind of dispute between the two Zemindaris. There are also some hot springs situated in the Darbhanga Raj land in the neighbourhood of the Rishi Kund and the temple mentioned above. These hot springs are visited by pilgrims every three years for the purposes of worship and such offerings as are made on these occasions are collected by the servants of the Darbhanga Raj. It is alleged that there has been an attempt on the part of the Mahant to take these offerings and that the petitioner was informed that the Mahant had, in fact, gathered men to forcibly carry out his intention. Apprehending a breach of the peace, the petitioner on the 12th September 1917 wrote to the District Magistrate of Monghyr to the effect that he had received from the Raj officers placed near the hot springs alluded to above information purporting to be that a Sub-Inspector of Kharagpur Thana had helped the Mahant on a previous occasion and that the present Sub-Inspector had shown some indications of displeasure, and that for that reason he prayed the District Magistrate to depute a responsible Police Officer other than the Sub Inspector or a Deputy Magistrate for preventing the apprehended breach of peace, the cost of which would be met by the Darbhanga Raj. It appears that Babu Charu Chandra Choudhury was accordingly deputed by the District Magistrate to proceed to the spot and make necessary enquiries. Babu Charu Chandra Choudhury, having arrived on the spot, relaid the boundary and found that the disputed portion of the land on which these hot springs are fell within the property of the Darbhanga Raj. It appears from a note submitted by this officer on the 16th of March 1918 that the Sub Inspector had issued notices on both sides to prevent a breach of the peace. It also appears from that report that at the time of the enquiry the petitioner had represented to this officer that the Sub-Inspector should not have issued notices on the servants of the Darbhanga Raj when the land in dispute was situated within the boundary of the Raj property. The note further goes on to say that the Deputy Magistrate made a local enquiry as to whether the Sub-Inspector had helped any particular party. The note also says that the result of the enquiry was embodied in a report dated the 10th of November 1917 and was submitted to the District Magistrate. Nothing seems to have been done in the case so far as the petitioner is concerned till the 2nd of January 1918, when the District Magistrate of Monghyr passed the following order:—

"Owing to an oversight no final orders have been passed by me on this report. This oversight has been brought to my notice by the Superintendent of Police. I now pass orders as follows:—I am satisfied from this report that the Sub-Inspector of Kharagpur Thana has done his duty in the matter and that the complaint made against him by the Sub-Manager has been unjustified. Inform all concerned and file."

It appears from the explanation furnished by the District Magistrate of Monghyr that on the 17th of December the Superintendent of Police had drawn the attention of the District Magistrate to the case and had told him that the Sub-Inspector of Kharagpur Thana was constantly urging to be allowed to proceed against the petitioner for defamation, on account of allegations made by him in the letter that he had written to the District Magistrate on which Babu Charu Chandra Choudhury had been deputed to enquire and report. It also appears that the Sub-Inspector could not proceed in the matter unless there was a final order passed by the District Magistrate on the said report. Two days after the final order

quoted above had been passed, the District Magistrate received an application from the Sub Inspector with the previously obtained permission of the Superintendent of Police praying for sanction to prosecute the petitioner under section 182 of the Indian Penal Code. This sanction was duly granted and the prosecution of the petitioner was started.

The petitioner contends that his prosecution under section 182 of the Indian Penal Code is bad, inasmuch as the sanction to prosecute him was obtained without any notice served upon him, that the information given by him to the District Magistrate was in fact not found to be false by any competent authority before the sanction was given, that the information given by him to the District Magistrate did not contain any false information as his knowledge was based on what he has received as a report from his Forest Ranger and other resporsible officers of the Raj, and lastly that there was nothing in the proceedings before the District Magistrate to show that the information given to him by the petitioner was false to the knowledge of the petitioner and that he believed the same to be false. On the above grounds he prays, firstly, to quash the proceedings or in the alternative to transfer the case from the file of the trying Magistrate to the file of any other Magistrate or pass such order as might appear to this Court to be proper. In order to appreciate the exact position relating to the grant of sanction to prosecute the petitioner, it is necessary to consider those portions of the letter written by the petitioner to the District Magistrate which have been considered the basis for the sanction for the prosecution under section 182 of the Indian Penal Code. The letter is a very long one but the portions that are relevant to the matter before me are as follows:—

"But I regret to bring it to your notice that in consequence of the improper proceedings of the Sub-Inspector in charge of the Kharagpur Thana at Rishi Kund yesterday, it is feared that there will be a disturbance of some sort on Sunday, the 16th of September 1917, and that trouble and annoyance will arise."

"But yesterday the Sub-Inspector of the Kharagpur Thana visited Rishi Kund and called up some of the Darbhanga Raj servants and peons who were on duty there, saying that he had come to enquire into the allegations contained in a petition which the Mahant had written. I am informed that the Sub Inspector lost his temper and became violent, threatening and intimidating the Darbhanga Raj servants, although he was repeatedly assured that there had been no breach of the peace of any sort and that everything was perfectly quiet in the place."

"Notwithstanding this, however, the Sub-Inspector, I am told, has arranged to help the Mahant with reference to his petition and I learn that he will again visit Rishi Kund springs on Saturday next, the 15th of September, and try to forcibly put the Mahant in possession of them on Sunday morning. I am further informed that the Mahant himself has arranged for men of bad character to attend on Sunday morning and disturb the public tranquillity, and with the help of the Sub-Inspector of Police, he will obtain forcible possession of the springs in the lands which belong to the Darbhanga Raj."

The letter in question begins with the words, "Sir, I am directed to inform you as follows" and is dated the 12th of September 1917. Two days after the petitioner received a letter from the District Magistrate of Monghyr which runs as follows:—

"Sir, I am in receipt of your letter of the 12th instant in which you have been good enough to give me certain information under which the Mela is being held at Rishi Kund hot springs. You inform me in paragraph 6 of your letter under reply that you are directed to bring certain matters to my notice and to ask me to issue certain orders to the Sub-Inspector of Police at Kharagpur, and you also proceed to say that you are instructed to ask me to depute certain officers to the spot on Saturday and Sunday. In reply I have the honour to request you to be good enough to let me know from whom you have received the directions and instructions referred to."

The petitioner replied to the above letter of the 19th September 1917. This also is a long letter and all that is necessary for the purposes of this case is to refer to such portions of it as are material.

The petitioner in this letter says, firstly, that his letter of the 12th September was written to the District Magistrate on the authority of the Hon'ble Maharaja Bahadur of Darbhanga. He next thanks the District Magistrate for having sent a guard of one head constable and eight constables for keeping the peace at the fair. He then says that in the circumstances as known to him and to his subordinates at the time the letter was written to the District Magistrate, there was no other course left to the Raj but to lay the facts before the head of the District and to await his help for maintaining the public tranquillity. Thereafter he details in the letter the points of difference that have arisen between the Mahant and the Raj and winds up the letter by saying that the latter had tried with the help of the Kharagpur Police to establish his title and right to land situated in the Darbhanga Raj but had failed completely in his endeavours to give the Raj annoyance and trouble.

These are the facts and circumstances under which the sanction to prosecute the petitioner under section 182 of the Indian Penal Code was accorded.

One of the ingredients to prove an offence under that section is that the accused should know or have reason to believe that the information given by him was false. It is essentially a case in which *mens rea* must be established either by direct evidence or by the circumstances of the case and the conduct of the accused. It has been contended for the petitioner that before any sanction could be given to prosecute him, it was necessary for the learned District Magistrate of Monghyr to satisfy himself that the conduct of the accused fell within the mischief of section 182 of the Indian Penal Code and that for this it was necessary that there should have been before the learned District Magistrate some evidence, either direct or inferential, to establish the fact that the information was false to the knowledge or belief of the petitioner. For this proposition reliance was placed upon *Habibur Rahman* v. *Munshi Khodabux* (1) and *Govindan Nayar, In the matter of the petition of* (2).

(1) 11 C. W. N. 195; 5 C. L. J. 219; 5 Cr. L. J. 29.
(2) 7 M. 224; 8 Ind. Jur. 80; 2 Weir 179; 2 Ind. Dec. (N. s.) 741.

My attention was also drawn to grounds Nos. 4 and 5 of the petition. These two grounds are as follows:—

1. For that the order is bad in law and liable to be set aside inasmuch as there is nothing to show that the informations were false to his knowledge or he believed them to be false.

2. For that the order is otherwise bad in law and without jurisdiction.

I looked up the explanation furnished by the learned District Magistrate of Monghyr with reference to these grounds and found that these grounds have been disposed of by the words "no remarks." Thereupon I asked the learned Government Pleader who appeared for the opposite party to tell me if there was anything on the record to show that the learned District Magistrate had anything before him to satisfy himself as regards the knowledge or belief of the accused regarding the falsity of the information given by him. The learned Government Pleader was unable to point out anything from the record to show that such was the case, but asked me to give him an opportunity to communicate with the learned District Magistrate to find out whether there was any such material before him at the time the sanction to prosecute the petitioner was granted. I accordingly allowed the case to stand over for the learned Government Pleader to be instructed on this point.

The case was again taken up on the 3rd of May 1918 and the learned Government Pleader informed the Court that he had no material to show that the information given by the petitioner to the District Magistrate was false to his knowledge or belief. In the absence of any such direct evidence it is necessary for me to consider whether there are circumstances in this case to show that the petitioner, when giving information to the District Magistrate, knew or had reason to believe that it was false. There is nothing on the record to show that the petitioner had any malice against the Sub-Inspector. There is also nothing to show that he had any reason to disbelieve the reports made to him by his subordinates, nor is there anything to indicate that the information given by him to the District Magistrate was within his personal knowledge. On the

contrary the letters written by him to the District Magistrate read together clearly point out that he was wholly relying upon the reports he had received from his subordinates. It should also be remembered that there was an apprehension of a serious breach of the peace and that the petitioner invoked the protection of the District Magistrate, impelled not so much by the desire to injure any particular officer of the Police as to avert the breach of the peace that was likely to take place. It may be that in giving the District Magistrate the information contained in his letters he placed too much confidence on the report of his subordinates. These, however, cannot be regarded in the circumstances of the case as evidence of *mala fides* on his part. In fact the whole of the record is singularly wanting in proof of any *mala fides* on the part of the petitioner against the Sub Inspector. It seems to me, therefore, that it was not open to the learned District Magistrate to grant sanction for the prosecution of the petitioner without having before him some material upon which he could hold that the information given by him was false to his knowledge or belief. I, therefore, set aside the sanction given by the District Magistrate to prosecute the petitioner and order all further proceedings in the case to be stayed.

Sanction set aside.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 39 OF 1919.

April 2, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

BYRAMJI PUDUMJI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Cantonment Code, 1912, *rr.* 97, 107*A*—*Order directing repairs to be carried out, failure to obey—Sentence in respect of future default, legality of.*

An order under rule 107A of the Cantonment Code inflicting a fine for persistent failure to carry out an order under rule 97 of the Code must, in order to be legal, refer to a failure as regards the past. It is illegal to convict a person, under this rule, of a failure in regard to the future.

Criminal application for revision from an order passed by the District Magistrate, Poona.

Mr. *Velinkar* for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—It is urged—and I think correctly urged—that the order made by the District Magistrate of Poona fining the applicant is, in the form it took, illegal. The order was made under the provisions of rule 107A of the Cantonment Code. It was proved to the satisfaction of the District Magistrate on 27th of October 1918 that the owner of a house in the Poona Cantonment had persisted in failure to carry out an order made under rule 97, and taking the words of rule 107A, he was punishable with a fine not exceeding Rs. 5 for every day after the first in regard to which he was convicted of having persisted in the failure. He could, of course, be convicted with having persisted in the failure only as regards the past; he could not be convicted of a failure in regard to the future. A fine of Rs. 5 a day, therefore, might have been imposed for the material days up to the 27th of October. But that was not done. The District Magistrate, taking, I have no doubt, a sensible broad view of the affair, came to the conclusion that it was unnecessary to impose a fine for the past failure. But to emphasise the need of obedience to the order previously made, he directed that a fine of Rs. 5 a day should be paid from the 1st of November. That date was in the future, and as the words of the rule show, he was not empowered to make an order as to the future. That part of his order, therefore, is illegal and must be set aside and the fine, if paid, should be refunded.

SHAH, J.—I agree.

Order set aside

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 849 OF 1917.

July 15, 1919.

Present :—Justice Sir P. C. Banerji, KT., and Mr. Justice Wallach.

JANG BAHADUR RAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAJ KUMAR RAI AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 107—Appeal—Appellate Court, whether can examine parties.

An Appellate Court is competent to examine any of the parties if, for the sake of doing justice and for the purpose of ascertaining facts, it considers it necessary to do so.

Second appeal against the decision of the District Judge, Ghazipur, dated the 11th June 1917.

Mr. *L. S. Baipai*, for the Appellants.

Mr. *M L. Agarwala*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was practically a suit for a declaration that the adoption of the defendant Jang Bahadur Rai, alleged to have been made by Deo Saran Rai, did not, in fact, take place and that Jang Bahadur is not the adopted son of Deo Saran Rai. The plaintiff is the brother of Deo Saran Rai, who is now dead. *Musammat* Parmati defendant is Deo Saran's widow. She executed a document in which she declared that her husband had adopted Jang Bahadur Rai son of another brother of Deo Saran Rai and that Jang Bahadur was Deo Saran's adopted son. The plaintiff's allegation was that he and Deo Saran were joint and that in fact Deo Saran never adopted any boy. The Court of first instance held in favour of the adoption and dismissed the claim. The lower Appellate Court was of opinion that no adoption took place and that the allegation of an adoption is untrue. It, however, held that the two brothers were separate and not joint as alleged by the plaintiff. The defendant Jang Bahadur has preferred this appeal, and the main contention is that the Court below was not justified in examining the defendant *Musammat* Parmati, who in the Appellate Court gave evidence contrary to her allegations in the Court of first instance. In our opinion the Appellate Court was competent to examine any of the parties, if it considered it necessary for the ends of justice to do so. *Musammat* Parmati was a party to the suit and the learned Judge had the power, in our opinion, to examine her for the purpose of ascertaining the facts. He, however, did not decide the case solely or mainly on the evidence of *Musammat* Parmati but on other evidence to which he refers in his judgment. His finding upon the question of adoption is a finding of fact and must be accepted by us in second appeal. In this view the appeal fails. We dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 656 OF 1917.

January 30, 1919.

Present:—Mr. Justice Beachcroft and Mr. Justice Walmsley.

JATINDRA NATH SINHA ROY AND ANOTHER—PLAINTIFFS—APPELANTS

versus

BINODE BEHARI GUPTA—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s 73, applicability of, to non-transferable occupancy holding—Landlord and tenant—Transferor of non-transferable occupancy holding, liability of, for rent—Adverse possession of limited interest acquired by transferee—Transferor, whether jointly liable for rent to landlord.

The provisions of section 73 of the Bengal Tenancy Act can not be extended by analogy to the case of a non-transferable occupancy holding. [p. 290, cols. 1 & 2.]

Where the transferor of a non-transferable occupancy holding has acquired the title of a tenant by adverse possession of the limited interest, the transferor is not liable for rent to the landlord. [p. 290, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Burdwan, dated the 4th January 1917, reversing that of the Munsif, 2nd Court at that place, dated the 30th November 1915.

FACTS appear from the judgment.

Babu *Amarendra Nath Bose*, for the Appellants.—The lower Appellate Court has

found that the transferee has acquired the title of a tenant against the landlord by adverse possession. Though the land is in possession of the transferee, the defendant, Binode Behari, is liable nevertheless for the rent. There is several liability. The defendant transferor and the transferee are jointly and severally liable for the rent due. It does not matter that the transferee has obtained adverse possession against the landlord. Refers to section 73 of the Bengal Tenancy Act, which says that 'when an occupancy Raiyat transfers his holding without the consent of the landlord, the transferor and the transferee shall be jointly and severally liable to the landlord for arrears of rent, etc.' On the analogy of this section, I submit that the defendant cannot escape his liability for rent. Though I cannot cite any authority for my contention, the principle underlying section 73 is a well-established one. There will be no extension of the application of the section, if the defendant in the present appeal is held liable for rent. The fact that the holding in the present case is a non-transferable one does not make much difference.

Babu *Brojo Lal Chuckerberty* (with him Babu *Susil Coomar Bose*), for the Respondent, was not called upon.

JUDGMENT.

BEACHCROFT, J.—The learned Subordinate Judge has returned the finding after remand that the transferee has acquired the title of a tenant against the landlord by adverse possession of the limited interest. That concludes the case. But the learned Pleader for the appellant argues that in spite of the possession of the transferee the defendant is also liable for the rent. That appears to me to be an impossible proposition. The transferee having acquired his title against the landlord, I cannot see how the transferee and the transferor should be jointly liable for the rent, nor do I see, considering how the transferee has acquired his interest against the landlord, how there can be a several liability. The learned Pleader for the appellant refers to section 73 of the Bengal Tenancy Act. That obviously has no application, because it refers to the case of a transferable occupancy holding whereas the holding in the present case is non transferable. Nor do I think that we can extend the principle recognized in section 73 by analogy to the case of a non-transferable holding. Analogies are always dangerous and particularly so in this case. Section 73 is a very natural provision for the protection of the landlord because otherwise a *ryot*, having a right of transfer, would not be liable for the rent, even if the transfer were not notified to the landlord. It seems to me that the position of the transferee having acquired a limited interest against the landlord is quite inconsistent with the position of the defendant remaining on the land. Therefore, the defendant is not liable for the rent and the appeal ought to be dismissed with costs of all the hearings in all Courts.

WALMSLEY, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1334 OF 1917.

July 11, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

Shaikh MUHAMMAD BAKAR ALI—PLAINTIFF—APPELLANT

versus

CHULHAI MAHTON AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 8, O. XVII, rr. 2, 3, scope and applicability of—Plaintiff unable to produce evidence—Dismissal for default—Appeal, second, whether lies.

In order to apply rule 3 of Order XVII of the Civil Procedure Code to a case, it must be shown that there was something upon which the Court could bring its judicial mind to bear in the shape of either evidence or pleadings, and that the Court did before making its decision duly apply its mind [p. 292, col. 1.]

Unless the facts clearly indicate that there was an adjudication, an order of dismissal, whether it be for want of evidence or not, should be treated as an order under Order IX of the Civil Procedure Code. [p. 292, col. 1.]

Where, in consequence of the plaintiff not adducing any evidence in support of his case, his suit is dismissed in default, and there is no indication that he was either willing to have the suit decided on the merits, or that the Court in any way applied its mind to the rights and liabilities of the parties,

the order must be treated as one under Order XVII, rule 2 of the Civil Procedure Code, and is not open to second appeal. [p. 292, col. 1.]

Appeal from a decision of the Subordinate Judge, Monghyr.

Mr. *Muhammad Hasan Jan*, for the Appellant.

Mr. *Rai Guru Saran Prasad*, for the Respondents.

JUDGMENT.

MULLICK, J.—The plaintiff instituted the suit for declaration of title and recovery of rent, and after various adjournments the 26th of April 1917 was fixed for the decision of the suit. On that day the Court recorded the following order:—"The Pleader for the plaintiff states that he is unable to adduce any evidence. The plaintiff is also present in Court but does not adduce any evidence in support of his case. The defendant is ready. Ordered, that the suit be dismissed for default of the plaintiff. The defendant will get costs of the suit."

The plaintiff thereupon appealed to the Subordinate Judge, who on the 6th September 1917 held that no appeal lay, as the dismissal was one for default under the provisions of Order IX of the Civil Procedure Code read with rule 2 of Order XVII.

The present second appeal is lodged by the plaintiff against the aforesaid order passed by the Subordinate Judge.

Now the question is whether any second appeal lies.

Order IX relates to procedure on the first day of hearing; rule 3 of that Order states that if neither party appears, the Court may make an order that the suit be dismissed. Rule 8 directs that when the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission. Order XVII relates to procedure after the first day of hearing. Rule 2 of that Order enacts that if on the adjourned date parties fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX, or make such other order as it thinks fit; that is to say, if the plaintiff fails to appear, the Court may dismiss the suit under Order IX or fix another date for hearing. If the Court fixes another date for hearing and the plaintiff still fails to appear, the Court may dispose of the suit under rule 2 of Order XVII read with Order IX. If, however, the plaintiff does not fail to appear but fails to produce his evidence or to perform any other act necessary for the progress of the suit, the Court may proceed to decide the suit, forthwith.

In the present case it is contended that the Court has acted under the last part of the rule, that there was an appearance by the plaintiff, and that the Court, refusing further adjournments, has decided the suit forthwith. The order itself does not state under which rule the Court has acted; that is to say, whether under rule 2 or rule 3 of Order XVII. We have, therefore, to look at the facts, so far as they appear in the paper-book, to judge whether or not the order of dismissal was a decision of the suit within the meaning of rule 3; in that case the appeal would lie.

It is contended that because the plaintiff's Pleader did not inform the Court that he had no instructions, the order of dismissal cannot be one under Order IX and that it must be a decree under the latter part of rule 3 of Order XVII.

I am unable to accept this argument. In my opinion what occurred was this, the Pleader who was appearing for the plaintiff said that he had no evidence and thereupon the Court, without applying its mind to the merits of the case or in any way adjudicating upon the rights and liabilities of the parties, dismissed the suit for the default of the plaintiff. That clearly was an order under rule 2.

The personal appearance of the plaintiff in this case makes no difference, for he had engaged a Pleader and was, therefore, not competent so long as his Pleader was acting for him to be heard by the Court. In order that there may be appearance within the meaning of Orders IX and XVII by a Pleader, I think it must be shown that the Pleader was duly instructed and able to answer all material questions put by the Court. There is nothing to show in this case, in fact the indications are quite to the contrary, that the Pleader, when saying that he had no evidence to produce, was duly instructed and able to answer any material

questions. In order to apply rule 3, I think, it must be shown that there was something upon which the Court could bring its judicial mind to bear in the shape of either evidence or pleadings and that the Court did before making its decision duly apply its mind. We cannot assume in this case that the Court did so, and we think that it is a safe rule to lay down that unless the facts clearly indicate that there was an adjudication, an order of dismissal, whether it be for want of evidence or not, should be treated as an order under Order IX of the Civil Procedure Code. In this connection I think it advisable to make some reference to the case of *Naurang Ram Sahu* v. *Bhakhori Mandar* (1), in which I had occasion to observe that in recording orders of dismissal for laches on the part of the plaintiff, the Court should be careful to state whether he is acting under rule 2 or rule 3 of Order XVII. In that case on the adjourned date of hearing the plaintiff after obtaining time for that purpose failed to amend the plaint, and the Court recorded an order that the suit was dismissed because no steps had been taken for its prosecution. I was of opinion that the Court had not acted under rule 2 because it was the duty of the Court, notwithstanding the failure to amend the plaint, to proceed with the trial of the suit, and because the plaintiff's Pleader being apparently anxious to proceed it could not be said that there was any failure to appear.

In the present case there is no indication that the plaintiff's Pleader was either willing to have the suit decided on the merits or that the Court in any way applied its mind to the rights and liabilities of the parties.

The appeal, therefore, does not lie and the order must be treated as an order under rule 2. The appellant's proper remedy was an application for restoration under Order IX.

The appeal is, therefore, dismissed with costs.

ATKINSON, J.—I concur.

Appeal dismissed.

(1) 51 Ind. Cas. 189; 4 P. L. J. 277.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2557 OF 1918.

May 6, 1919.

Present:—Mr. Justice Bevan-Petman.

SHER ALI—PLAINTIFF—APPELLANT

versus

MANGU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908*), O. XVII, r.* 3, *scope of—Dismissal of suit for default, legality of—Court, duty of.*

Rule 3 of Order XVII of the Civil Procedure Code is an enabling rule and not a mandatory one. [p. 293, col. 2.]

A mere order of dismissal based on default is not a proper or legal order under this rule. The Court should proceed with the disposal of the suit on the materials before it and, if the circumstances are such that it cannot decide the suit forthwith on the materials before it, it should not avail itself of the provisions of that rule. [p. 293, col. 2; p. 294, col. 1.]

Where, therefore, it appeared at the first hearing of a suit that certain defendants had not been served and the Court passed orders adjourning the case and directing issue of summons to all absent defendants on receipt of process-fees, or a proclamation by beat of drum at the expense of the plaintiff, but the plaintiff took no action whatever in respect of the order and on the date of hearing gave no reasons for his default and pleaded no extenuating circumstances but asked for forgiveness and indulgence and the Court dismissed the suit under Order XVII, rule 3, Civil Procedure Code:

Held, that under the circumstances rule 3 of Order XVII was inapplicable and should not have been applied. [p. 294, col. 1.]

Second appeal from the decree of the District Judge, Gurdaspur, dated the 15th June 1918, affirming that of the Munsif, 2nd Class, Shakargarh, District Gurdaspur, dated the 13th February 1918, dismissing the claim.

Mr *Abdul Razaq*, for the Appellant.

Lala *Hari Chand*, for the Respondents.

JUDGMENT.—The facts of this case are that at the first hearing of the suit, the 11th January 1918, it appears that certain defendants had not been served. The Court passed orders, whether *suo motu* or at the request of the plaintiff does not appear from the record, to the following effect:—

Summons to issue to all absent defendants on receipt of process-fees, a proclamation by beat of drum to be made for the next hearing, the plaintiff to pay five annas and four annas respectively for the proclamation in the local Tahsil and in the canal colony, the plaintiff to file particulars and addresses of defendants.

respondents in the canal colony by the next day and summons to issue also to them, the defendants present to file their written statements of defence on the 13th February."

The hearing was adjourned to the 13th February.

The plaintiff took no action whatever in respect of the above order but appeared in Court on the 13th February. He then gave no reasons for his defaults and pleaded no extenuating circumstances but asked for indulgence and forgiveness. Some of the defendants were present. The Court dismissed the suit under Order XVII, rule 3, Civil Procedure Code, and the District Judge dismissed the appeal.

For the appellant it is submitted that Order XVII, rule 3, applied only to an adjournment applied for by a party and not ordered *suo motu* by a Court as in the present instance. Reliance is placed on *Pearee Mohun Bera* v. *Shama Churn Mytee* (1), that the words "any other act" mean some act subsequent to those previously mentioned in the rule and that the Court could proceed only to decide the suit and not dismiss it. The following decisions were relied on: *Sitara Begam* v. *Tulshi Singh* (2), *Ram Narayan* v. *Jagdeo Missir* (3) and *Nagendra Kumar Bose* v. *Nabin Mandal* (4). It is also contended that the suit could not proceed alone against the defendants present in Court as the land was in the joint names of all defendants and that, therefore, the suit was rightly dismissed. The contention that the words "any other act" mean some act subsequent to those previously mentioned is untenable, is not pressed and need not be further dealt with.

For the respondents it is briefly contended that Order XVII, rule 3, does not by its terms indicate that it is applicable only to adjournments granted at the request of a party, that if the rule be held inapplicable the suit might be regarded as dismissed under Order IX, rule 2, of the Civil Procedure Code, and finally, that if the appeal be accepted, costs should be allowed to the respondents throughout.

(1) 19 W. R. 34.
(2) 23 A. 462; A. W. N. (1901), 149.
(3) 10 Ind. Cas. 903; 33 A. 690; 8 A. L. J. 839.
(4) 1 Ind. Cas. 741; 36 C. 189.

There are a number of judicial decisions dealing with the subject-matter of Order XVII, rule 3, chiefly on the construction of section 158 of Act XIV of 1882, which is the corresponding section. The rule itself provides that in the event of certain defaults a Court may "proceed to decide the suit forthwith." This has been construed in *Nagendra Kumar Bose* v. *Nabin Mandal* (4), as meaning that the Court is not empowered to proceed to dispose of the suit by recording further evidence or otherwise proceeding with the suit, but that the Court is merely empowered to decide the suit forthwith. The learned Judges referred to the decisions in *Mariannissa* v. *Ramkalpa Gorain* (5) and *Cooke* v. *Equitable Coal Company* (6) as laying down the general principles applicable to section 158, Civil Procedure Code. In the former case it was held that the meaning of section 158 was that the Court is to proceed with the disposal of the suit on the materials before it. The decision in *Sitara Begam* v. *Tulshi Singh* (2) is to the same effect and is an authority for holding that the suit cannot be summarily dismissed, but apparently the learned Judges in that case were of opinion that the Court could take further evidence and dispose of the suit in a normal way. In *Nagendra Kumar Bose* v. *Nabin Mandal* (4), already referred to, the learned Judges held that such a construction of that decision did not necessarily follow and if that had been intended, they were not prepared to place the same construction on section 158. They held, therefore, that under that section the Court was merely empowered to decide the suit forthwith.

It may be urged how can the suit be decided forthwith if there are no materials on the record for a decision as in this case except by dismissal. Any such difficulty is, I think, solved by bearing in mind that rule 3 of Order XVII is an enabling rule and not a mandatory one. If the circumstances are such that the Court cannot decide the suit forthwith on the materials before it, it should not avail itself of the provisions of that rule. It is clear, as pointed out in *Sitara Begam* v. *Tulshi Singh* (2), that a mere order of dismissal based on a

(5) 34 C. 235; 5 C. L. J. 260.
(6) 8 C. W. N. 621.

default is not a proper or legal order under section 158. Had that been the intention of the Legislature, it could have easily provided for the dismissal of the suit as a penalty. This has not been done and, on the contrary, the Court is empowered, if it desires to avail itself of Order XVII, rule 3, to decide the suit on the materials already before it.

In the present case the first Court was not in a position to decide the suit. It had no materials for decision before it. The written statements of defence had not even been filed. Under these circumstances I think Order XVII, rule 3, was inapplicable and should not have been applied. This Court is not concerned now with the orders of dismissal or otherwise which the first Court might have passed under other rules and orders but did not.

I, therefore, accept the appeal and remand the suit to the Munsif at Shakargarh and direct him to proceed according to law. Costs in the lower Appellate Court and in this Court shall be costs in the case. This appeal will, for the same reasons, dispose of the connected Second Appeal No. 2558.

Appeal accepted.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 1623 OF 1918.

May 14, 1919.

Present:—Mr. Justice Bevan-Petman.

DIWAN CHAND—JUDGMENT-DEBTOR—APPELLANT

versus

THE FIRM KNOWN AS BEDHA RAM DEVI DIAL, THROUGH DEVI DIAL—DECREE HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 5—Execution of decree—Duty of Court—"Striking off" application, whether permissible—Order releasing property from attachment, effect of— Decree-holder, whether can subsequently apply for execution by arrest of judgment-debtor.

In execution of a decree the decree-holder attached certain property of the judgment-debtor and the same was made over to a *sapurdar*. Certain attempts at sale proving abortive, the bailiff reported on 1st May 1916 that the *sapurdar* had left and the goods were in possession of the judgment-debtor who, however, presented a written statement denying that he was in possession. Owing to the non-attendance of parties, the execution proceedings were consigned to the record room on the 7th June 1916. A year later, the decree-holder made a fresh application for execution on the 27th July 1917 and a specific order was recorded that the goods were released and the application was again consigned to the record room. In November 1917 the decree-holder applied for execution by the arrest of the judgment-debtor:

Held, (1) that the Court was not justified in "striking off" the application for execution on the 7th June 1916, which should either have been dismissed or adjourned, as the Court was not legally competent to do anything else; [p. 296, col. 1.]

(2) that it must be held that the application was not dismissed and that the attachment continued to subsist; [p. 296, col. 1.]

(3) that the order of release must be regarded as one involving and implying the dismissal of the second application and that that application should be held as having been dismissed; [p. 296, cols. 1 & 2.]

(4) that, consequently, the attachment ceased on the 27th July 1917 and the goods were thereafter at the disposal of the judgment-debtor; [p. 296, col. 2.]

(5) that, in any event, the judgment-debtor was a party to the disappearance of the property and the decree-holder was entitled to execute the decree by the arrest of the judgment-debtor. [p. 296, col. 2.]

Miscellaneous second appeal from the order of the Senior Subordinate Judge, Lyallpur, dated the 18th February 1918, affirming that of the Munsif, 2nd Class, Lyallpur, dated the 18th December 1917, issuing a warrant for the arrest of the judgment-debtor appellant.

Lala *Ram Chand Manchanda*, for the Appellant.

Mr. *Mu'and Lal Puri*, for the Respondent.

JUDGMENT.—The respondent, the decree-holder, obtained a decree against the appellant, the judgment-debtor, and in execution of the decree he attached certain property of the latter and the same was made over to a *sapurdar*, or care-taker, who gave the usual receipt and undertaking. It is a very common practice in such cases for the goods seized to remain in the possession of the judgment debtor. Certain attempts at sale proving abortive, the bailiff reported on the 1st May 1916 that the care-taker had left the town and that the goods were in the possession of the judgment-debtor who was responsible for the failure. The judgment debtor, however, presented a written statement in Court denying that he was in possession

and suggesting collusion between the decree-holder and the care-taker, and the execution proceedings were consigned to the record room on the 7th June 1916 owing to the non-attendance of the parties. A year later the decree holder made a fresh application for execution of the decree. On the 27th July 1917, owing to the absence of the decree-holder, a specific order was recorded that the goods were released, and the application was again consigned to the record room. In each of the orders the Munsif uses the word "*dakhil daftar.*" In November 1917 the decree-holder applied for execution of the decree by the arrest of the judgment-debtor. The Munsif wrote a very confused order, but he issued a warrant for the arrest of the judgment-debtor on the ground that the property had been released. On appeal the lower Appellate Court held that no attachment subsisted after the first application for execution had been dismissed in default, that *Bhana Mal* v. *Ganpat Rai* (1) relied on by the judgment-debtor was inapplicable, inasmuch as the property had not been released in that case, and that the judgment-debtor had his remedy against the care taker and he, therefore, dismissed the appeal. The care taker is alleged to be a man of straw and to have disappeared.

The judgment debtor appeals to this Court and on his behalf it is argued that the report of the bailiff is not evidence, that there is no evidence on the record to show that the goods remained in his possession, that the mere dismissal of the applications for execution and the specific order of release did not in fact release them, that nothing was done to give effect to the order of release, that the judgment-debtor never recovered the goods, that they must be regarded as still actually seized and in the possession of the care taker and that the principles enunciated in *Bhana Mal* v. *Ganpat Rai* (1) were applicable to the case. No other authorities have been referred to.

It is convenient to give the following extract from the judgment relied on, which is of a Division Bench of the Chief Court: "in Chitty's Archbold's Practice of the Queen Bench Division, Edition 14, Chapter LXXV, 16 and 17 (page 869), authorities are cited for the following rules: as soon as the Sheriff seizes the debtor's goods under the writ he is thereby absolutely discharged to the extent of the levy, whether the Sheriff sell the goods or return the writ or not, or though they afterwards be rescued from him; and the debtor may plead this to an action on the judgment, or, if another writ be sued out against him for the same debt, he may be relieved upon motion. The Sheriff is liable to the execution creditor for the amount of the levy. Applying these rules our answer to the second question is that the decree-holder cannot further execute his decree against the person or property of the judgment debtor, other than that attached and made over to the care-taker unless it be proved that the judgment-debtor was a party to .the disappearance of the property attached."

On behalf of the respondent it is contended that the goods were released, that thereafter the decree-holder could not demand their sale or otherwise put forward any right or claim in respect of them without fresh execution and attachment, that, till he did so, he was in no way concerned with the goods, that, on the contrary, the goods having been released the care-taker was no longer entitled to possession of them and was relieved of all obligation except to return them to the judgment-debtor if they were not in the latter's possession already, that the goods were no longer attached and were at the disposal of the judgment-debtor who alone had any rights in respect of them and that, therefore, the judgment in *Bhana Mal* v. *Ganpat Rai* (1) was inapplicable and that the decree-holder was entitled to take out fresh execution, but no authorities have been referred to. It was also stated that the rules of English Law adopted and followed in *Bhana Mal* v. *Ganpat Rai* (1) were not applicable to India but, here again, no reasons or authorities were given for this contention.

The Civil Procedure Code of 1882 did not provide for cases where the application for execution could not proceed for default of the decree-holder and a

(1) 21 P. R. 1899.

practice arose of "striking off" or shelving the application. Such a practice was not justified by that Code and the proper order was one either granting or dismissing the application in whole or in part. The effect of "striking off" was discussed in numerous cases and it was held that no general rule was applicable, that the attachment was not necessarily put to an end and that the effect would depend on the circumstances of the case. A full discussion of this subject is to be found in Woodroffe and Ameer Ali's Commentary on the Code, 2nd Edition, page 960. The defect in the old Code was pointed out by Edge, C. J., in *Dhonkal Singh* v. *Phakkar Singh* (2) and in the present Code the situation is dealt with by Order XXI, rule 57, which provides that where any property has been attached in execution of a decree, but, by reason of the decree-holder's default, the Court is unable to proceed, it shall either dismiss the application, or adjourn it and that, upon such dismissal, the attachment shall cease. The present rule, however, does not indicate whether a dismissal for default can be set aside and whether, if not set aside, a fresh application for execution is, or is not, barred. In *Nomuna Bibi* v. *Roshun Meah* (3) it was held that on the dismissal of an application under this rule the attachment ceases even if the Judge intended to continue it.

Coming to the facts of the present case, it is clear that the Munsif was not justified in "striking off" the application for execution on the 7th June 1916. He did not dismiss it as assumed in arguments in this Court. In accordance with Order XXI, rule 57, he should either have dismissed it or adjourned it. He was not legally competent to do anything else. The intentions of the Munsif cannot be considered. In my opinion, therefore, it must be held that the application was not dismissed and that the attachment continued to subsist. The order of the Munsif, dated the 27th July 1917, is similar except that he specifically released the property. I think the order of release must be regarded as one involving and implying the dismissal of the application, and that the application should be held as having been dismissed and, to this extent, I am prepared to follow the conclusions to be gathered by the decisions of the Courts under the old Code when dealing with applications which had been "struck off."

The result of this finding is that the attachment ceased on the 27th July 1917. Thereafter the goods were at the disposal of the judgment debtor. Whether the goods had been all along in his possession or not, it is not denied that he took no steps whatever to recover them. It is incredible that if he had not been in possession of the attached property, or was not in collusion with the care-taker, he would not have taken very prompt steps to recover it. I hold, without taking the report of the bailiff into consideration, that the property attached had either been left in the possession of the judgment-debtor, or that he subsequently obtained possession of it, or that the judgment-debtor has been in collusion with the care-taker and that he was a party to the disappearance of the said property. This last finding brings the case within *Bhana Mal* v. *Ganpat Rai* (1).

I, therefore, dismiss the appeal with costs.

Appeal dismissed.

(2) 15 A. 84 (F. B); A. W. N. (1893) 36; 7 Ind Dec. (N. S.) 7.0.

(3) 9 Ind. Cas. 558; 38 C. 482; 15 C. W. N. 428; 13 C. L J. 621.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 138 OF 1913.

June 16, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

ALLIBHAI MAHOMED—APPELLANT

versus

THE BRITISH INDIA STEAM NAVIGATION CO LTD—RESPONDENT.

Contract Act (IX of 1872), s. 151—Carriage by sea—Carrier, liability of, extent of—Negligence, liability for, whether can be contracted out of.

A carrier by sea cannot, under the Indian Law, contract out of liability for the negligence of himself or of his servants. Section 151 of the Contract Act lays down an irreducible minimum of liability for common carriers as well as for other bailees. [p. 302, col. 2, p. 303, col. 2.]

Mr. *T. R. Das* (with him Mr. *Munshi*), for the Appellant.

Mr. *McDonnell*, for the Respondent.

JUDGMENT.

ORMOND, J.—The plaintiff was the consignor of 227 bundles of dry beef conveyed by the defendants' S. S. Bharata from Calcutta to Rangoon. 52 bundles were damaged by tar and had to be destroyed and the plaintiff sues for damages. The defendants rely on the clauses in their bill of lading. The bill of lading sets out: "The company shall not be liable for loss, damage or delay directly or indirectly resulting from any of the following causes or perils, howsoever occasioned * * * * * breakage or leakage * * * * * injurious effect of other goods whether by contract or otherwise howsoever, perils, dangers and accidents of the sea * * * * any act, neglect or default whatsoever of pilot, masters, officers, mariners, engineers, stevedores or other servants or agents whatsoever of the company on board or elsewhere in the management, navigation or otherwise of the steamer * * * * or in the loading, stowing, carriage, unloading or delivery of the cargo." The learned Judge on the original side dismissed the suit on the ground that the defendant company could contract themselves out of all liability including liability for the negligence of their servants.

The question is, can a common carrier by sea, who is not governed by the Indian Carriers Act, contract himself out of liability for negligence?

It is not disputed that the defendant company is governed by the common law of England relating to common carriers by sea as applied in India. And it is admitted that under the present English Law the defendant company could contract itself out of liability for negligence.

Mr. Das for the appellant contends (1) that although under the English Common Law, as it is now expounded, a common carrier by sea can contract out of all liability; yet in India he is bound under sections 151 and 152 of the Indian Contract Act to take ordinary care of the goods and cannot contract himself out of such liability; (2) that the law applicable to the case is the common law of England before the English Carriers Act, 1830, was passed and that under the common law, as it then was, a carrier by sea could not contract himself out of liability for negligence; and (3) that it was in consequence of the English Carriers Act (which applies only to inland carriers) that the English Courts held that carriers by sea could contract themselves out of liability for negligence; and that the Indian Courts should in like manner apply to carriers by sea the law applicable to inland common carriers under the Indian Carriers Act, which declares that an inland carrier shall be liable for the negligence or criminal act of himself or any of his agents or servants notwithstanding any special contract to the contrary.

Mr. McDonnell for the respondent company contends (1) that the Contract Act does not deal with the law relating to common carriers and he relies on *Irrawaddy Flotilla Co.* v. *Bugwandas* (1), and (2) that the common law does not change but is only elucidated by judicial decisions and that the common law of England, as it is now, is the law applicable to the present case.

In theory, no doubt, the common law does not change but is merely elucidated. But if under the law as it stood when it was introduced into India, a common carrier could not contract himself out of liability for negligence, the defendant company could not do so now, unless the law in India has been altered in this respect. In *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee* (2) Sir Barnes Peacock, C. J., in delivering the judgment of the Supreme Court says:—"It is a well recognised doctrine, and one which has been acted upon by this Court for more than half a century, that speaking generally, the first introduction of English Law into Calcutta was effected by the Charter of George the First, by which in the year 1726, the Mayor's Court was established. It is unnecessary to cite authorities in support of that position; indeed, it was admitted by the learned Advocate-General in his argument in this case". And at page 426, in the judgment of the Privy Council, the following passage occurs:—"The English Law, civil and criminal, has been usually considered to

(1) 18 C. 620; 18 I. A. 121; 15 Ind. Jur. 403 & 542; 6 Sar. P. C. J. 40; 9 Ind. Dec. (N. S.) 413 (P. C.).

(2) 9 M. I. A. 387 at pp. 394, 426; 2 Moo. P. C (N. S.) 22; 9 Jur. (N. S.) 877; 8 L. T. 843; 2 N. R 53); 12 W. R. (Eng.) 21; 1 W. R. P. C. 14; 1 Suth. P C. J. 515; 2 Sar. P. C. J. 37; 19 E. R. 786; 15 E. R. 311; 141 R R. 1.

have been made applicable to natives, within the limits of Calcutta, in the year 1726, by the Charter, 13th George I. Neither that nor the subsequent Charters expressly declare that the English Law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them." See also *Freeman* v. *Fairlie* (3).

In *Moothora Kant Shaw* v. *India General Steam Navigation Co.* (4) it was held by the Full Bench that at the time of the passing of the Indian Carriers Act in 1865, the English Law relating to common carriers was in force in this country. Sir Richard Garth at page 181 says: "It seems only reasonable to suppose that, as common carriers were introduced into India by the English, and under English rule, the law by which their duties were regulated was the English Law applicable to that class of persons." But it does not follow that the English Law as it is altered from time to time, whether by Statute or judicial decisions, is the law applicable to common carriers in India.

I think we may take it that the law applicable to the question in this case is the common law of England as it was at the time of the passing of the English Carriers Act (1830), unless it has since been altered in India.

In *Peek* v. *North Staffordshire Ry. Co.* (5) Blackburn, J., cites with approval a passage from Story on Bailments taken from paragraph 549 in the 9th Edition and says:— "Mr. Justice Story, in his Commentaries on the Law of Bailments published in 1832, after the Carriers Act, states, as I think accurately, what was the effect of the decisions up to that time. 'It was', says he, 'formerly a question of much doubt how far common carriers on land could by contract limit their responsibility, upon the ground that, exercising a public employment, they are bound to carry for a reasonable compensation, and had no right to change their common law rights and duties. And it was said that, like innkeepers, they were bound to receive and accommodate all persons, as far as they may, and could not insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to *Southcote's case* (6) and it was admitted in *Morse* v. *Slue* (7). It is now recognised and settled beyond any reasonable doubt.'...So far I think this, according to the decisions subsequent to 1832, still remained law in 1854, when the Railway and Canal Traffic Act was passed. But Mr. Justice Story proceeds to say: 'Still, however, it is to be understood that common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice exempt themselves from all responsibility in cases of gross negligence and fraud, or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants, as he would be in case of his own personal fraud or misconduct.'" And in *Hinton* v. *Dibbin* (8), Lord Denman, C. J., when reviewing the state of the law at the time of the passing of the English Carriers Act, 1830, at page 659 says:—"It had been decided by all the Courts that a carrier is liable for the loss of articles above the amount, mentioned in the usual (carrier's) notice though not paid for accordingly, where he is guilty of what in so many cases is called 'gross negligence.'"

From early times, a common carrier could by a special acceptance exempt himself from liability for loss or damage caused otherwise than by the misconduct or negligence of himself or his servants. Sir Edward Coke in a note to *Southcote's case* (6) says:—"*Nota* reader, it is good policy for him who takes any goods to keep, to take them in special manner, *scil.* to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party: or if they happen to be stolen or purloined, that he shall not answer for them, for he who accepteth them ought to take

(3) 1 M. I. A. 305; 1 Sar. P. C. J. 123; 18 E. R. 117.
(4) 10 C. 166 at p. 181; 13 C. L. R. 342; 8 Ind. Jur. 247; 5 Ind. Dec. (N. S.) 113.
(5) (1863) 10 H. L. C. 473 at p. 493; 22 L. J. Q. B. 241; 9 Jur. (N. S.) 914; 8 L. T. 768; 11 W. R. 1023; 11 E. R. 1109; 138 R. R. 250.
(6) 4 Co. Rep. 83*b*; 76 E. R. 1061.
(7) (1672) 1 Vent 190; 2 Keb 72; Sir T. Raym. 220; 1 Mod. 85; 86 E. R. 129; 2 Lev. 69.
(8) (1842) 2 Q. B. 646 at p. 659; 2 G. & D. 36; 11 L. J. Q. B. 113; 6 Jur. 601; 114 E. R. 253; 57 R. R. 754.

them in such or the like manner, or otherwise he may be charged by his general acceptance. So if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged by his general acceptance, which implies that he takes upon him to do it." Later on, carriers gave notice that they would not be responsible for loss of or damage to goods above a certain value, unless declared and paid for accordingly; and the notice if brought home to the person tendering the goods had the effect of a special acceptance or contract. The carrier under such a notice claimed total exemption from liability; but the Courts held that the contract did not absolve him from liability for misconduct or for negligence. In some cases it was held that the consignor could not have intended that the carrier should not exercise any care at all of the goods; and in other cases it was held that the carrier could not free himself from the liability which attached to him as an ordinary bailee *i.e.*, liability for misconduct or negligence. Thus in *Batson* v. *Donovan* (9) Best, J., says: "A carrier was at liberty to make a special acceptance of the goods, and to introduce into the terms of such acceptance any reasonable condition not inconsistent with his duty to the public....The carrier must take the same care of the goods that a prudent man would take of his own property. This is the law with respect of all the bailees for hire or reward." In *Garnett* v. *Willan* (10) decided in 1821, Bayley, J., at page 59, with reference to the special contracts or notices of carriers, says: "The Courts have put a sound construction upon those words 'lost or damaged,' (as not including loss or damage arising from the negligence or misfeasance of the carrier or his servants) by which the carrier will receive all the protection which he ought to receive, for he will thereby be exempt from those peculiar liabilities which attach to him in his character of carrier, but not from the consequence of his own misfeasance, for which every bailee is responsible," and Holroyd, J., in the same case says: "A carrier, notwithstanding his notice, is responsible for any loss or damage arising in the course of the trust reposed in him, either from his own personal misconduct or that of his servants," and in the same case Best, J., says: "I cannot see with reference to the question of the responsibility of the carrier that there is any sound distinction between negligence and misfeasance. I am of opinion that by the common law a carrier is answerable for the negligence, as well as the misfeasance of his servants. I am of opinion, that by these notices the carrier is only protected from that responsibility which belongs to him as insurer."

It seems to have been assumed that an ordinary bailee could not contract out of liability for negligence or misfeasance; possibly because the bailee, having accepted the bailment and charge of the goods, could not shelter himself under a stipulation that he should take no care at all of the goods, such a position being repugnant to and inconsistent with the fact of the bailment—and, therefore, a carrier, who by special contract had tried to exempt himself from all liability, was still liable as an ordinary bailee for negligence and misconduct. A common carrier was one who professed to carry for all persons indiscriminately; he could not refuse to carry goods according to his profession, unless he had a good excuse, *e.g.*, want of room, etc. He could, however, by special contract divest himself of all the peculiar liability which otherwise would have attached to him as a common carrier. And if by his profession or by special contract, he refused to accept any responsibility, there seems to be no reason why he should not have been allowed to do so, if a private carrier or an ordinary bailee could do so. If he professed to carry only parcels below £10 in value, he would not be liable as a common carrier for the loss of a parcel which was above that value; and he could refuse to carry such a parcel in the same way as an ordinary bailee could refuse a bailment. If in contravention of the carrier's notice, a consignor handed in a parcel which exceeded the prescribed value and omitted to state its real value, although the carrier had stipulated that in such a case he would incur no liability whatever, the Courts held that the carrier's liability was that of an ordinary

(9) (1820) 4 B. & Ald. 21; 22 R. R. 599; 106 E. R. 846.
(10) (1821) 5 B. & Ald. 53; 24 R. R. 27; 106 E. R. 1113.

bailee and that he was, therefore, liable for negligence and misconduct.

The Carriers Act was passed in 1830. It did not empower a carrier to contract himself out of liability for negligence, but section 1 enacts that a carrier shall not be liable for the loss of or injury to goods of a certain description if the parcel exceeded £ 10 in value, unless the value and nature of such goods was declared and an increased charge (if any) paid or agreed to be paid. It was not, however, until 1842 in *Hinton* v. *Dibbin* (8) that this statutory exemption was held to include loss occasioned by the negligence of the carrier or his servants. In *Owen* v. *Burnett* (11), a case under section 1 of the Act, the judgments of the Court proceeded upon the assumption that the carrier would have been liable notwithstanding section 1 of the Act, if the damage had been caused through gross negligence on the part of the carrier's servants.

After *Hinton* v. *Dibbin* (8) there came a series of six Railway cases, from 1849 to 1853, in respect of damages to horses or cattle, which did not come under section 1 of the Act. The condition made by the Railway Company was that the horses or cattle were to be carried at the entire risk of the owner and that the Company would not be responsible for any damage, however caused. All six cases were decided in favour of the carrier, although the damage had resulted from the negligence of the Company's servants. The decisions in the first two cases proceeded upon a variance of the contract alleged and the contract proved. In the third case of *Chippendale* v. *Lancashire and Yorkshire Railway Co.* (12) the plaintiff claimed on the ground that the defendant had failed to supply a proper truck. The plaintiff himself had loaded some of the cattle, and judgment was given for the carrier, because the plaintiff had seen the truck and because the cattle were at his risk. In *Austin* v. *Manchester Sheffield & Lincolnshire Ry. Co.* (13) Cresswell, J., quoted only the first part of the extract from Story referred to above, and assumed that carriers could contract out of liability for negligence. In *Carr* v. *Lancashire & Yorkshire Ry.* (14) Parke, B., says (at page 711): "It is perfectly clear that since the passing of the Carriers Act it is competent for a carrier to make a special contract to convey goods and chattels; and it is clear that the liability of the latter may be made to depend upon the terms of that contract, into which both parties had entered". And in *Walter* v. *York & North Midland Ry.* (15) Wightman and Coleridge, JJ., referred to section 6 of the Act as saving special contracts, and they assumed that the carrier could by a special contract exempt himself from all liability including liability for negligence. In 1858 in *Phillips* v. *Edwards* (16) in the course of the argument (the case was decided on other grounds), Pollock, C. B., doubted whether a common carrier could have extinguished his liability altogether. And even so late as 1875, in *Nugent* v. *Smith* (17), Brett, J., says: "It seems impossible to account for the almost universal use of bills of lading by all seagoing ships if a great number of them, *viz.*, all who were not common carriers, would only be answerable for negligence, for which they are answerable notwithstanding the bill of lading." In 1869, however, in *The Duero* (18), the Court had upheld the shipowner's stipulation not to be liable for loss or damage occasioned by the negligence of his servants

Section 6 of the Act states that the Act does not in anywise affect special contracts made for the conveyance of goods. If the carrier could not, before the Act, exempt himself by a special contract from liability for the negligence of himself or his servants, the Act did not empower him to do so and as pointed out in *Baxendale* v. *General Eastern Rail.*

(11) (1834) 3 L. J. Ex. 76; 2 C. & M. 335; 4 Tyr. 133, 149 E. R. 796, 39 R. R. 794.

(12) (1851) 7 Railw. Cas. 824; 21 L. J. Q. B. 22; 15 Jur. 1106.

(13) (1850) 10 C. B. 454; 7 Railw. Cas. 300; 21 L. J. C. P. 179; 16 Jur. 763, 138 E. R. 181; 84 R. R. 645.

(14) (1852) 7 Ex. 707; 7 Railw Cas. 426; 21 L. J Ex. 261; 17 Jur. 397; 155 E. R. 1133; 86 R. R. 801.

(15) (1853) 2 El. & Bl. 750; 2 C. L. R. 237; 23 L. J. Q. B. 73; 18 Jur. 143; 2 W. R. 11; 118 E. R. 648; 22 L. T. (o. s.) 98; 95 R. R 779.

(16) (1858) 3 H. & N. 813; 28 L. J. Ex. 52; 157 E. R. 696; 32 L. T. (o. s.) 147; 117 R. R. 990.

(17) (1876) 1 C. P. D. 19 at p. 33.

(18) (1869) 38 L. J. Adm. 69; 2 A. & E. 393; 22 L. T. 37.

way (19), section 6 refers only to contracts which modify the Company's exemption under section 1

In 1854, the Railway and Canal Traffic Act was passed which declared that the Company shall be liable for the loss of or injury to any animals or goods occasioned by the neglect or default of such Company or its servants, notwithstanding any notice, condition or declaration contrary thereto or anywise limiting such liability; but the Act allowed special contracts if signed by the person delivering the cattle or goods and if adjudged by the Court or Judge to be just and reasonable.

In *Peek* v. *North Staffordshire Ry. Co.* (5) the question arose whether a condition by the Company that they would not be responsible for damage to the goods (marble chimney pieces) unless their value was declared, was just and reasonable within the meaning of that Act. Blackburn, J., at page 511 says: "I think that a condition exempting the carriers wholly from liability for the neglect and default of their servants is *prima facie* unreasonable. I do not go so far as to say that it is necessarily in every case unreasonable and void. A carrier is bound to carry for a reasonable remuneration, and if he offers to do so, but at the same time offers in the alternative to carry on the terms that he shall have no liability at all, and holds forth as an inducement a reduction of the price below that which would be reasonable remuneration for carrying at carrier's risk, or some additional advantage, which he is not bound to give, and does not give to those that employ him with a common law liability, I think a condition thus offered may be reasonable enough. For the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract, or on the terms of his undertaking the common law liability, are necessarily reasonable as regards the person having that option."

Such was the state of the law in England when the Indian Carriers Act was passed in 1865. There can be no doubt I think that down to 1852, if not later, a common carrier under the common law of England could not contract out of liability for negligence. The change of the law in this respect by judicial decisions was due indirectly to the Carriers Act and apparently was not due in any way to change of view as regards public policy.

The Indian Legislature, I think, recognised that under the common law of England as applicable to India, a common carrier could not contract out of liability for negligence, for the Carriers Act professes to be a declaratory Act as to the liability of common carriers for loss of or damage occasioned by the negligence or criminal act of themselves, their agents or servants. Section 6 enables the carrier to limit his liability by a special contract signed by the owner of the goods, but section 8 declares his liability for the negligence or criminal act of himself or his servants, notwithstanding any special contract.

I now come to the other part of Mr. Das' argument connected with sections 151 and 152 of the Contract Act. Section 148 says a "bailment" is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the persons delivering them. Section 151 says: "In all cases of bailment the bailee is bound" to take a certain degree of care of the goods and section 152 says: "The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151." The meaning seems to me to be clear, *viz.*, that an ordinary bailee is bound to take reasonable care of the goods, notwithstanding any contract to the contrary; and he incurs no further liability in the absence of a special contract. It has been so held by Sankaran Nair, J., in *Sheik Mahumad Ravuther* v. *B. I. S. N. Co.*, (20) and I know of no decision to the contrary. This, I think, as indicated above, was formerly also the English Common Law; but since it has been held that a common carrier can contract out of liability for negligence it would follow that an ordinary bailee could do so—and that an ordinary

(19) (1869) 4 Q. B. 244; 10 B. & S. 212; 38 L. J. Q. B. 137; 17 W. R. 412.

(20) 1 Ind. Cas. 977; 32 M. 95; 18 M. L. J. 497; 4 M. L. T. 110.

bailee could do so, seems to have been contemplated by Blackburn, J., in *Mitchell* v. *Lancashire & Yorkshire Ry.* (21). But this would be a later development of the law which, in my opinion, is not the law in India.

In *Irrawaddy Flotilla Co.* v. *Bugwandas* (1) their Lordships of the Privy Council say that the Contract Act was not intended to alter or deal with the law applicable to common carriers and that common carriers are not within the Act. The question in that case was whether sections 151 and 152 of the Contract Act reduced the liability of a common carrier to that of an ordinary bailee. The question whether a common carrier can reduce his liability below that of an ordinary bailee did not arise and was not discussed. It was decided that the peculiar liabilities which attach to a common carrier as such, are not affected by the Contract Act. A carrier who by contract divests himself of the peculiar liabilities that could attach to him as a common carrier, ceases to be governed by the law applicable to common carriers and is governed by the law applicable to an ordinary bailee. And if an ordinary bailee cannot contract out of liability for negligence, still less would a common carrier be able to do so. It would be unreasonable to hold that because a carrier professed to carry for all persons indiscriminately, he may do so upon the condition that he shall incur no liability either as a common carrier or as an ordinary bailee; whereas a private carrier may not contract out of his liability as an ordinary bailee.

If the decision is to rest upon the question of public policy, it would no doubt be more satisfactory if the Indian Law was in conformity with the English Law. Formerly under English Law a common carrier could not contract out of liability for negligence, on the ground of public policy, and as stated above the change in English Law on this point was due not to any change of view as regards public policy. The Indian Carriers Act is an indication that in India public policy requires that the carrier should exercise supervision over the persons handling the goods. If it is a question whether the carrier or the individual consignors should insure themselves against loss through the negligence of the carrier's servants, it would probably be cheaper and certainly more appropriate for the carrier to do so.

It has been decided in India, following the present English Law, that a common carrier by sea can contract out of liability for negligence, in the following cases: *Jellicoe* v. *British India Steam Navigation Co.* (22), *Hassanbhoy Visram* v. *The British India Steam Navigation Company* (23), *Hajee Ismail Sait* v. *Company of the Messageries Maritimes of France* (24) and *Sheik Mahamad Ravuther* v. *B. I. S. N. Co.* (20), Sankaran Nair, J., dissenting. In the first case, the plaintiff was not represented and the questions now raised were not raised in any of the first three cases. I do not think that the question can be said to be definitely concluded by judicial decisions.

For the reasons stated above, in my opinion, a carrier by sea under Indian Law cannot contract out of liability for the negligence of himself or of his servants.

The learned Judge has not found as a fact whether the damage to the plaintiff's goods was caused through the negligence of the Company's servants or not. I would remand the case for such a finding.

TWOMEY, C. J.—The question in this appeal is whether a common carrier by sea can contract himself out of liability for the negligence of his servants and agents. It is not disputed that the B. I. S. N. Company are common carriers by sea and it is common ground that their liabilities are governed by the common law. The points in dispute are: (1) whether we should take the common law to be the common law of England at the present day or at an earlier period, and (2) whether in any event the provisions of section 151, Contract Act, prescribing a minimum standard of liability for bailees in general is not applicable to common carriers who are only one species of bailee, namely, bailees for the carriage of goods.

In the Calcutta case of *Jellicoe* v. *British India Steam Navigation Co.* (22) Garth, C. J., held that "a shipowner has a right to impose upon shippers any terms, however unreasonable, which the shippers think proper to accept. They may thus free

(21) (1875) 10 Q. B. 256 at p. 262; 44 L. J. Q. B. 107; 33 L. T. 161; 23 W. R. 853.

(22) 10 C. 489; 5 Ind. Dec. (N. S.) 328.
(23) 13 B. 571; 7 Ind. Dec. (N. S.) 379.
(24) 28 M. 400.

themselves from consequences of their own negligence or default, however gross or wilful." He went on to say: "So long as the law allows one class of carriers to insist upon contracts of this kind, and the public submit to have their goods carried upon such terms, Courts of Justice are quite powerless to protect them." This view appears to have been accepted also by the Bombay and Madras High Courts as being in accordance with the common law of England which they were bound to follow. Wallis, J., in *Sheik Mahamad Ravuther* v. *B. I. S. N. Co.* (20) remarked that "contracts have been made and business carried on for many years in India on this footing and if the law is to be altered now it must be by the Legislature." These Indian decisions are no doubt in accordance with the common law of England as it now stands, and it was assumed that the same law applies to India. In the case last cited, however, Mr. Justice Sankaran Nair expressed a decided opinion that the English Common Law to be applied in India is not the law of the present day but the law as it stood at a much earlier period. He said: 'I am of opinion that the English Common Law that has been accepted in India (*i. e.*, by the Indian Legislature) is the law as declared by Story and Lord Blackburn, which is based on grounds of public policy applicable alike to England and India; that its further development as to exemption by contract due to the Carriers Act of 1830 for loss due to negligence has not been accepted in India, but, on the other hand, has been declared inapplicable by Act III of 1865 to the cases falling within that Act and following the reasoning of the Privy Council, that, though an Act may be inapplicable, it ought to be followed as a rule of justice, equity and good conscience, in cases similar to those dealt with by the Legislature in the absence of any circumstances to the contrary, the principles embodied in Act III of 1865 ought to be followed. I am further of opinion that a rule of English Common Law ought not to be followed when it is opposed to the principles followed and acted upon by the Indian Legislature." The point has now been argued before us with great acuteness by Mr. Das. It is shown that the common law was first introduced into India not later than the year 1726, and that at that time and for more than a century afterwards common carriers in England were not permitted to exempt themselves by contract from liability for loss or damage caused by the negligence of their servants. I concur with my learned colleague in holding that we are justified in disregarding subsequent developments of the common law in England, unless where they have been rendered directly applicable to India by Statute or are shown to be consistent with the principles of subsequent Indian legislation. It is shown beyond doubt that it was not until after the passing of the English Carriers Act in 1830, and as an indirect consequence of that Act, that contracts of this kind came to be recognised in England. When the common law was first introduced into India, any such contract would have been inoperative in England. The English Law relating to inland carriers in England was subsequently relaxed by judicial decisions and the relaxation was extended by the English Courts to carriers by sea. But as Mr. Justice Sankaran Nair has pointed out, the Indian Carriers Act of 1865 expressly provides that common carriers by land shall be liable for loss or damage caused by the negligence of their servants, and there is no reason in principle why a different rule should be applied in India in the case of sea carriers. To hold that sea carriers can exempt themselves by contract would clearly be inconsistent with the policy of the Indian Legislature as shown in the preamble of the Indian Carriers Act, 1865, and section 8 of the Act.

On the second question also, I concur with my learned colleague in holding that section 151, Contract Act, lays down an irreducible minimum of liability for common carriers as well as for other bailees. Mr. Justice Sankaran Nair in the case cited above examined the question whether an ordinary bailee can contract out of his liability under section 151, and I think he gives convincing reasons for his view that such a contract cannot be recognised. If this view be correct, it is clearly repugnant to common sense that a common carrier, who is not only a bailee but an insurer also, should be at liberty to rely

on a contract relieving him of all liability. It is urged that the Privy Council case *Irrawaddy Flotilla Co.* v. *Bugwandas* (1) shows definitely that the liabilities of common carriers are independent of the Contract Act altogether. Their Lordships gave it as their opinion that "common carriers are not within the Act." But that case was one in which the common carriers took up the position that, in the absence of negligence, they were free from liability if they took the amount of care required by section 151, Contract Act. The decision was in effect that the liability of the common carrier as insurer is not affected by the Contract Act, in other words, he cannot avail himself of the provisions of section 151 to reduce his liability to that of an ordinary bailee. This was the only question their Lordships had to decide, and I think it is clear that no wider meaning was intended for the phrase "common carriers are not within the Act." There is nothing in their Lordships' judgment to support the view that a common carrier, not being a common carrier under the Indian Carriers Act, 1865, is not as a bailee liable at least to the extent indicated in section 151 or that he can divest himself of this minimum liability any more than an ordinary bailee can.

I agree that the case must be remanded to the original side for a finding on the 4th and 6th issues as to negligence and the amount of damages, if any.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3781 OF 1913.

November 21, 1918.

Present:—Mr. Justice N. R Chatterjea and Mr. Justice Newbould.

PROFULLA KUMAR SEN AND OTHERS —DEFENDANTS—APPELLANTS

versus

THE HON'BLE NAWAB SIR SALIMULLAH BAHADUR AND OTHERS—PLAINTIFFS —RESPONDENTS.

Rent decree against recorded tenants—Execution of decree—Sale of tenure—Subsequent suit for arrears—Transferee of portion of tenure, liability of.

A tenure was sold in execution of a decree for rent obtained against the recorded tenants only. Afterwards, the landlord brought a suit for arrears of rent for the period between the date of the institution of the previous suit and the confirmation of the sale, as well as for some subsequent years, making the old recorded tenants and an unrecorded transferee of a part of the tenure, parties to the suit:

Held, (1) that the entire, tenure including the share of the purchaser of a portion of it whose name was not registered in the landlord's *sherista*, passed by the execution sale and that it was not open to such a purchaser to sue for a declaration of his right to his share in the tenure; [p. 305, col. 1.]

(2) that the unrecorded purchaser was not liable for the rent of the period subsequent to the confirmation of sale. [p. 305, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Backergunj, dated the 5th August 1913, modifying that of the Munsif, 1st Court at Barisal, dated the 31st August 1912.

Babus *Surendra Chandra Sen* and *Surendra Nath Das Gupta*, for the Appellants.

Babus *Surendra Nath Guha* and *Biraj Mohan Mojumdar*, for the Repondents.

JUDGMENT.—This appeal arises out of a suit for rent in respect of a tenure which was held originally by defendants Nos. 1 to 5 and certain persons who are described as Mohamedans.

The plaintiffs, who are the Zemindars, brought a suit for rent of the tenure against defendants Nos. 1 to 5 on the 10th August 1906. This suit was for a period prior to Sraban 1313. In execution of the decree obtained in the suit, the tenure was sold and the sale was confirmed on the 10th May 1908, corresponding to 27th Baisakh 1315. The present suit was brought for the arrears of rent between the date of the institution of the previous suit and the date on which the sale was confirmed, *i.e.*, up to the end of 1314 not only against the defendants Nos. 1 to 5 but also against the defendant No. 6. The plaintiffs also claimed a 4-annas share of the rent for 1315 and 1316 against the defendant No. 6 in the present suit, on the ground that the Record of Rights showed that the defendant No. 6 was a co sharer to the extent of 4 annas in the tenure by virtue of a purchase of the said 4 annas share from the Mohamedans in the year 1291.

MUNSHI LAL *v.* MOHAMMAD AMIR MIRZA BEG.

The Court of first instance gave a decree to the plaintiff for rent up to the year 1314 against defendants Nos. 1 to 5 only and dismissed the claim against defendant No 6. On appeal, the learned Subordinate Judge held that the defendant No. 6 was also liable for the rent as claimed, as he had failed to show that the *kobala* was *benami* and the Record of Rights showed his name as being the owner of the tenure to the extent of 4 annas share.

The defendant No. 6 contended in the Courts below that the *kobala* executed in his favour by the Mohamedans was a *benami* one, and that he had no possession of, or concern with, the tenure. He further contended that the entries in the Record of Rights were not made at his instance. These facts, however, have been found against him by the lower Appellate Court and we must hold, therefore, that he was a co-sharer of the tenure along with defendants Nos. 1 to 5.

It is found by both the Courts below (and in fact the finding was based upon the admission of the plaintiffs themselves) that the defendant No. 6 had never been recognised as a tenant, that the defendants Nos. 1 to 5 were the recorded tenants in the *sherista* of the plaintiffs and that the plaintiffs had never realized rent from the defendant No. 6, although the *kobala* in the name of the defendant No. 6 was executed so far back as 1891. The property sold is described as an entire tenure, and as the decree was obtained by the plaintiffs against the recorded tenants, we think that what was intended to be sold and was sold was the tenure itself, and not merely the interest of defendants Nos. 1 to 5. Having regard to all the circumstances referred to above, we do not think that it was open to the defendant No. 6 to maintain a suit for a declaration of his right to a 4-annas share on the ground that the sale did not pass his share in the tenure. During these 17 years or more, he has never asserted his right as a tenant: and the finding is that he has never been recognized as a tenant nor was any rent realized from him. We are of opinion that the entire tenure including the interest, if any, of defendant No. 6 passed by the sale to the plaintiffs. The defendant No. 6 disclaims any possession of, or concern with, the *howla* or any under-tenure in the *howla*.

Under these circumstances, the decree of the lower Appellate Court, in so far as it relates to the claim for 1315 and 1316 against the defendant No. 6, is set aside; but upon the findings arrived at the defendant No. 6 must be held liable for the rent for the period prior to the confirmation of the sale along with defendants Nos. 1 to 5. The decree of the lower Appellate Court is varied accordingly.

We allow costs in proportion in all Courts, the appellant to get one-fifth, and the respondents to get four-fifths.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 10 OF 1919.

July 4, 1919.

Present :—Mr. Lyle, A. J. C., and Mr. Ashworth, A. J. C.

MUNSHI LAL—DECREE-HOLDER—APPELLANT

versus

S. MOHAMMAD AMIR MIRZA BEG JUDGMENT-DEBTOR—AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 51, 73, O. XXI, r. 84, O. XL, r. 1—Decree against heirs of holder of estate—Receiver, appointment of—Decree, subsequent, against one of several heirs in respect of personal debt—Receiver, separate, whether can be appointed in respect of share of judgment-debtor—Rateable distribution, whether can be allowed—Judgment-debtor, whether same.

One *M. A.* was the last holder of a *taluka* which, after his death, was taken possession of by *A. M.*, his brother and *H. M.* and *A. B.* his nephews. A suit was brought on the basis of certain mortgage-deeds executed by *M. A.* against these three as representatives of the mortgagor, and a decree was obtained providing for payment by instalments and in case of default for sale of the property. Another decree was obtained against them by *R. A.*, the daughter of *M A.*, for her share of the dower due to her mother. In execution of this decree a Receiver was appointed and placed in possession of the *taluka* with directions to satisfy these two decrees out of the profits of the *taluka*. Subsequently to these proceedings, *M. L.* obtained a decree against *A. B.* for his personal debts and, in an application to execute it, he urged that as the two previous decrees were against the representatives of *M. A.*, who were liable to the extent of the assets received by

them, the decrees should be satisfied by sale of the property left by *M. A*, and not out of the profits which were not assets left by him, and that as his judgment-debtor owned a one-third share of the property, his decree could be satisfied from the profits of that share. He accordingly prayed that his judgment-debtor's share be attached under Order XXI, rule 84, of the Civil Procedure Code, and a Receiver appointed under Order XL, rule 1, to realise the profits and apply them in satisfaction of his decree, *or*, that if no Receiver was appointed the share of his judgment-debtor might be attached and sold to satisfy his decree, *or* that if this was not permitted, he might be allowed a rateable share in the profits realised by the Receiver already appointed:

Held, (1) that section 51 of the Civil Procedure Code entitled the Court to appoint a Receiver of rents of the estate of a deceased person for the purpose of liquidating debts against that estate, and that there was nothing in the Code to limit the appointment of a Receiver of rents to a case where the debt to be discharged was a debt against the heirs and not against the deceased holder of the estate, and that, so long as the present Receiver was maintained, the application for the appointment of a Receiver for the sale of the property held by the Receiver already in possession thereof could not be entertained; [p. 307, col. 2; p. 308, cols 1 & 2.]

(2) that as to rateable distribution, the application was barred by the fact that the decree was not against the same judgment-debtor within the meaning of section 73 of the Civil Procedure Code. [p. 308, col. 2.]

Appeal against the order of the Sub-Judge, Sitapur, dated the 6th December 1918.

Messrs. *Bisheshar Nath Srivastava*, *Gulab Chand Srimal* and *Tara Chandar Sharma*, for the Appellant.

Mr. *Mumtaz Husain*, for Respondents Nos. 1 to 3.

JUDGMENT.—The facts of this case will appear from the order of the Subordinate Judge of Sitapur dated the 6th December 1918, which runs as follows: —

"Mirza Muhammad Ali Beg was the last holder of the Taluqa of Aurangabad and after his death his brother Ahmad Mirza Beg and his nephews Hamid Mirza Beg and Amir Mirza Beg got possession over the Taluqa. The Allahabad Bank held certain mortgage-deeds executed by Mirza Muhammad Ali Beg, and on the basis of those deeds the Bank brought a suit against Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg as the representatives of the mortgagor and obtained a decree, which provides for payment of the money by instalments and authorises the Bank to realise the entire money remaining due in case of default in payment of any instalment by sale of the property mortgaged. The wife of Muhammad Ali Beg predeceased him, Rani Abadi Begam is the daughter of Muhammad Ali Beg and she brought a suit to recover her share in the dower due to her mother against Ahmad Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg as Muhammad Ali Beg had died before the institution of her suit. She obtained a decree for over Rs. 93,000. In execution of her decree she applied that a Receiver be appointed and the Taluqa be placed in his possession and from the profits her decree be satisfied. That application was granted and the Deputy Commissioner of Sitapur was appointed Receiver" at first temporarily by the Subordinate Judge on the 7th March 1917 and later on until Abadi Begam's decree was satisfied by this Court on the 19th March 1917, and it was directed that out of the profits the instalments of the Allahabad Bank should be paid first and the balance be applied towards the satisfaction of Abadi Begam's decree. Ahmad Mirza Beg appealed against that order but his appeal was dismissed. The Deputy Commissioner is in possession of the Taluqa as Receiver. These facts are not disputed. Munshi Lal brought a suit against Amir Mirza Beg in the Court of the Subordinate Judge of Lucknow for his personal debts and obtained a decree which has been transferred to this Court for execution. Munshi Lal has filed the present application and says that his judgment debtor, Amir Mirza Beg, is owner of 5 annas 4 pies share in the villages which are in the possession of the Deputy Commissioner as Receiver in Abadi Begam's decree and of which the *nikasi* is about Rs. 1,50,000, that he pays the amount of profits realised by him towards the satisfaction of the decree obtained by the Allahabad Bank and Rani Abadi Begam, that Abadi Begam's decree was passed against the three persons as heirs and representatives of Muhammad Ali Beg and they were liable to the extent of the assets received by them and the decree in favour of the Allahabad Bank was passed on the basis of the deeds executed by Muhammad Ali Beg and could be satisfied by sale of the villages mortgaged and Abadi Begam could also realise her money from the property of Muhammad Ali Beg and the two decrees could not

be satisfied out of the profits of the villages as these profits could not be called assets of Muhammad Ali Beg, that the profits could only be applied towards the satisfaction of the decree obtained by him against Amir Mirza Beg personally, that there was a large amount of mortgage money with which the villages were charged and applicant's decree could very soon be satisfied from the profits of Amir Mirza's share, that if the property of his judgment-debtor is sold, it will cause great loss to him and it would take a long time in getting the property sold and, therefore, it was prayed that his property be attached under Order XXI, rule 84, the First Schedule of the Code of Civil Procedure, and under Order XL, rule 1, a Receiver be appointed who might realise the profits and apply them towards the satisfaction of his decree and as the property has already been placed in the possession of the Receiver in execution of Abadi Bagam's decree, he might be given permission to proceed against the Receiver according to law, that if no Receiver be appointed in his case, then the share of the judgment-debtor in the village might be attached and sold and from the proceeds his decree be satisfied, that if this also be not allowed, then he might be allowed a rateable share in his profits realised by the Receiver in Abadi Begam's decree.

The Subordinate Judge has refused to accede to any of the three requests of the applicant Munshi Lal, on the ground that he should apply to the Court which appointed the Receiver. He seems, however, to endorse the applicant's contention that the appointment of the Receiver of this Taluqa with power to use the rents towards satisfying the mortgage of the Allahabad Bank and Abadi Begam's decree was improper, as neither the Allahabad Bank nor Abadi Begam had any right to the profits of the Taluqa which belonged to the heirs. In appeal the position is taken up that if the appointment of the Receiver made by order of this Court, dated the 19th March 1917, was illegal, then the applicant Munshi Lal was entitled to ask the Court to ignore that appointment as he was not party to the proceedings. In order to succeed, the applicant Munshi Lal must show that the appointment of the Receiver was illegal. For the purpose of doing this his Counsel refers to *Kishan Lal Atal* v. *Ummat-ul-Fatima Begam* (1) as authority for the proposition that the corpus only and not the current profits of an estate are assets of the deceased holder. In this ruling it was held that, until the sequestration of the estate by attachment or otherwise, a creditor is not entitled to seize the rents and profits of the property of the deceased accruing after the property has devolved on his heirs-at-law, since such profits cannot be treated as the estate of the deceased and the heirs of the deceased are entitled to appropriate them. This ruling does not help the applicant Munshi Lal, since it admits that the rents and profits of the estate can be taken by a creditor of the deceased if the estate had been sequestrated by attachment or otherwise. If the appointment of a Receiver to collect rents is covered by the words "or otherwise", then the ruling is of no benefit to Munshi Lal. Munshi Lal's Counsel, however, relied on *Rani Kanno Dai* v. *B. J. Lacy* (2) as authority for the proposition that a Court cannot appoint a Receiver of rents in execution of a money decree against the deceased holder of the estate. The respondent's Counsel failed to furnish a simple answer to the invocation of that ruling. This ruling was passed under the old Code of Civil Procedure. Section 51 of the Code of Civil Procedure of 1908, which allows a Court to order execution of the decree by appointing a Receiver, is a new section which was added on the suggestion of the Advocate-General of Madras. Munshi Lal applicant's Counsel also urges that in no case can a Receiver be appointed in execution of a mortgage decree and refers to *Muhammad Hussain Khan* v. *Amar Chand Paul* (3). This ruling on the contrary merely holds that the appointment of a Receiver is within the discretion of a Court and that in the particular circumstances of the case which was the subject of the ruling, circumstances entirely different from present one, it was not desirable to appoint a Receiver. In our opinion the effect of section 51 of the Code

(1) 25 Ind. Cas. 384; 17 O. C. 207.
(2) 19 A. 235; A. W. N. (1897) 38; 9 Ind. Dec. (N. S.) 154
(3) 21 Ind. Cas. 283; 16 O. C. 238.

of Civil Procedure of 1908 is to entitle a Court to appoint a Receiver of rents of the estate of a deceased person for the purpose of liquidating debts against that estate. Once a Receiver has been appointed, the heirs of the deceased are no longer entitled to the rents. In this case the Receiver was appointed in order to prevent the sale of a valuable property in discharge of debts which could be easily paid off from the profits. The appointment of a Receiver was *prima facie* to the advantage of the heirs, as it had the effect of keeping intact the estate. The heirs could not complain if a portion of the property had been sold, and it follows that they had no right of complaint if in lieu of the sale of a portion of the property they were compelled to forego the profits for some years. There is nothing in the Code of Civil Procedure which limits the appointment of a Receiver of rents to a case where the debt to be discharged is a debt against the heirs, and not against the deceased holder of the estate. Therefore neither the request of the applicant for the appointment of a Receiver on his own behalf nor for the sale of the property held by the Receiver can be granted so long as the present Receiver is maintained.

It remains to consider whether the applicant's claim for rateable distribution can be granted on his present application. It may be conceded that rents realised by a Receiver can be the subject of rateable distribution [see *Fink* v. *Maharaj Bahadur Singh* (4)]. It is also well established law that the words in section 73 of the Code of Civil Procedure for the execution of decrees for the payment of money passed against the same judgment-debtor will cover the case where the party applying for rateable distribution has a decree against one only of several judgment debtors against whom decrees are being executed by the Court [see *Iqbal Jahan Begam* v. *Munney Mirza* (5)]. In this case, however, the decree which is being executed by this Court by the appointment of a Receiver is a decree against the three heirs of Mirza Muhammad Ali Beg as representing his estate, while the applicant's decree is against only one of these three heirs in his personal capacity. The two decrees are not, therefore, against the same judgment-debtor [see *Bhola Nath* v. *Maqbul un nissa* (6)]. We are also of the opinion that the learned Subordinate Judge was correct in holding that an application for rateable distribution must be made to the Court by which the assets are held [see *Krishnashankar* v. *Chandrashankar* (7)]. Reference may also be made to the case reported as *Jatindra Nath* v. *Sarfaraz Meah* (8). The applicant's Counsel has attempted to distingnish this case, on the ground that it related to the right of a landlord to maintain an action for rent against his tenants after a Receiver had been appointed and did not relate to the right of a decree-holder to obtain rateable distribution. The principle, however, of the ruling clearly is that no claim can be made in derogation of a Receiver's appointed powers except to the Court which appointed the Receiver.

It has also been brought to our notice that in 1909 Ahmed Mirza Beg, Hamid Mirza Beg and Amir Mirza Beg entered into an agreement whereby the profits of the estate were to be first used for the liquidation of debts against the estate. The decree of Munshi Lal was obtained subsequent to the date of that agreement. It is urged that he is bound by the agreement as he is the creditor of one of the parties to it. There is, however, no proof that the applicant had notice of the agreement. The fact that that agreement was registered would not be notice to him. Our finding then is that the appointment by this Court of a Receiver of the rents of the property in execution of decrees against the estate of Mirza Muhammad Ali Beg was not illegal and that the applicant has no right to ignore that appointment or to have another Receiver appointed in his interest. As to his request for being allowed to participate in a rateable distribution of the rents, it is barred by the fact that his decree is not against the same judgment-debtor within the meaning of section 73 of the Code of

(4) 26 C. 772; 4 C. W. N. 27; 13 Ind. Dec. (N. S.) 1094.
(5) 10 O. C. 129.
(6) 26 A. 28; A. W. N. (1903) 184.
(7) 5 B. 198; 3 Ind. Dec. (N. S.) 132.
(8) 6 Ind. Cas. 214; 14 C. W. N. 653.

CHUNI LAL HALDAR *v.* MAKSHADA DEBI.

Civil Procedure and that even if it were, his application should have been to this Court, and not to the Court of the Subordinate Judge who had no jurisdiction in the matter.

It has been urged by the applicant's Counsel that there must be some means whereby his client can obtain execution of his decree against Amir Mirza Beg and that the continuance of the Receiver to his prejudice cannot be regarded as equitable. He states that it is not possible for his client to realise his decree against the portion of the estate of Mirza Muhammad Ali Beg which is not in the hands of the Receiver, because that portion is heavily encumbered by other debts or decrees. We do not see that there is anything to prevent the applicant applying to this Court for such cancellation or modification of the Court's order of the 19th March (appointing the Receiver, in execution of the decrees of the Bank and Rani Abadi Begam) as the circumstances of the case and justice may require. When the Receiver was appointed by the Court it is not apparent that the existence of any decree against the heirs was disclosed, nor was the question considered whether the appointment of the Receiver might prejudice the rights of future holders of decrees against the heirs of Mirza Muhammad Ali Beg. There can be no question that this Court which appointed the Receiver can remove him or modify the terms on which he was appointed after giving notice to all parties concerned. Whether as a condition precedent to the making of an application to this Court in connection with the Receiver, the applicant should get his decree transferred to this Court or not, is a matter on which we express no opinion.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 101 OF 1917.

February 3, 1919.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Panton.

CHUNI LAL HALDAR—CLAIMANT No. 6 —APPELLANT

versus

Srimati MAKSHADA DEBI AND OTHERS —RESPONDENTS.

Probate and Administration Act (V of 1881), s. 90—Permission to sell granted to Hindu widow—Sale, validity of, as against reversioner—Order granting permission, whether can be questioned in land acquisition proceedings.

Permission to sell, granted under section 90 of the Probate and Administration Act to an administratrix, who is a Hindu widow and heiress of her husband, is sufficient to prove the validity of the sale against the reversioner. To hold otherwise would be to introduce an unwarrantable qualification into the express provisions of the Probate and Administration Act with regard to Hindu widows. [p. 310, col. 2.]

There is nothing in the Probate and Administration Act which would justify a differentiation between the powers of an administratrix who happens also to be a Hindu widow and heiress of her husband and those of any other administrator under the Act. [p. 310, col. 2.]

Kamikhya Nath Mukerjee v. *Hari Churn Sen*, 26 C. 607; 13 Ind Dec. (N. s.) 990, relied on.

In proceedings under the Land Acquisition Act it is not open to the Court to go behind an order of the District Judge passed in his probate jurisdiction or to review his order to see if it was correctly made [p. 310, col. 2.]

Bhairab Chandra Dutta v. *Benoy Chandra Dutta*, 43 Ind. Cas. 804; 46 C. 70; 22 C. W. N. 520; 27 C. L. J. 395, relied on.

Appeal against the decree of the President of the Calcutta Improvement Tribunal of Calcutta, dated the 19th February 1917.

Babus *Sarat Chandra Roy Chaudhuri*, Babu *Peari Mohan Chatterjee* for Babu *Mohini Mohan Chatterjee* and *Krishna Lal Banerjee*, for the Appellant.

Babus *Provas Chandra Mitter*, *Surendra Madhab Mullick* and Babu *Bejoy Kumar Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal by Chuni Lal Haldar, claimant No. 6, and arises out of apportionment proceedings before the President of the Tribunal under the Calcutta Improvement Act, 1911. The respondents are Makhoda Debi, claimant No. 5, and Upendra Nath Sen, claimant No. 8. By a declaration dated 16th

February 1915, 5 *cottas* 3 *chittaks* and 4 square feet of land were acquired under the Act, the total compensation awarded being Rs. 4,588-0-8. The property originally belonged to Kali Charan Haldar. He had three sons, Raj Kumar, Krishna Kishore and the appellant. Both the two first are dead. Makhoda Debi is the widow of Krishna Kishore. On 8th March 1884 Makhoda Debi obtained Letters of Administration to her husband's estate from the District Judge of the 24-Pergannas. On 1st April 1890 she further obtained from the District Judge under section 90 of the Probate and Administration Act, 1881, leave to sell certain property of her husband, including his one third in the land now acquired, for not less than Rs. 2,000. On the following day she sold all except one of the properties, which she had permission to sell, to Chandra Kishore Sen, the predecessor in-interest of claimant No. 8. The property thus sold amounts to 1 *cotta* 8 *chittaks* and 25 square feet of the land now acquired and is represented by the sum of Rs. 1,151-0-8, part of the Rs. 4,585-0-8. The appellant maintained that the sale was good only for the life of Makhoda Debi and he asked that this sum might be dealt with under section 32 of the Land Acquisition Act. The President decided against him and ordered payment of the Rs. 1,151-0-8 to claimant No 8. Hence this appeal.

For the appellant six contentions were urged:—

(1) That claimant No. 8, having purchased from a Hindu widow and having adduced no evidence of legal necessity, was only entitled to the property so purchased for her life.

(2) That the President erred in holding that the permission to sell was sufficient to prove the validity of the sale against the reversioner.

(3) That the reversioner as a third party was not bound by the order of permission to sell granted in his absence.

(4) If the order is to be taken as relieving the purchaser from proving legal necessity, it must be shown that the District Judge considered it.

(5) That the order of permission was without jurisdiction, inasmuch as Makhoda Debi had at the date of the order ceased to be administratrix.

(6) Assuming that the District Judge could make the order, the transaction of sale was in fraud of the reversioner, and the order fraudulently obtained from the Court on suppression of the true facts and by false representations, of all which the purchaser was well aware.

The first two grounds are concluded against the appellant by the decision in *Kamikhya Nath Mukerjee* v. *Hari Okurn Sen* (1) and it was argued that that decision is not correct, that it is opposed to the principles of Hindu Law, and that it had not been followed. It transpired that the learned Pleader used the last expression not in its ordinary sense, that the decision had been since considered by other Benches of this Court who had declined to follow it, but that he had been unable to find any subsequent reported decision in which it had even been cited. It stands in the reports as the decision of this Court and we are bound either to accept and follow it, or, if we doubt its correctness, to refer the question to a Full Bench. This we are certainly not prepared to do, as we are in full agreement with it. To hold otherwise would be to introduce an unwarrantable qualification into the express provisions of the Probate and Administration Act with regard to Hindu widows. There is nothing in that Act which would justify a differentiation between the powers of an administratrix who happens also to be a Hindu widow and heiress of her husband and those of any other administrator under the Act.

The next three contentions of the appellant question the propriety of the order of the District Judge allowing Mokhada Debi as administratrix to sell the property. It is not open to the appellant in these proceedings thus to go behind the order, nor can we review the order to see if in the circumstances it was correctly made. For instance in ground (5), the appellant suggests that the order was without jurisdiction because the applicant was then no longer administratrix. It must, however, be presumed that the

(1) 26 C. 607; 13 Ind. Dec. (N. S.) 990.

District Judge satisfied himself on that point before making the order in her favour as such administratrix. The case cited by the learned Pleader for the appellant [*In the goods of Nursing Chander Bysack* (2)] shows how the Court will examine the matter. We cannot presume that the District Judge failed in his duty in this respect or in his consideration of the other matters on which he had to be satisfied before he could properly make the order. As was pointed out in *Bhairab Chandra Dutta* v. *Benoy Chandra Dutta* (3), "the propriety of an order or decree made in a cause, in which the Court has jurisdiction, cannot be challenged collaterally." That general principle may well be applied in a case like the present, where the appellant is seeking in land acquisition proceedings to go behind an order of the District Judge passed in his probate jurisdiction some 28 years ago.

The sixth and last contention impugns the District Judge's order as vitiated by fraud. It is questionable whether the appellant can so impugn the order in these proceedings, but assuming that he could do so, it is sufficient to say that we entirely agree with the learned President that no case of fraud has been made out in this case, and, in particular the appellant has completely failed to show that the purchaser was in any way privy to it. There were no distinct allegations by the appellant of the fraud charged and the arguments on his behalf appeared to rest on vague suggestions made against a third party.

The appeal fails on all points and is dismissed with costs to the respondents who have appeared. Hearing-fee four gold *mohurs* to claimant No. 8 and two gold *mohurs* to claimant No. 5.

Appeal dismissed.

(2) 3 C. W. N. 635.
(3) 43 Ind. Cas. 804; 46 C. 70; 22 C. W. N. 520; 27 C. L. J. 395.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 702 OF 1917.

June 16, 1919.

Present :—Mr. Justice Walsh and Mr. Justice Ryves.

KHUB SINGH—DEFENDANT—APPELLANT

versus

RAMJI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Will—Gift in favour of nephew—Bequest, subsequent, in favour of donee, describing him as adopted son—Adoption not proved—Bequest, validity of.

N., a separated Hindu, made a gift of the bulk of his property to *K*, his nephew, who had lived with him since boyhood and had been brought up and married by him, and who, subsequently to the gift, had assisted *N.* in his business and lived jointly with him. Before his death, *N.* executed a Will bequeathing the remainder of his property to *K.* Upon *N.*'s death some distant collaterals of his brought the present suit against *K.* claiming all *N.*'s property. *K.* in reply asserted the gift and the Will in his favour and also stated that he was the adopted son of *N.* At the trial the adoption was denied by the plaintiffs, and no evidence was led by *K.* on the issue relating thereto. The trial Court found that the gift was genuine and had been acted upon and that it was *N.*'s intention under the Will to pass the remainder of his property to *K.*, and dismissed the suit. The lower Appellate Court, while upholding the gift, decreed the claim in respect of the property dealt with by the Will, on the ground that *K.* could only derive benefit thereunder if he were the adopted son of *N.* but as he had abandoned the plea of adoption, he could derive no benefit under the Will. On appeal to the High Court:

Held, that the plaintiffs were not entitled to a decree, the simple fact that the Will described the donee as an adopted son, did not mean that, unless in law and in fact he was an adopted son, the testator intended that he was to get no benefit under the Will. [p 312, col. 2.]

Second appeal against the decree of the Additional Judge, Meerut, dated the 30th March 1917.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Kailash Nath Katju*, for the Appellant.

Mr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—The property in dispute belonged to one Nihalo, who died on the 29th of December 1914. The plaintiffs-respondents were distant collaterals of Nihalo, who was a separated Hindu, and they claimed all the property left by Nihalo, as his heirs. Their claim was resisted in the mutation proceedings by the appellant, on the ground that he was entitled to

Nihalo's property. Mutation was granted in his favour, hence this suit. The plaintiffs claimed all the property left by Nihalo The defendant asserted that on the 15th of December 1891 Nihalo had executed a deed of gift of the bulk of his property in his favour and had put him in proprietary possession of it, and that subsequently on the 13th of January 1912 he executed a registered Will by which he left the remainder of his property to him. The defendant also stated that as a matter of fact he was the adopted son of Nihalo, and in proof produced a *taluiatnama* or deed of adoption, executed on the 19th of January 1913. The fact and legality of the adoption were denied. At the trial the defendants' Pleader stated that he did not wish to give evidence on the issue of adoption as he was prepared to stand or fall on the remaining issues. The Court of first instance held that the deed of gift was genuine and that it had been acted upon, and that under it the defendant had acquired full proprietary title and possession of the properties comprised in it. The plaintiffs' plea with regard to the Will was that it was "*farzi*", that is to say, mere "waste paper." In argument before us it was pleaded that inasmuch as throughout the Will the defendant was described as Nihalo's adopted son, on failure of proof of the adoption the Will must fail, because it was argued that the whole motive of making it was the fact of the defendant being believed to be the adopted son of Nihalo. The Court of first instance overruled this plea and held that it was the intention of Nihalo under this Will to pass the remainder of his property to the defendant. On appeal the lower Appellate Court found that the plaintiffs' suit as regards all the property except that covered by the Will was rightly dismissed. With regard to the Will that Court held that Nihalo made the Will in the defendant's favour, only *qua* adopted son, and as the plea of adoption had been abandoned, it held, purporting to follow two decisions of the Privy Council, *Lali* v. *Murlidhar* (1) and *Fanindra Deb Raikat* v. *Rajeswar Das* (2), that it was necessary to find what was the intention of the testator in making the gift under the Will. In both these cases in the Privy Council it was held that under the circumstances of those cases the fact that the donee was an adopted son was a condition precedent to his receiving the gift In both cases it was found that if the alleged adoption was not valid, the gift must fail. The question in every such case is whether the donee's right to succeed depended on whether he had been sufficiently indicated, or whether he actually and legally was, the "adopted son," and whether the gift was made to him personally or only because he was believed to be the adopted son. In *Fanindra Deb Raikat* v. *Rajeswar Das* (2) their Lordships of the Privy Council admitted that "The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language (of the document) and the surrounding circumstances." Now in this case the facts are these: Nihalo had no children of his own. The defendant who was his nephew (or more accurately "wife's brother's son") lived with him apparently since his boyhood. Nihalo brought him up and got him married and as has been mentioned above, on the 15th of December 1891 made a gift in his favour of the bulk of his Zamindari property. Since that time the nephew had been helping Nihalo in his business and living jointly with him. Then we come to the Will executed 21 years afterwards, in which he bequeathed to him the rest of his property. At that time Nihalo's wife was dead, and he had no near relatives. As said before, he was a separated Hindu. It is contended that he did not mean to leave this property to the defendant merely because he was his nephew and because he had lived with him for all these years and had been the recipient of his bounty but because he had adopted him and for no other reason. It seems to us that it would be pressing the principle laid down in the Privy Council rulings very far to hold that simply because in this Will the donee is described as an adopted son, it must be taken that the testator meant that unless in fact and law he was an adopted son he never meant him

(1) 28 A 488; 3 C. L. J. 594; 8 Bom. L. R. 402; 3 A L. J 415; 10 C. W. N. 730; 33 I. A. 97 (P. C.).

(2) 11 C. 463 at p 484 (P. C.); 12 I. A 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068.

to get any benefit under the Will. Under these circumstances we think that the Court of first instance was right. We allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs, including in this Court fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1561 OF 1917.

October 30, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer

NARASIMHAYYA—PLAINTIFF—APPELLANT

versus

SRINIVASAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Interest, post diem, *liability for—Stipulation for payment of principal and interest on certain day—Interest on arrears of interest, agreement for—Absence of provision for* post diem *interest—Liability of debtor, extent of.*

Post diem interest is payable on a mortgage-bond on the general promise by the debtor to be liable for interest, though a definite term is fixed in the bond for repayment of principal and interest. If the liability under that general undertaking to pay interest is further extended by another undertaking which may be called appurtenant to the principal undertaking to pay interest upon arrears of interest and this further undertaking is found in the same document following the provision to pay interest, the intention of the parties must be deemed to be that both the principal and appurtenant undertaking should apply to the question of liability for *post diem* interest. [p. 313, col. 2.]

Mathura Das v. *Raja Narindar Bahadur*, 19 A 39 (P. C.); 23 I. A. 138; 1 C. W. N. 52; 6 M. L J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25, *Bindesri Naik* v. *Ganga Saran Sahu*, 20 A. 171 (P C.); 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471, *Ghantayya* v. *Papayya*, 23 M. 534; 8 Ind. Dec. (N. S.) 775 and *Ramanathan Chetty* v. *Nur Muhamad Marakayar*, 11 M. L. J. 183, followed.

Chajmal Das v. *Brij Bhukan Lal*, 17 A. 511 (P. C.); 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 652 and *Thaithottathil Pokkar* v. *Ramachandra Shenoy*, 26 Ind. Cas. 124; 16 M. L. T. 478, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge, South Canara, in Appeal Suit No. 59 of 1917 (S. S. No. 178 of 1916 on the file of the District Court of South Canara), preferred against the decree of the Court of the District Munsif of Karkal, in Original Suit No. 497 of 1915.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. Y. Adiga*, for the Respondents.

JUDGMENT.—We think we are bound by the Privy Council decisions in *Mathura Das* v. *Raja Narindar Bahadur* (1) and *Bindesri Naik* v. *Ganga Saran Sahu* (2) and the decisions of this Court in *Ghantayya* v. *Papayya* (3) and *Ramanathan Chetty* v. *Nur Muhamad Marakayar* (4) to hold that *post diem* interest is payable on the general promise by the debtor to be liable for interest, though a definite term is fixed in the bond for repayment of the principal and interest. If the liability under that general undertaking to pay interest is further extended by another undertaking (which may be called appurtenant to the principal undertaking) to pay interest, upon arrears of interest and which further undertaking is found in the same document following the provision to pay interest, it is difficult to hold that the parties intended that only the principal undertaking should apply to the question of the liability for *post diem* interest and not the appurtenant undertaking also.

As regards *Chajmal Das* v. *Brij Bhukan Lal* (5) that was decided before *Mathura Das* v. *Raja Narindar Bahadur* (1) and their Lordships, after reluctantly agreeing with the High Court that there was no covenant to pay *post diem* interest, gave interest by way of damages taking the principal undertaking alone as a guide for the measure of damages and not the appurtenant undertaking also. *Thaithottathil Pokkar* v. *Ramachandra Shenoy* (6) is a similar case These decisions are of no assistance when considering the question as to whether compound interest is allowable, where *post diem* interest is granted on

(1) 19 A. 39 (P. C.); 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25.

(2) 20 A. 171 (P. C.); 2 C. W. N. 129; 25 I. A. 9; 7 Sar P. C. J. 273; 9 Ind. Dec. (N. S.) 471.

(3) 23 M. 534; 8 Ind. Dec. (N. S.) 775.

(4) 11 M. L. J. 183.

(5) 17 A. 511 (P. C.); 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 652.

(6) 26 Ind. Cas. 124; 16 M. L. T. 478.

the covenant and not as damages in the absence of a covenant. On the other hand, the decisions in *Bindesri Naik* v. *Ganga Saran Sahu* (2) and *Ramanathan Chetty* v. *Nur Muhamad Marakayar* (4) proceed on the view that both the covenants can be availed of by the creditor in respect of *post diem* interest.

We, therefore, allow the second appeal and restore the decision of the District Munsif dismissing with costs the defendants' appeal to the lower Appellate Court. The respondents will pay appellant's costs in this Court. Six months' time will be allowed for payment from this date.

M. C. P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2554 OF 1917.

May 21, 1919.

Present:—Mr. Justice Newbould.

SHED AHAMAD—DEFENDANT—APPELLANT

versus

IBRAHIM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law – Gift—Donor and donee residing on property—Delivery, whether necessary—Maliki, *meaning of—Evidence Act (I of 1872), s. 90—Presumption, whether applies to documents executed by illiterate person.*

In cases where the donor and the donee reside on the property, a gift of the property under the Muhammadan Law may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. [p. 316, col. 1.]

The presumption arising under section 90 of the Evidence Act can be applied to a deed executed by an illiterate person whose signature has been made by some other person on his behalf. [p. 315, col. 2.]

The word "*maliki*" itself is a term of no special meaning. It may mean proprietary right or it may mean a lesser right superior to that of the actual cultivator of the land; even the right of a *ryot* who has let his land to an under-*ryot* is sometimes called *maliki*. [p. 315, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Chittagong, dated the 31st August 1917, modifying that of the Munsif, 2nd Court at that place, dated the 29th March 1916.

FACTS appear from the judgment.

Babu *D. L. Kastgir* (with him Babu *Tarakeswar Nath Mitra*), for the Appellant.—The plaintiff claimed *maliki* title, but the learned Subordinate Judge has given him a decree declaring his *raiyati* title. *Maliki* title is proprietary title and is distinguished from *raiyati* title. As regards the land in the first schedule, the Appellate Court relied on a *heba* executed by one Kusam Bibi in favour of the plaintiff's predecessors. The first Court rejected the *heba* as not genuine. How can the Appellate Court presume the document to be genuine? Section 90 of the Evidence Act cannot certainly help it, as it thinks it does. The *heba* purported to be signed for Kasum Bibi by one Sadatali Under section 90 the genuineness of the document cannot be legally presumed. The genuineness of the signature of Sadatali may be presumed, but can the Court presume that Sadatali was authorised by Kusum Bibi to sign on her behalf? Refers to *Ubilack Rai* v *Dallial Rai* (1), *Thakoor Pershad* v. *Musammat Bashumatty Kooer* (2) and *Uggrakant Choudhry* v. *Hurro Chunder Shickdar* (3). That the deed was actually executed by Kusam Bibi has got to be proved. Kusam Bibi was an illiterate person. Further, the lower Appellate Court has relied on other documents without reversing the first Court's decision that they are not genuine. There is practically no evidence of the delivery of possession of the land granted by the *hebanama*. Under the Muhammadan Law a gift must be accompanied by delivery of possession. As regards 14 annas of the land in Schedule II the Appellate Court has misconstrued certain documents.

Babu *Upendra Lal Roy* (with him Babu *Jatindra Nath Sen Gupta*), for the Respondents, said that if the case was not going to be sent back for re hearing of the appeal, he did not press his cross-appeal, which might stand dismissed.

JUDGMENT.—This appeal arises out of a title suit in which the plaintiffs claimed

(1) 3 C. 557; 1 Ind. Dec. (N. S.) 939.
(2) 24 W. R. 428.
(3) 6 C. 209; 3 Ind. Dec. (N. S.) 137.

khas possession of the lands of two schedules on declaration of their title thereto. The two plots of land in dispute are valued in the plaint at Rs. 20. The Munsif dismissed the suit. On appeal by one of the plaintiffs the Subordinate Judge granted the principal plaintiff a decree for half of the lands of the first schedule and also in respect of 14-annas share of the second schedule. The first defendant now appeals to this Court. The judgment of the Subordinate Judge is attacked on various grounds and I am asked to send the case back to him for re-hearing.

The first point taken is that the learned Subordinate Judge has given the plaintiff a decree declaring his *raiyati* title when he claimed *maliki* title and repudiated the *raiyati* title. It appears, however, from the plaint that what the plaintiffs claimed was a *maliki raiyati* right *Maliki* in itself is a term of no special meaning. It may mean proprietary right or it may mean a lesser right superior to that of the actual cultivator of the land. Even the right of a *raiyat* who has let his land to an under-*raiyat* is sometimes called "*maliki*." In the present case there was really no need for an express decision as to the exact nature of the plaintiffs' right. The principal plaintiffs and the contesting defendants all based their title to the land as successors-in-interest of one Kusam Bibi, the common ancestor. Her right appears to have been a *raiyati* one and it was this right which was claimed. As the plaint included a prayer for declaration of a *raiyati* right, I cannot say that the Subordinate Judge committed any error in decreeing such a right when he found that that right had been established.

As regards the land in the first schedule, the case really turns on a *heba* which is alleged to have been executed by Kusam Bibi in favour of the plaintiffs or their predecessors. The first Court rejected this document as a spurious piece of paper. The learned Subordinate Judge held that he was justified in making the presumption authorised by section 90 of the Evidence Act and relied on this document. This finding is attacked on the ground that the document in question purported to be signed for Kusam Bibi by Sadatali. It is urged that under section 90 all that can be presumed is that the signature of Sadatali is genuine but there can be no presumption that Sadatali was authorised by Kusam Bibi to sign on her behalf. In support of this contention, reference has been made to the cases of *Ubilack Rai* v. *Dallial Rai* (1), *Thakoor Pershad* v. *Musammat Bashmutty Kooer* (2) and *Uggrakant Chowdhry* v. *Hurro Chunder Shickdar* (3). But these cases are distinguishable from the present case. From the facts stated in the reports, it does not appear that in any of those cases the deed was executed by an illiterate person whose name was signed by some one else on his behalf. In the case of *Uggrakant Chowdhry* v. *Hurro Chunder Shickdar* (3), the facts are not stated. In the other two cases the deeds were executed by a person who purported to execute them as an agent. Section 90 provides that in the case of documents to which it refers the Court may presume, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. Not only from the signature of Kusam Bibi by the pen of Sadatali but also from the body of the deed it would appear that the deed was actually executed by Kusam Bibi. I have never heard it suggested that the provisions of section 90 do not apply to a deed executed by an illiterate person whose signature has been made on his behalf. The real distinction between such a deed and the deed referred to in the cases cited is that if Sadatali had not signed with the authority of Kusam Bibi, the deed would be a forgery. In the other cases the signature by the agent without authority would have been merely an act which was beyond his power. I hold that the lower Appellate Court was justified in applying the presumption of section 90 and relying on this document when he came to a decision in the plaintiffs' favour.

It is next contended that the learned Subordinate Judge has relied on other documents without reversing the Munsif's decision that they are not genuine. He refers to these documents jointly as "various deeds of title put in evidence by the plaintiffs." The Munsif in rejecting those documents which he rejected stated that he did so on the same grounds on

which he rejected the *heba*. By relying on those documents the learned Subordinate Judge has in effect reversed the finding of the Munsif as to their credibility, and I do not think that the case should be remanded in order that he may repeat, in respect of each individual document, what he stated as regards the *hebanama*.

Another point taken is that there is no evidence of delivery of possession of the land granted by the *hebanama* and that without such delivery of possession, under the Muhammadan Law the gift is void.

But in cases where the donor and the donee both reside on the property, the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. Here Kusam Bibi was living in her house when she made this gift to her sons, the predecessors of the parties. It was sufficient to make the gift valid if she openly consented, as she did, to the entry of the donees' name in the Survey papers.

As regards the lands in schedule II both the Courts below have referred to a certain *kobala*, Exhibit 10, and a *khatian*. The Munsif says that these documents proved the defendant's title. The Subordinate Judge says that they establish the plaintiffs' title to the 14 annas share. The point depends on the construction of the documents, and before I can say that they have been wrongly construed by the learned Subordinate Judge it would be necessary for me to examine those documents No translation of either document has been put before me and during the hearing of this appeal I was not asked to examine or even look at either document in original. I am, therefore, not in a position to say that the construction put by the learned Subordinate Judge on these documents was incorrect. The respondents have filed a cross-appeal, their contention being that if the *heba* is genuine then they are entitled to the entire lands in schedule I. The learned Pleader, however, concedes that unless the case is sent back for re-hearing of the appeal, he will not ask for a remand for a fresh determination on the point. I hold, therefore, that the appeal fails and is dismissed with costs.

The cross appeal is dismissed without costs, as it has not been pressed for the reasons stated above.

Appeal dismissed.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 61 OF 1918.

July 15, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Adami.

Musammat DHANIA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HAKAYAT PANDEY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow, alienation by—Rent, payment of, whether legal necessity.

The payment of rent is clearly a legal necessity, but a sale of immoveable property for the purpose of discharging an obligation to pay rent is not necessarily justified on such grounds and unless it can be shown that there was no other ostensible means of satisfying a rent decree except by allowing the property to be sold at auction, it cannot be held that the sale of the property, as distinguished from the obligation to pay the rent decree, was justified by legal necessity. [p. 319, col. 2; p. 320, col. 1.]

A widow executed a *zarpeshgi* lease of certain property and out of the consideration for the *zarpeshgi* left a sum in the hands of the *zarpeshgidar* to pay off a previous rent decree. The *zarpeshgidar* failed to discharge the rent decree, with the result that the property was sold to satisfy the decree and was ultimately purchased by the *zarpeshgidar*. In a suit by the reversioners of the widow to challenge the validity of the *zarpeshgi*:

Held, that the sale in execution of the rent decree was not, in the circumstances of the case, justified by legal necessity. [p. 320, col. 1]

Letters Patent Appeal from a decision of Mr. Justice Jwala Prasad, dated the 6th June 1918 and reported as 49 Ind. Cas 841, reversing the decree of the District Judge, Saran, dated the 10th July 1914.

Mr. *L. M. Ganguli* for the Appellants.

Mr. *Harnarayan Prasad* for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal under clause 10 of the Letters Patent from a decision of a single Judge [of this Court dated the 6th June 1918.*

*See 49 Ind. Cas. 841.—*Ed.*

DHANIA *v.* HIKAYAT PANDE.

The dispute is between the reversioners of a small holding of between 2 and 3 *bighas* of land and Zarpeshgidars holding under a deed granted by the mother of the reversioners during her lifetime. The property is valued in the plaint at Rs. 140. The case has been the subject of no less than seven decisions before coming to this Court for final determination, having been remanded twice by the High Court on second appeal for further findings. This unfortunate state of affairs is due primarily to the slipshod manner in which the case was presented in the pleadings and argued before the lower Courts and until litigants in this province realise the importance of having their cases presented in the pleadings so as to raise clearly and concisely the questions to be determined and argued, I am afraid such instances will continue not unfrequently to occur.

Bishun Mahton died sometime in 1903 or 1904. The exact date of his death it has been found impossible to determine with more precision on the evidence. He left a widow *Musammat* Ugmi and two daughters Bhodia and Gangia. *Musammat* Ugmi died in 1911. The daughters, who were the reversionary heirs to Bishun Mahton's property after the death of their mother, are the plaintiffs in the suit. In July 1905 *Musammat* Ugmi being then a widow executed in favour of the defendants, Nos. 1 to 4 a Zarpeshgi of the property in suit. The sum advanced in consideration of the bond was Rs. 300. Of this sum Rs. 165 was stated to be to enable the widow to discharge a prior debt of her deceased husband. Rupees. 55 was to pay a rent decree obtained against the widow for arrears of rent due in respect of the property for a period of three years from 1309 to 1312 Fasli, corresponding to 1902 to 1905 A. D. The balance of Rs. 80 was said to be for sums due from the widow to the Zarpeshgidars themselves. It was found that the Rs. 55 was retained by the Zarpeshgidars themselves in order to pay off the decree for rent and was not in fact paid to the widow. It was also found that there was no proof of any debt of Rs. 80 due to the Zarpeshgidars and that this sum was not advanced. There was, however, proof that the Rs. 165 was advanced to the widow to pay her deceased husband's prior debts and it was found that to this extent only was there any legal necessity on the part of the widow for the alienation of the property under the Zarpeshgi. It is clear, therefore, on these findings that so far as the Zarpeshgi is concerned, the advance taken by the widow was partly justified on the grounds of legal necessity and partly not, and even if the deed purported to grant more than the widow's life interest it could, on the authority of *Harikissan Bhagat* v. *Rajrang Sahai Singh* (1) and similar cases, be set aside by the reversioners on payment of the sum advanced for legal necessity, which was found to be Rs. 165 only.

The case, however, was complicated by the fact that the Zarpeshgidars failed to pay the amount due under the rent decree, although they had retained the money for this purpose out of the sum acknowledged in the Zarpeshgi deed to have been advanced to *Musammat* Ugmi. The result was that the property was put up for sale in execution and purchased by the defendant No. 5 in September 1908 and subsequently transferred by him to the Zarpeshgidars themselves. The only other principal defendants are Nos. 6 and 7 who are co-sharers with No. 5. These seven defendants defended the action and are the present appellants. The remaining defendants are the *thicadars*.

It is only necessary to state the facts just mentioned to show that the sale of the property in execution of the rent decree during the widow's lifetime did not arise out of any inability on her part to pay the amount due, she having raised the money for that very purpose and although the payment of rent and the alienation of property for that purpose, if circumstances render it necessary, can be justified on grounds of legal necessity the sale in execution in the circumstances would hardly appear to be justifiable on such grounds. Moreover, the facts show that at the time when the sale took place the defendants Nos. 1 to 4 were in possession as Zarpeshgidars and although they had retained a portion of the consideration payable by them under the deed

(1) 1 Ind. Cas. 434; 9 C. L. J. 453; 13 C. W. N. 544.

to satisfy the decree, they nevertheless stood by and allowed execution to proceed, afterwards taking a transfer of the purchaser's interest. These are all matters which create the gravest suspicion as to the good faith of these defendants. This consideration was one which very forcibly impressed the learned Munsif who tried the suit in the first instance. He came to the conclusion that the Zarpeshgidars (defendants Nos. 1 to 4) and the Thicadars (plaintiffs in the rent suit) conspired together to bring the holding to sale and, in order to create difficulties for the reversioners, allowed a third person (the defendant No. 5) to purchase at the ludicrously low price of Rs. 51, so that the Zarpeshgidars could then take a transfer from the auction-purchaser instead of themselves buying at the auction-sale and so rob the reversioners of their holding. The Munsif also found that the purchase at the auction-sale only passed the life-interest of the widow, the decree-holders being fractional landlords only. He accordingly decreed the suit for possession on payment to the Zarpeshgidars of the sum of Rs. 165, the amount of the consideration found to have been paid to the widow and justified by legal necessity. With the other issues we are not now concerned. From this decision the defendants appealed and on the 10th July 1914 the District Judge allowed the appeal and dismissed the suit. On the question as to what interest passed at the auction-sale his judgment was somewhat perfunctory. He said: "Ugmi was a party to the rent suit and no fraud in connection with it is proved. I do not know why the Munsif has held that it binds the holding only so long as the widow's interest lasted. Rent is a legal necessity and I hold that the rent decree had the full force of a rent decree."

The Munsif, as I have above indicated, had found, apart from other questions affecting the validity of the decree, that, as the decree-holders in the rent suit were not the whole body of landlords but fractional landlords only, the suit was not one within section 148A of the Bengal Tenancy Act and the decree, therefore, had only the effect of a money decree. Hence, what passed at the auction-sale was not the holding itself but only the right, title and interest of the judgment-debtor, *Musammat* Ugmi, *viz.*, her life-interest, and that the plaintiffs' interest as reversioners did not pass by the sale. The learned District Judge on appeal does not appear to have considered this aspect of the case.

The plaintiffs then appealed to the High Court. On the 4th May 1916 the case came before a single Judge of the High Court, who set aside the decree and remanded the case for re-hearing. He considered it was essential to ascertain whether the amount claimed in the rent suit brought against the widow was for arrears which became due in her lifetime or in the lifetime of Bishun, her husband, he being of opinion that, in the latter event, the rent decree would pass an absolute interest in the holding notwithstanding the fact that the plaintiffs in that suit were some only of the co-sharer landlords. The date of Bishun's death had not at that time been clearly ascertained. He also directed the Court to find how much of the Rs. 300, the consideration for the Zarpeshgi, was for legal necessity, the lower Appellate Court having come to no finding on this point.

The lower Appellate Court on remand found that Bishun died in 1310 or 1311 Fasli and, as part of the rent accrued during his lifetime, that an absolute title passed to the auction-purchaser, and dismissed the claim. The Court also found, agreeing with the Munsif, that Rs. 165 only of the Zarpeshgi money was advanced for legal necessity, that the Rs. 55 had been retained by the Zarpeshgidars to pay off the rent decree, which they never paid, and that the balance of Rs. 80 was never due to them.

The plaintiffs appealed from this decision to the High Court and the case was heard by a different Judge, who remanded the case again for the lower Court "to determine if the rents of the *musammat's* time were such as would make the sale for those arrears for legal necessity."

On second remand the lower Appellate Court found that there was no legal necessity for the sale of the holding in execution, as the decretal amount should have been paid out of the Zarpeshgi money, and, if the widow and the Zarpeshgidars between them failed to do this and allowed the property to be sold, it was obviously unjust that the reversioners should suffer thereby.

When this finding was remitted to the High Court the learned Judge held that the sale, not being justified by legal necessity but being due to the neglect of the Zarpeshgidars themselves to pay the decree-holder out of the moneys they had retained for that purpose, was not binding on the reversioners and that they were entitled to redeem the property on payment of the sum of Rs 165, the only portion out of the sum alleged to have been advanced by the Zarpeshgidars which was shown to have been for legal necessity. He accordingly allowed the appeal setting aside the decree of the lower Appellate Court, and restoring that of the Munsif.

From that decision the present appeal has been preferred by the defendants.

The appellants contended, *first*, that the Zarpeshgi granted by the widow to the defendants Nos. 1 to 4 entitled them to retain the property until the sum advanced was paid off, and, *secondly*, that the interest which was purchased at the auction-sale in execution of the rent decree by defendant No. 5 and afterwards transferred by him to the Zarpeshgidars (defendants Nos. 1 to 4) passed an absolute interest in the property subject to encumbrances and not the life-interest of the widow only, and, as the only encumbrance was their own Zarpeshgi, the defendants Nos. 1 to 4 had acquired an absolute title to the property.

As to the first point, it has been found as a fact that the consideration money which actually passed to the widow was Rs. 165 and, therefore, the plaintiffs would be entitled to redeem on payment of this amount. The sum of Rs. 55, alleged to have been advanced for payment of the rent decree, would have been claimable on the ground of legal necessity either if this sum had been paid to the widow or if the defendants who retained it in order to satisfy the decree had discharged their obligation in that respect but this they failed to do.

With regard to the second point the case stands thus. The decree-holders were fractional landlords only and, therefore, the decree obtained by them did not operate as a rent decree under section 148A of the Bengal Tenancy Act, and what passed at the sale was *prima facie* only the interest of the judgment-debtor, that is to say, the life interest of *Musammat* Ugmi. The learned Judge, however, who remanded the case in the first instance held that, if the decree was for rent payable in the lifetime of Bishun, the sale would pass the whole interest in the property. It now turns out that the decree was for rent which accrued partly in Bishun's lifetime and partly in that of his widow, the judgment-debtor. It has also been found that, in so far as the sale took place in execution of a decree for rent which accrued during the widow's lifetime, there was no legal necessity for the sale. Moreover, the payment of rent by a limited owner is, in my opinion, a personal obligation on the part of the tenant and not a liability which affects the property as a whole, and the learned Judge who heard the appeal after the second remand came to the conclusion that, where a sale takes place under circumstances which render it partially voidable owing to the want of legal necessity, the whole sale must be set aside and the purchasers are only entitled to payment of that part of the judgment-debtor's liability which justified the sale on the ground of legal necessity. From this it would appear to follow that whilst the plaintiffs could set aside the sale they would be under an obligation to pay to the auction-purchasers at all events a sum equivalent to the rent which accrued during Bishun's lifetime. In the present case, however, the auction-purchasers have transferred their interest to the Zarpeshgidars and have ceased to have any further interest in the property. The Zarpeshgidars must, therefore, be treated as in the position of auction-purchasers and had the sale been justified even to the extent of the rent payable in Bishun's lifetime on the ground of legal necessity, I think they would be entitled to recover from the plaintiffs the amount of that rent before the sale could be set aside. Some confusion has arisen in this case in some of the judgments by a failure to keep clearly in mind the distinction between a debt the payment of which can be treated as a legal necessity and the sale of property for the purpose of discharging that debt. The payment of rent is clearly a legal necessity, but a sale of immoveable property for the purpose of discharging an obligation to pay rent is not necessarily justified on such

grounds and unless it can be shown that there was no other ostensible means of satisfying the rent decree except by allowing the property to be sold at auction, it could not be held that the sale of the property as distinguished from the obligation to pay the rent decree was justified by legal necessity. In the present case it is abundantly clear that no legal necessity for the sale of the property in pursuance of the rent decree against the widow has been made out. What happened was that money was in fact raised by the Zarpeshgi granted to the defendants Nos. 1 to 4 for the very purpose of satisfying the rent decree. The defendants themselves retained out of the consideration money for the Zarpeshgi a sum of Rs. 55 for the purpose of satisfying the rent decree and had they carried out their obligation in this respect, the property would not have been sold. The only reason why the property was in fact sold was because the defendants Nos. 1 to 4 either wilfully or through neglect failed to carry out that part of their obligation. They cannot now be allowed to set up a title which is entirely based not upon any legal necessity but upon their own laches. The result is that the appeal must be dismissed. The respondents are entitled to their costs of this appeal.

ADAMI, J.—I agree.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 694 OF 1916.

June 24, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Dundas.

GHUMANDI LAL—PLAINTIFF—APPELLANT

versus

KANHAYA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Post diem *interest, whether recoverable—Intention of parties—Damages.*

In order to ascertain whether a mortgagor on redemption is bound to pay *post diem* interest for the whole term during which the mortgage has been in existence, the instrument must be looked at as a whole and the intention of the parties gathered from the deed. [p. 321, col. 1.]

Mathura Das v. *Raja Narindar Bahadur*, 19 A. 39 (P. C.); 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25, followed.

Plaintiff sued for possession by redemption of a certain shop on payment of the mortgage-money. The mortgage sued upon contained a covenant to redeem at the expiry of 5 years by payment of the *zar-i-rahn*, a covenant to pay interest at Rs. 5 per annum in the meantime and an agreement that, on failure to redeem, the mortgagee shall be at liberty to realise the principal mortgage money, interest, costs, etc, from the property mortgaged:

Held, (1) that the mortgagor did not contemplate paying interest indefinitely; [p. 321, col. 2.]

(2) that it was evident that interest for 5 years at all events was made a charge on the property; [p. 321, col 1.]

(3) that the fact that 5 years' interest was made a charge on the property showed that that should be paid at the time of redemption; [p. 322, col. 1.]

(4) that under the circumstances the plaintiff must be allowed to redeem on payment of principal, interest for the specified term and interest by way of damages for six years prior to suit [p. 321, col. 2.]

Jawahir Mal v *Raja Shah*, 95 P. R. 1903; 21 P. L. R. 1903, followed.

Second appeal from the decree of the District Judge, Gurgaon at Hissar, dated the 21st January 1916, varying that of the Subordinate Judge, 1st Class, Gurgaon, dated the 8th July 1915, decreeing the claim for possession by redemption on payment of Rs. 1,730 within six months to the defendants without costs, failing which the suit shall stand dismissed with costs with reservation for fresh suit if allowed by law or so desired.

The Hon'ble Mr. *Mohammad Shafi*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This was a suit for possession by redemption of a shop at Ballabgarh, which was mortgaged with possession for a term of five years for Rs. 1,000 by a deed of 10th December 1880.

The first Court decreed redemption on payment of Rs. 1,730 as follows:—

Rs. 1,000 principal.
Rs. 720 interest for 12 years.
Rs. 10 improvements.

The lower Appellate Court increased this amount by Rs. 1,300 on the view that the mortgagor was bound to pay interest at Rs. 60 per annum for the whole period between the date of the mortgage and redemption.

The plaintiff has appealed urging that he can redeem on payment of the principal and interest for five years only, or at the outside on payment of interest by way

of damages for an additional six years besides the interest for five years.

Now the mortgage contains the following undertakings :—

(1) A covenant to redeem at the expiry of the term of five years by payment of the principal mortgage money (*zar-i-rahn*);

(2) a covenant to pay interest at Rs. 5 per mensem to the mortgagee in the meantime;

(3) an agreement that on the mortgagor's failure to redeem as provided above the mortgagee shall be at liberty to realise the principal mortgage money, interest, costs of repairs and costs of Court from the property mortgaged.

It is clear from the above that interest for five years at all events is made a charge on the property and in his cross-objections in the lower Appellate Court plaintiff did not contest his liability to pay this and, therefore, cannot do so now. The question, therefore, narrows down to that of *post diem* interest.

We have been referred to many authorities as to whether a mortgagor on redemption is bound to pay *post diem* interest for the whole term during which the mortgage has been in existence. The leading case on the point is *Mathura Das* v. *Raja Narindar Bahadur* (1), wherein it is laid down by the Privy Council that in order to ascertain whether *post diem* interest is to be allowed, the instrument must be looked at as a whole and the intention of the parties gathered from the deed. It cannot be predicated with certainty without such examination whether the intention is that interest will continue to accrue as long as the principal money is unpaid, although there is a natural presumption in favour of this intention rather than that the mortgagor should have the use of the mortgage money without charge, or whether on the mortgagor's failure to redeem within the stipulated period the contract is to be regarded as broken and the mortgagee thrown back on a suit for damages. In the one case it is evident that the mortgagor will have to pay interest up to the date of redemption and in the other the mortgagees are entitled to recover principal and interest for the term of the mortgage *plus* interest for six years prior to suit by way of damages. The Calcutta High Court in *Moti Singh* v. *Ramohari Singh* (2) by a Full Bench judgment adopted this latter rule as their guide to ascertain the amount payable by a mortgagor to redeem, in a case where the mortgage did not specifically provide for *post diem* interest. The same rule was adopted in *Jawahir Mal* v. *Raja Shah* (3), when the Chief Court concluded that the mortgage could be redeemed only on payment of interest and *post diem* interest by way of damages accruing within six years of suit. This judgment appears to us to be very much in point looking to the wording of the mortgage now in suit.

The principal authority to the contrary in the Punjab is *Mota Singh* v. *Bishen Singh* (4), which again quotes the Privy Council decision in *Mathura Das* v. *Raja Narindar Bahadur* (1). On the wording of the deeds before the Court the Judges decided that interest must be calculated for the entire period during which the mortgage remained unpaid.

There is one further point, namely, that the expression *zar-i rahn* has been several times interpreted in the Punjab as meaning principal mortgage money but excluding interest. [*Aulia Khan* v. *Kanshi Ram* (5) and *Lok Chand* v. *Hazar Khan* (6)]. The present case, however, is distinguishable. The fact that five years' interest was made a charge on the property mortgaged shows that the intention of the parties was that that should be paid at the time of redemption.

On an examination of the terms of the mortgage in suit we do not think that we can hold with certainty that the mortgage contemplated paying interest indefinitely. This being the case, we can fall back on the alternative provided by the Privy Council

(1) 19 A. 39 (P. C.); 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25.

(2) 24 C. 699 (F. B.); 1 C. W. N. 437; 12 Ind. Dec. (N. S.) 1135.

(3) 95 P. R. 1902; 21 P. L. R. 1903.

(4) 32 Ind. Cas. 821; 5 P. R. 1916; 23 P. W. R 1916.

(5) 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1913; 145 P. L. R 1913.

(6) 41 Ind. Cas. 59; 93 P. R. 1917; 107 P. W. R. 1917.

judgment of allowing redemption on payment of principal and interest for the specified term and interest by way of damages for six years prior to suit, including an item of Rs. 10 for improvements. This will permit redemption on payment of Rs. 1,000 principal, Rs. 660 interest and Rs. 10 for improvements, or a total of Rs. 1,670.

Accordingly we accept the appeal to the above extent, but as neither party has succeeded wholly in his contentions we leave them to bear their own costs throughout.

Appeal partly accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 56 OF 1918.

May 13, 1919.

Present:—Mr. Justice Newbould and Mr. Justice Duval.

SABED KHAN—PLAINTIFF—APPELLANT

versus

BILATUNNESSA BIBI, WIFE OF SABED KHAN—DEFENDANT—RESPONDENT.

Muhammadan Law—Marriage—Agreement that wife shall be at liberty to reside with her parents on certain contingencies arising, validity of.

Conditions entered into at the time of marriage and contained in a *kabinnama* are enforceable although the *kabinnama* is executed subsequent to the marriage. [p. 323, col. 2.]

There is nothing in Muhammadan Law opposed to an agreement entered into at the time of marriage which does not allow the wife to deny her husband's conjugal rights but permits her, on certain contingencies arising, to leave her husband's house and to insist on the conjugal rights being exercised in her parents' residence. [p. 323, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Mymensingh, dated the 26th September 1917, reversing that of the Munsif, 2nd Court at Tangail, dated the 8th September 1916.

FACTS appear from the judgment.

Mr. *Ashraf Ali* (with him Babus *Hira Lal Guha* and *Provash Chandra Dutt*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for restitution of conjugal rights. The first Court decreed the suit. The second Court reversed it, relying on the *kabinnama* which provided that the wife would be entitled to live with her parents (1) if she was ill-treated by the husband or any member of his family and (2) if she had any disagreement with her husband or his family. The respondent is the appellant's deceased wife's widowed sister whom the appellant married. The couple lived together for two years, after which the wife went away to her parents and there the *kabinnama* was executed containing the above two provisions. The wife then came back and lived for another two years with the husband, when she again went to her parents on account of her pregnancy. She refused to come back after delivery. Hence the suit.

My point is that no legal cruelty has been proved which would entitle her to remain away from her husband. Under the Muhammadan Law the contract on which she relies is held to be void. The contract was neither a separation deed nor was it executed immediately on marriage. See Wilson's Anglo-Muhammadan Law, section 56, page 140. The prompt dower has been paid and the stipulation is void. See Macnaghten's Muhammadan Law, page 57, on effect of marriage contract; Ameer Ali (3rd Edition), Volume II, page 452. The wife cannot refuse to live with her husband except on the ground of legal cruelty. See Abdur Rahman's Institutes of Muhammadan Law, section 17; Bailie's Digest, page 30. The contract was entered into two years after marriage. See also *Meherally Mooraj* v. *Sakerkhanoobai* (1), *Abdul Pirojkhan* v. *Hussenbi* (2), *Moonshee Buzloor Ruheem* v. *Shumshoonnissa Begum* (3) and Hamilton's Hedaya, 55.

Moulvi *A. K. Fuzlul Huq*, (with him Babu *Profulla Chandra Nag*), for the Respondent.—No mention was made in the plaint that the *kabinnama* contained illegal provisions. The point was never raised before either of the Courts. A Muhammadan marriage is a civil contract. All kinds of stipulations can be made provided they do not militate against the law of contracts. The important point is this, whether the contract was

(1) 7 Bom. L. R. 602.
(2) 6 Bom. L. R. 728.
(3) 11 M. I. A. 551; 8 W. R. (P. C.) 3; 2 Sar. P. C. J. 259; 2 Suth. P. C. J. 59; 20 E. R. 208.

entered into at the time of the marriage. I submit it was drawn up at the time of the marriage but was registered sometime later. The deed itself bears that out. So my submission is that the contract having been entered into at the time of the marriage, it is enforceable. See Wilson's Digest, section 56. This statement does not militate against a stipulation contingent on the happening of certain circumstances. The parties are not on happy terms. When there is an express condition, we must not go upon the general principles of Muhammadan Law, *viz.*, that the wife cannot refuse to go back to her husband when there is no legal cruelty. See Ameer Ali, Volume II, page 482. The view expressed therein is in my favour.

Mr. *Ashraf Ali* replied briefly.

JUDGMENT.—This appeal arises out of a suit between Muhammadans for restitution of conjugal rights. The plaintiff is the husband and has been granted a decree for restitution of conjugal rights by both the Courts below. But while the Munsif directed the defendant, the wife, to go to her husband's house, the lower Appellate Court declared that the conjugal rights must be exercised at the *biri* of the wife's parents. It appears that after the marriage of the parties the husband executed a *kabinnama*. The decision of the lower Appellate Court is based on the terms of clauses 4 and 5 of this deed. The wife was given the right to leave her husband's house and to live elsewhere on two contingencies. The first contingency was ill-treatment by the husband or by any other inmate of his house. The second contingency was any sort of difference or disagreement with the husband or his family members. It has been found that there was ill-treatment and on this finding it has been held that the husband was entitled to restitution of conjugal rights only if he allowed his wife to live with her parents. On behalf of the appellant, it is contended that such a clause in the *kabinnama* must be held to be invalid because it is contrary to the principles of Muhammadan Law. Reference has been made to Wilson's Anglo-Muhammadan Law, 3rd Edition, paragraph 56, in which it is stated: "The condition that the wife shall, though adult, be at liberty to live in the house of her parents is void and the husband is entitled, notwithstanding it, to insist on the wife residing with him in his own house, provided he has paid the dower or a prompt portion of it." Reference has also been made to the case of *Abdul Pirojkhan* v. *Hussenbi* (2) and the case of *Meherally Moorai* v. *Sakerkhanoobai* (1) in support of this proposition. But here it is not suggested that the wife will be entitled to leave her husband's house without a cause. Such a condition would undoubtedly be opposed to the Muhammadan Law. But there is nothing in any of these authorities to show that the condition that the wife may leave her husband's house on ill-treatment is opposed to these principles. Reference was also made to the leading case of *Moonshee Buzloor Ruheem* v. *Shumshoonnissa Begum* (3) and it was argued that before the wife could resist the suit for restitution of conjugal rights on the ground of cruelty, she must prove such cruelty as would endanger her life, or at any rate cruelty, of a more severe character than has been found by the learned Subordinate Judge in the present case. But in this case the defence is based not on cruelty itself but on ill-treatment as a breach of a condition of the *kabinnama*, which entitled her to leave her husband's house and permitted her to go to her parents. It is also contended that this agreement was void as not having been entered into at the time of marriage. But in neither of the lower Courts was such a point taken. It appears that there is evidence, and that the deed itself recites that though executed sometime after the marriage; it contains the conditions which were entered into at the time of marriage. We, therefore, hold on the findings of the lower Appellate Court that this agreement is not bad by reason of its having been an agreement subsequent to the marriage. We can see nothing in Muhammadan Law opposed to an agreement such as this, which does not allow the wife to deny her husband's conjugal rights but permits her, when ill-treated, to leave her husband's house and to insist on those rights being exercised in her parents' residence.

The appeal fails and is dismissed with costs.

Appeal dismissed.

GOIYAN DHANGAR *v.* SHEIKH GONDAR.

PATNA HIGH COURT.
LETTERS PATENT APPEAL No. 53 OF 1918.
June 27, 1919.
Present: – Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Adami.
GOIYAN DHANGAR—APPELLANT
versus
SHEIKH GONDAR—RESPONDENT.

Benami *transaction*—Benamidar, *whether can sue for possession of immoveable property without joining beneficial owner.*

A *benamidar* is entitled to maintain an action for recovery of possession of immoveable property in his own name, without joining the beneficial owner as a party to the suit. [p. 325, col. 1.]

Letters Patent Appeal from a decision of Justice Sir Ali Imam, dated the 23rd April 1918 and reported as 45 Ind. Cas. 794, confirming that of the Subordinate Judge, Purneah.

Mr. *Shiva Narain Bose*, for the Appellant.

Mr. *S. N Sahai*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal under clause 10 of the Letters Patent from the judgment of a single Judge of this Court dated the 23rd April 1918.* The plaintiff sued for a declaration of title to and recovery of *khas* possession of certain land of which he had been dispossessed by the defendant. The plaintiff proved his title under a registered sale-deed executed in his favour by the previous tenant in September 1913. The main defence was that the plaintiff's vendor, one Bandhu, was not the real tenant but was a *benamidar* of the defendant and, therefore, had no title which he could transfer to the plaintiff. This story was not accepted by the learned Munsif, nor did the defendant succeed in establishing a further defence that he had not dispossessed the plaintiff but had been in possession of the property himself all along. A further point was taken by the defendant that the suit was bad for non-joinder of parties, the plaintiff's father being joint with the plaintiff although he had not been added as a party on the record. The Munsif thought that this did not affect the maintainability of the suit and he passed a decree in the plaintiff's favour.

The defendant appealed to the Subordinate Judge and the only question which was argued before the Subordinate Judge, as appears from his judgment, was that the suit was not maintainable by the plaintiff. It appeared from the plaintiff's evidence that the land had been purchased by the plaintiff's father in the plaintiff's name and the plaintiff being, therefore, found to be a *benamidar* of his father, the Subordinate Judge came to the conclusion, following certain decisions of the Calcutta High Court, that the plaintiff was not competent to maintain a suit for possession of immoveable property.

On appeal to this Court the case came before a single Judge who, relying on the authority of *Atrabannessa Bibi* v. *Safatullah Mia* (1), upheld the decision of the Subordinate Judge. There was, at the time when that judgment was delivered, some conflict of opinion on this question in the decisions of the High Courts in India. Since then, however, the question has been finally determined by the judgment of their Lordships of the Privy Council in the case of *Chowdhuri Gur Narayan* v. *Sheo Lal Singh* (2). Exactly the same question came for determination before their Lordships in that case as has to be determined now, and in their Lordships' judgment which was delivered by Mr. Ameer Ali it appears that the question for determination there was whether a person who has no beneficial interest in the property which stands in his name or is acquired in his name can maintain an action in respect thereof. The facts of that case were very similar to the present. There was evidence to show that the purchase by one Mohesh Lal of a share in certain villages which were the subject-matter of the suit was really a purchase for the benefit of another person and that Mohesh Lal having purchased in that manner was the *benamidar* of the real beneficial owner. In that case as in the present case Mohesh Lal had persistently denied that he was a *benamidar* or that he had no beneficial interest in the property. The High Court came to the conclusion that there was good ground for supposing that Mohesh Lal was really only a *benamidar*. Now, in the present case, the Subordinate Judge and the learned Judge of this Court have

*See 45 Ind, Cas. 794—*Ed.*

(1) 31 Ind. Cas. 189; 22 C. L. J. 259; 43 C. 504.
(2) 49 Ind. Cas. 1; 23 C. W. N. 521; 17 A. L. J. 65; 36 M. L. J. 68; 9 L. W. 335; 1 U P. L. R. (P. C.) 1; 46 C. 566 (P. C.).

also come to the conclusion upon the plaintiff's own evidence, in which he says that the property was purchased by his father in his name, that there was sufficient to show that the plaintiff was really a *benamidar*. From the judgment of their Lordships of the Privy Council, to which I have already referred, it appears that they treated the case as one of a claim made by a *benamidar* for the possession of immoveable property and upon that hypothesis came to the conclusion that there was no reason why a *benamidar* should not maintain an action in his own name without having the beneficial owner added as a party. The following passage which occurs in that judgment seems to me to make the matter quite clear:

"As already observed, the *benamidar* has no beneficial interest in the property or business that stand in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the *benamidar* in respect of the property although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the *benamidar*, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not a proceeding by or against his representative in its ultimate result is fully binding on him."

Then the judgment points out that in the case of a contest between the alleged *benamidar* and the alleged real owner other considerations might arise with which their Lordships were in that judgment not concerned. It seems to me that the circumstances of the present case are entirely covered by the decision to which I have just referred. There is no dispute by the beneficial owner, if it could be taken, as the learned Subordinate Judge has found, that the plaintiff was only a *benamidar*, that he has any adverse right which the *benamidar's* action in any way interferes with. There is no dispute between these parties. The beneficial owner, the *benamidar's* father, has not thought fit to intervene in the action or to interfere in any way, and the only contest is as between the *benamidar* and the defendant seeking to obstruct his possession.

It seems to me quite clear that the decision of the Judicial Committee to which I have just referred applies to the present case and that this is just the class of action in which they have laid down that a suit by a *benamidar* for the possession of immoveable property is maintainable in India. In these circumstances, the decision of the learned Judge affirming the decision of the Subordinate Judge must be set aside and the decree of the Munsif restored. We think that the appellant is entitled to his costs both here and in the two lower Courts and the result is that the appeal is allowed with costs here and of the appeal to the Subordinate Judge and of the second appeal to this Court.

ADAMI, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2302 OF 1917.

November 28, 1918.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

CHIDAMBARAM PILLAI—PLAINTIFF—APPELLANT

versus

M. C. M. DURAISWAMY CHETTY—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Abandonment of claim—Causes of action, joinder of—Vendor and purchaser—Assignment of arrears of rent to purchaser - Suit on assignment, whether bars subsequent suit for rent on title.

Where the vendee of certain property got an assignment of the uncollected rents from the vendor and sued the defendant first for arrears of rent under his assignment and afterwards for rent that had accrued due since his purchase, basing it on title:

Held, that the causes of action for the two suits were different and the second suit was not barred under Order II, rule 2, Civil Procedure Code. [p. 326, col. 1.]

Under Order II, rule 2, Civil Procedure Code, the test is not whether the plaintiff could have sued for both the claims in the same suit but whether he was bound to have sued. [p. 326, col. 1.]

CHIDAMBARAM PILLAI *v.* DURAISWAMY CHETTY.

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 241 of 1917, preferred against the decree of the Court of the Principal District Munsif, Kumbakonam, in Original Suit No. 463 of 1915.

FACTS appear from the judgment.

Messrs. *E. S. Chidambaram Pillai* and *P. N. Marthandam Pillai*, for the Appellant.—The lower Court misapplied the provisions of Order II, rule 2, Civil Procedure Code. The right to sue for rent under the assignment was in respect of arrears and is distinct from the right to sue for rent based on plaintiff's title as vendee. The causes of action are distinct. Plaintiff might have sued for both in one suit, but was not bound to do so. See *Dasarthy Naidu* v. *Palala Kumaramull* (1), *Naro Hari* v. *Anpuranabai* (2) and *Muhammad Abdul Aziz* v. *Rafi-un nissa Bibi* (3).

Mr. *K. S. Jayarama Aiyar*, for the Respondent.—There are no two causes of action for the plaintiff. Defendant's obligation was to pay rent and all breaches of that obligation constitute only one cause of action. Plaintiff must have sued for the rent due whether under the assignment or under his title as vendee in one suit.

JUDGMENT.—The question in this case is whether Order II, rule 2, Civil Procedure Code bars the present suit. The plaintiff obtained a sale of certain property. Subsequently the right of the vendor for uncollected rent was assigned to him. The plaintiff first sued for arrears of rent due under his assignment. The second suit is for the rent based on title. In our opinion the causes of action for the two suits are not the same. It is true that under Order II, rule 3, Civil Procedure Code, the plaintiff could have joined both the causes of action in one suit. But that is not the test. As was pointed out in *Dasarthy Naidu* v. *Palala Kumaramull* (1), the test is not whether the plaintiff could have sued for both the claims in the same suit, but whether he was bound to have sued. Mr. K. S. Jayarama Aiyar contended that the only obligation was to pay rent and that all the breaches of that obligation form but one cause of action. In the present case, the obligations are different. The one was incurred to the assignor and he could have sued separately, notwithstanding the fact that he subsequently sold the property in respect of which rent had accrued due. The obligation in the second suit relates to the right arising from the title to property itself. As was pointed out in *Naro Hari* v. *Anpurnabai* (2) printed as foot-note in *Vishnu Sakharam Nagarakar* v. *Krishnarao Malhar* (4) and in the cases following it, it is not the final breach that constitutes the cause of action but the right and the infringement taken together. In this view, the two suits were based on two different causes of action. The case is practically on all fours with *Muhammad Abdul Aziz* v. *Rafi-un-nissa Bibi* (3) and we are of opinion that that case enunciates the true principle applicable to such cases. In *Ittappan* v. *Manavikrama* (5) this Court's definition of the term 'cause of action' accords with the view taken in Allahabad.

For these reasons, we must reverse the decree of the District Judge and restore that of the District Munsif with this modification, that plaintiff should be given interest at one per cent. per mensem on Rs. 87-8-0 from the 1st March 1913 up to date of suit and on the other Rs. 87-8-0 from 1st March 1914 to date of suit, and thereafter at 6 per cent. per annum till date of realization. Parties will pay and receive proportionate costs here and in the Courts below.

Appeal allowed.

M. C. P.

(1) 45 Ind. Cas. 969; 7 L. W. 557 at p. 567; (1918) M. W. N. 427; 24 M. L. T. 311.

(2) 11 B. 161*n*; 11 Ind. Jur. 261*n*; Unrep. P. J. B. H. C. (1874-1875) 235; 6 Ind. Dec. (N. S.) 105.

(3) 17 Ind. Cas. 833; 10 A. L. J. 469.

(4) 11 B. 153; 11 Ind. Jur. 258; 6 Ind. Dec. (N. S.) 101.

(5) 21 M. 153 at p. 156; 8 M. L. J. 92; 7 Ind. Dec. (N. S.) 465.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2220 OF 1917.

March 20, 1919.

Present:—Justice Sir Ernest Fletcher, Kt., and Mr. Justice Cuming.

KADER BUX—DEFENDANT No. 2—APPELLANT

versus

BENI MADHAB SEN AND OTHERS—RESPONDENTS.

Appeal—Documents rejected by trial Court—Appellate Court, power of, to admit documents—Additional evidence.

Where a trial Court refuses to admit documents tendered to it in evidence, it is open to the Appellate Court to admit them after proof. Such admission does not amount to receiving additional evidence.

Appeal against the decree of the Subordinate Judge, 2nd Court, Chittagong, dated the 30th June 1917, reversing that of the Munsif, 2nd Court, Satkania, dated the 29th April 1916.

Babus *Dhirendra Lal Kastgir* and *Tarakeswar Nath Mitter*, for the Appellant.

Babu *Chandra Sekhar Sen*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This appeal has been argued at considerable length by the learned Vakil for the appellant, but the points seem to have no foundation at all.

The first point urged is that this being a *waqf* property—the tenure having been possessed by a *waqif*—the *mutwalli*, knowing that the tenure could be annulled, had no power to enter into an agreement with the purchaser at a revenue sale for the grant of a new lease in place of the lease that was liable to be annulled. The learned Vakil for the appellant has given us no decision that the transaction is outside the scope of the powers of a trustee. Apart from authority, I decline to accept the view. In addition to this, the matter was not raised in the lower Courts. It is not a pure question of law whether the lease is binding; and the lower Appellate Court has found that rent was being paid by the *mutwalli* under the terms of the new lease.

The next point was that there was no proof that the plaintiff was an auction purchaser. The plaintiff stated in the plaint that he was and it seems to have been assumed at the trial that he was. Moreover, additional

evidence was given before the lower Court of Appeal to show that he was, in fact, the purchaser at a revenue sale.

The third question raised seems to have absolutely no foundation. The appellant managed to persuade the learned Judge of the first Court that certain documents were not admissible in evidence and accordingly they were rejected. The learned Judge of the lower Appellate Court took a different view and admitted the documents in evidence after proof. The case made by the appellant is that the lower Appellate Court had no power to admit additional evidence. It was not additional evidence at all. These documents were tendered in the Court of first instance and were improperly rejected.

The appeal fails and is dismissed with costs.

CUMING, J.—I agree.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2655 OF 1917.

April 28, 1919.

Present:—Sir Henry Rattigan, Kt, Chief Justice, and Mr. Justice Abdul Raoof.

MUHAMMAD IBRAHIM—PLAINTIFF—APPELLANT

versus

ALLAH BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, Sch. II, para. 1, scope of—Minor—Reference to arbitration by next friend of minor plaintiff—Ratification by conduct—Plaintiff, whether can challenge reference.

An application of the guardian or next friend of a minor under Schedule II, paragraph 1, of the Civil Procedure Code comes within the purview of Order XXXII, rule 7, of the Code, and, unless the leave of the Court is expressly obtained and recorded, the application will have the same effect and be open to the same objections as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court expressly recorded in the proceedings. [p. 330, col. 1.]

Ganesha v. *Mul Chand*, 15 Ind. Cas. 161; 95 P. R. 1912; 159 P. W. R. 1912, followed.

One *H.* carried on business in partnership with one *N.* *H.* having died, his sons, *A*, *B* and *C*, sued *N*,

for dissolution of the partnership and settlement of accounts. During the pendency of the suit *C* died and the present plaintiff's name was substituted as a co-plaintiff with *B*, his uncle, as the next friend. Subsequently the parties agreed to refer the dispute to arbitration and applied to the Court for an order of reference, which was granted. The arbitrator gave his award, but the plaintiff being dissatisfied with it filed objections. Eventually a decree was passed in accordance with the award. Plaintiff then brought the present suit for a declaration that the decree was null and void and ineffectual against him. It appeared that the plaintiff had been well represented in the earlier suit and had by his conduct accepted the situation and did not impugn the reference to arbitration, but was contented to contest the award on the ground of the misconduct of the arbitrator:

Held, that as the plaintiff's next friend did not obtain an express sanction of the Court before referring the case to arbitration, the plaintiff's claim was maintainable, but that as he had expressly ratified and affirmed the reference, he was debarred from contesting it. [p. 330, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Gujranwala, dated the 28th August 1917, dismissing the claim.

The Hon'ble Messrs. *Sheo Narain* and *Fazl-i-Husain*, for the Appellant.

Messrs. *Nanak Chand* and *Brij Lal*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiff appellant for a declaration that the decree dated the 14th of May 1914 passed by the Chief Court on the basis of an award dated the 22nd of October 1908 was null and void and ineffectual against him. The facts giving rise to the suit are the following. One Haji Sikandar carried on a business in partnership with one Nur Din. Haji Sikandar having died left three sons, Umar Din, Muhammad Din and Charagh Din, as his heirs and legal representatives. In 1898 the three brothers brought a suit against Nur Din for the dissolution of the partnership and the settlement of accounts. During the pendency of the suit, Charagh Din having died, the name of the appellant Ibrahim was substituted in the place of his father as a co-plaintiff, with Muhammad Din, his uncle, as the next friend. It appears that in 1908 the parties to the suit agreed to refer the matter in difference between them to arbitration and applied to the Court on the 13th of July 1908 for an order of reference. In the hearing of the application the parties were described thus:—Muhammad Din and Umar Din, sons of Haji Sikandar, and Muhammad Ibrahim, minor son of Charagh Din, residents of Nizamabad plaintiffs *versus* Nur Din, son of Ismail, resident of Nizamabad defendant. At the foot of the petition the following description was given:—Petition of Muhammad Din, son of Haji Sikandar, and Muhammad Ibrahim, minor son of Charagh Din through Muhammad Din, his Taya. The petition was signed by Muhammad Din, Ilm Din, agent of the plaintiffs, and Nur Din defendant, and was couched in the following words:—

"In the above noted case we, the parties, have unanimously nominated Pandit Prem Nath Kaul, record-keeper of the District Court, Rawalpindi. We do hereby agree that the award which may be given by the said arbitrator will be final and we, the parties, will accept and abide by that award on the issue framed by the Court and also as regards the point which party owes money, how much and to whom. Hence we have executed this agreement that the whole case may be made over to the arbitrator for disposal."

The Court made the following order on the petition:—

"It is ordered that according to the application of the aforesaid parties the case for disposal of the issues and the point as to how much money is on account of the business in question, which party owes it and to whom it is due under the account between them, be made over to the arbitrator."

The arbitrator gave his award and filed it in Court on the 22nd of October 1908. The plaintiffs were dissatisfied with the award and filed objections impugning its correctness. The Court by its order dated the 18th December 1908 set aside the award and proceeded to decide the case on the merits. A decree was passed on the 10th of July 1909. Both the parties were dissatisfied with the decree and preferred cross appeals to the Chief Court. In the memorandum of appeal filed by the defendant Nur Din the first plea taken was that the lower Court had erred in law and had acted without sufficient ground in setting aside the award. The

Chief Court accepted this plea in appeal, set aside the decree of the lower Court and passed a decree in accordance with the award on 14th of May 1914. The plaintiffs' appeal was dismissed. Thereupon the plaintiffs presented on the 11th of July 1914 a petition for review of judgment. The question of the minority of the plaintiff-appellant Ibrahim was raised at the hearing. It was argued that by a petition dated the 13th of October 1908 Muhammad Din had withdrawn from the guardianship of the minor plaintiff and that the latter himself had, by a petition dated the 14th of October 1908, applied to the arbitrator to appoint another person as the guardian *ad litem*, but no notice had been taken of these applications and no one had been appointed to take the place of the retiring next friend. The Court went into this question fully and came to the conclusion that the interests of the plaintiffs had been fully looked after by Ilm Din, their Mukhtar-i-am. It was held that Muhammad Din upon his own admission knew little or nothing about the matter in dispute and trusted entirely, for the conduct of the case, Ilm Din who was conversant with all the details. All possible objections were raised and argued before the Court by Mr. Beechey on behalf of the plaintiffs, but there appears to be no indication in the judgment that the legality of the reference to arbitration was challenged in any shape or form. It would rather appear from the objections relating to the conduct of the arbitrator that the propriety of the reference was tacitly accepted. In this connection it is important to bear in mind that the appellant had in the meantime attained majority and was fully competent to take care of his interest. According to the evidence he was born on the 20th June 1894. He must, therefore, be taken to have attained majority sometime in June 1912. In 1914 he was more than 20 years old. He must certainly have been aware of the litigation which was going on. No question appears to have been raised on his behalf that the reference to arbitration during his minority had been invalidly or irregularly made. Probably he had accepted the situation and was contented to contest the award on the ground of the misconduct of the arbitrator. The petition for review of judgment was rejected on the 23rd of October 1914. The present suit has been instituted against Allah Bakhsh and Khuda Bakhsh, the sons of Nur Din, mainly on the ground that inasmuch as the agreement referring the dispute to arbitration was not expressly sanctioned by the Court, the reference was invalid and consequently the award of the arbitrator and the decree based on it were null and void and ineffectual against the plaintiff. The other grounds are detailed in clauses (*b*), (*c*) and (*d*) of the paragraph 5 of the plaint. These latter grounds were fully discussed and disposed of by the learned Judges who heard and decided the application for review. The suit was contested by defendants Nos. 1 and 2 while the defendants Nos. 3 and 4, Muhammad Din and Umar Din, for obvious reasons admitted the claim. The learned Subordinate Judge for the reasons set forth in his judgment has dismissed the suit and the plaintiff has come up in appeal to this Court.

The first contention raised before us is that the lower Court, having found that "the plaintiff's next friend did not obtain an express sanction of the Court before referring the case to the arbitration of Pandit Prem Nath", was wrong in dismissing the plaintiff's claim. In support of this contention the Full Bench ruling of this Court in *Ganesha* v. *Mul Chand* (1) and the provisions of Order XXXII, rule 7, are relied upon. On behalf of the defendants-respondents it has been argued that the provisions of Order XXXII, rule 7, are not applicable to an application referring a matter to arbitration, inasmuch as it is neither an agreement nor a compromise within the meaning of this rule. The decisions of the Allahabad High Court are cited by the learned Counsel in support of his contention, namely, (1) *Hardeo Sahai* v. *Gouri Shankar* (2) and (2) *Lutawan* v. *Lachiya* (3). The first was a decision under sections 462 and 506 of the old Code of 1882. The second decision is under the new Code and is certainly in point and supports the argument, but it is opposed to the Full Bench ruling of this Court. Moreover the view on this point was expressed by only two of the Judges who constituted the Full Bench and

(1) 15 Ind. Cas. 161; 95 P. R. 1912; 159 P. W. R. 1912.
(2) 28 A. 35; 2 A. L. J. 493; A. W. N. (1905) 171.
(3) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

was not shared in by Sir Pramoda Charan Banerjee, the third Judge. He did not express any opinion on this point at all. We are bound by the Full Bench ruling of this Court which, in our opinion, lays down the correct law on the point. According to the decision an application of the guardian or next friend of a minor under section 506 of the former Code of Civil Procedure or under Schedule II, paragraph 1, of the present Code comes within the purview of section 462 of the former Code or Order XXXII, rule 7, of the present Code, as the case may be, and unless the leave of the Court is expressly obtained and recorded, the application will have the same effect and be open to the same objections as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court, expressly recorded in the proceedings. The decision, however, having regard to the facts of the case, does not help the plaintiff-appellant. At page 332* of the report the following observation is to be found:—

"The leave or sanction of the Court must be obtained and must be expressly recorded if the reference to arbitration is to be valid for all purposes and against all parties including the minor, but it does not follow that in a case where such sanction has not been obtained, the reference must necessarily be invalid or void. The minor alone can claim to avoid it .....but it is of course open to him, if so advised, to affirm and ratify the reference and all subsequent proceedings."

In this case there is evidence to show that the appellant did affirm and ratify the reference and all subsequent proceedings. In his application dated the 2nd of March 1917 he referred to the decree in question and alleged that a compromise had been arrived at between the parties in connection with the execution of that decree. This statement in the application clearly indicates that the appellant had accepted the decree as valid and correct. The plaintiff has been examined as a witness in this case and his evidence goes to show that so far as he was personally concerned, he had no knowledge of any defect. As we have said before, no objection was put forward on his behalf at the hearing of his appeal or his application in this Court. He to all intents and purposes had accepted and ratified the reference to arbitration. It is clear from the evidence on the record that his next friend and uncle, Umar Din, diligently prosecuted the previous suit in which he was equally interested. A reference to the proceedings in that suit shows that all that was possible to do was done by him. When the award was found objectionable he got it set aside by the first Court. When the decision on the merits was against the plaintiffs in some respects, an appeal was preferred to the Chief Court. Eventually when the decision of the Chief Court was given against the plaintiffs, a petition of review was filed and hotly contested. This is not a case in which it has been shown that the interest of the minor has in any way suffered. The question as to the gross negligence and carelessness on the part of the next friend was fully considered and disposed of by this Court in the previous litigation and has been fully dealt with by the learned Subordinate Judge in his judgment in the present case We fully agree in the conclusions arrived at by him on the evidence on the record. As regards the prosecution of the case before the arbitrator, we have no doubt on the evidence that in spite of his application dated the 13th of October 1908 Muhammad Din continued to prosecute the case both in the lower Court and the Chief Court. Ilm Din, the agent, continued to act and look after the case before the arbitrator as long as anything useful and material was to be done.

In this view it is not necessary to decide the question whether, having regard to the fact that at the date of the decree of this Court in the previous suit the appellant had obtained majority, it is open to him now to challenge the validity of the decree by a separate suit. The cases of *Seshagiri Rao* v. *Tangaturi Jagannadhan* (4) and *Musammat Khadija* v. *Musammat Fidyatuz Zohra* (5) appear to support the argument of Mr. Nanak Chand, but we do not think it necessary to base our decision on this ground as the suit must fail on the grounds set forth above.

We confirm the decree of the Court below and dismiss the appeal with costs.

Appeal dismissed.

*Page of P. R. 1912—*Ed.*

(4) 32 Ind. Cas. 391; 39 M. 1031; 19 M. L. T. 93.
(5) 49 Ind. Cas. 707; 24 P. R. 1919.

MAHABIR PRASAD PANDE *v.* GANGA DEHAL RAI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 761 OF 1917.

June 18, 1919.

Present:—Mr. Justice Rafique and Mr. Justice Walsh.

MAHABIR PRASAD PANDE AND OTHERS—DEFENDANTS—APPELLANTS

versus

GANGA DEHAL RAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Execution of decree—Sale—Judgment-debtor, agreement by, to sell property to third person if sale is not confirmed—Application to set aside auction sale, whether can be made by private purchaser—Contract Act (IX of 1872), s. 65—Contract becoming void by reason of unforeseen contingency—Money paid, whether can be recovered.

Where the property of a judgment-debtor is sold in execution of a decree, but before the sale is confirmed, the judgment-debtor arranges to sell it to a third party for a stipulated sum in the event of the sale not being confirmed, the judgment-debtor, in depositing the money in Court, should himself apply, as the owner of the property, for the auction sale to be set aside. An application by a person as purchaser subsequent to the auction sale, being in contravention of rule 89 of Order XXI of the Civil Procedure Code, cannot be entertained. [p. 331, col. 2]

Where a contract expressly omits to provide for a contingency which is not contemplated, and which is already provided for by the law, and that contingency occurs, whereby the contract becomes void, the contract is not opposed to public policy, and under section 65 of the Contract Act, the person who has received an advantage under the contract is bound to restore it to the person from whom he received it. [p. 332, col. 2.]

Second appeal from the decree of the Additional Judge, Gorakhpur, dated the 3rd March 1917.

Messrs. *Sarat Chandra Choudhri*, *Brijnath Vyas* and *Janki Prasad*, for the Appellants.

Mr. *Lakshmi Narain*, for the Respondent.

JUDGMENT.—This is an exceptional and troublesome case. It has been extremely well argued on both sides and we have come to the decision at which we have arrived after considerable hesitation. Upon the reasoning of the respective Judges in the inferior Courts we agree with the first Court rather than the lower Appellate Court, but on the other hand we have come to the conclusion that the appeal must be dismissed and the plaintiff's suit decreed upon a ground which has not been satisfactorily dealt with in the lower Appellate Court.

The facts are simple. The property of the defendant judgment-debtor had been attached and an auction sale had taken place and confirmation thereof was pending, whereupon the plaintiff agreed with the defendant to purchase the property for a stipulated sum in the event of the sale not being confirmed, and the intention probably was and certainly ought to have been and the practice should be in such cases that the defendant or judgment-debtor in depositing the money in Court should himself apply as the owner of the property for the auction sale to be set aside. An arrangement of that kind does not make the judgment-debtor at the time being nevertheless the owner of the property. Instead, however, of the defendant making the application under Order XXI, rule 89, the application was made by the plaintiff in his capacity as purchaser subsequent to the auction sale and was properly dismissed upon the authority of *Ishar Das* v. *Asaf Ali Khan* (1). The rule provides in express terms that a purchaser applying under that rule must be a purchaser before the auction sale. The result, therefore, was that the sale was confirmed and the money, a substantial sum, Rs. 900, remained deposited in Court. The defendant, as the person who had deposited it, applied to have it paid out to him and it was so paid out. The question then arose as to what should be done with it and the plaintiff eventually sued the defendant to recover the money. Now the contract to which we have referred was reduced into writing and in substance provided for every contingency except the contingency which has actually occurred, and it provided in very clear and distinct language the conditions under which *prima facie* the plaintiff was entitled to realise the sale consideration from the defendant, namely, if any difficulty arose on account of which he, the plaintiff, did not get possession over the property owing to any act or omission on the part of the defendant. It has not been found in favour of the plaintiff that the sale was confirmed through any act or omission on the part of the defendant, nor is there anything in the case to suggest that that was the fact. It is true that it would have been much better, indeed the application would probably have succeeded,

(1) 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19.

if the defendant had made it instead of the plaintiff. There is nothing to show whose fault this was. and it may be presumed that it was simply an ordinary misunderstanding of the technical position under the Code based upon a very natural belief that a person who has deposited money for the purchase of property is in one sense of the word the owner thereof. This being the case, undoubtedly by English Law, upon which a great deal if not most of the contract law in India is based, the action would be bound to fail. An English lawyer would be compelled to hold that as the contract provided an express condition under which this money could be recovered back from the defendant, the plaintiff, and any Court before whom it came, would be prohibited by the rules of interpretation from imposing an additional condition which the parties had not chosen to provide in the contract. We think that the law in this matter in particular, as has been pointed out more than once by English lawyers, is not in India precisely the same as in England. Our decision really turns upon the provisions of section 65 of the Indian Contract Act, which lays down that when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it to the person from whom he received it. That lays down a proposition much wider than anything which is to be found in English Law. In fact there are many English decided cases to the contrary. It does not remove the whole of the plaintiff's difficulty, because the question still remains whether in fact the contract in this case has not made an express provision inconsistent with the stipulation contained in section 65. On the whole we have come to the conclusion that the contract is not inconsistent with that section. It has to be borne in mind that contracts in this country are not made, as a general rule, by trained professional lawyers with the same attempt at scientific precision which prevails among English Solicitors, and we have come to the conclusion that the parties to this somewhat unartistic document thought it unnecessary to provide for a contingency against which express provision had already been made by the codified law in India The contract is silent as to what is to happen if the sale was confirmed. It is quite clear that if there had been no contract at all, then the plaintiff would be entitled to recover by the express provisions of section 65 and we think having regard to all the circumstances in the case and the conduct of the parties, the contract must be treated as having expressly omitted to provide for that contingency which was, in the first place, never contemplated, and in the second place, was already provided for by the law. The lower Appellate Court, in dealing with this aspect of the matter, held that the contract, if void, offended against section 23, in other words, against public policy. We cannot take this view of the matter. There is nothing to justify that view in the decision in *Ishar Das* v. *Asof Ali Khan* (1) and the real purpose and intention of Order XXI, rule 89, is contained in a very clear statement in the judgment of Mr. Justice Batchelor in *Pandurang Laxman Uphade* v. *Govinda Dado Uphade* (2), in which it is pointed out, as was pointed out by my brother Mr. Justice Rafique in the argument in this case, "that the object of the Legislature apparently was not merely or specifically to preserve the immoveable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immoveable properties shall not at Court sales be sold at inadequate prices.....but that the Court will be realising the intentions of the Legislature if it construes these provisions so as to ensure that the monetary loss accruing to the judgment debtor be as little as possible." This view of the matter has exercised considerable influence upon our judgment in this case. So far from these contracts being against public policy, they are really in the interests of judgment-debtors alone with a view if possible at the eleventh hour to rescue the property from a forced sale at an undervalue, and the view which the defendant presses upon us that we ought to take of this contract must, if accepted by us, have the effect of very much discouraging other persons coming to the rescue of the judgment debtor and putting down money to be deposited in Court to prevent the confirmation of the auction sale, if they are to do so at the

(2) 37 Ind. Cas. 211; 40 B. 557; 18 Bom. L. R. 571,

risk of losing their money entirely in the event of some unforeseen accident making the contract impossible of completion. The result of the view taken of this case by the first Court would really be contrary to natural justice. It is satisfactory to find that the law as codified enables us in this case to do what we feel satisfied is really substantial justice. The result is that the appeal must be dismissed and we accordingly dismiss it with costs.

The cross-objections are disallowed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEALS FROM THE MADRAS HIGH COURT.

May 12, 1919.

Present:—Viscount Cave, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

Sri Sri Sri VIKRAMA DEO MAHARAJULUM GARU, MAHARJAH OF JEYPORE AND ANOTHER—APPELLANTS

versus

Sri Sri Sri VIKRAMA DEO GARU—RESPONDENT

Sri Sri Sri VIKRAMA DEO GARU—APPELLANT

versus

MAHARAJAH OF JEYPORE AND ANOTHER—RESPONDENTS.

Hindu Law—Maintenance, right to—Impartible zemindari*—Junior members of family of holder, whether entitled to be maintained out of estate—Custom —Burden of proof.*

Apart from custom and from certain near relationships to the holder, the junior members of the family of a *zemindar* entitled to an impartible *zemindari* have no right to maintenance out of it. [p. 335, col. 1.]

There is no invariable custom by which any members of the family beyond the first generation from the last holder can claim maintenance as of right. [p. 335, col. 1.]

Where, therefore, the son of a brother of the last holder claimed maintenance, and the defendants (under an erroneous view that by the general law he was entitled to maintenance) alleged a custom excluding his claim:

Held, that the burden of proof was on the plaintiff, and it was for him to prove a custom entitling him, not for defendants to prove one disentitling him. [p. 335, col. 1.]

Appeals from a decree of the Madras High Court (Sankaran Nair and Tyabji, JJ.), dated the 22nd December 1909, varying a decree of the Agent to the Governor at Vizagapatam.

FACTS.—Vikrama Deo Garu sued the Maharajah of Jeypore and his son for maintenance to which he claimed to be entitled as son of the brother of the Maharajah's father and predecessor. He alleged that he was actually receiving Rs. 350 per month, but that this was insufficient; he claimed Rs. 2,000 per month and Rs. 15,000 for a house. Defendants pleaded, *inter alia*, that plaintiff was too distantly related to entitle him to claim any maintenance "either according to Hindu Law or the custom among Uriya Zemindars or the custom of the family."

Of the issues fixed by the trial Court the following only are material:—

3. Is the first defendant bound to maintain (the plaintiff) according to Hindu Law out of the income of the Jeypore Zamindari?

4. Whether according to the custom among Uriya Zemindars, or the custom of the family, the first defendant is not liable to maintain the plaintiff out of the income of the Jeypore Zemindari?

13. Whether the plaintiff can claim a separate house for residence?

The trial Court found for the plaintiff on issues Nos. 3 and 4, for the defendants on issue No. 13.

On the third issue the learned Judge based his finding on Mayne's Hindu Law, paragraph 458, and the decision of the Madras High Court in Appeal No. 27 of 1907 [*Chettikulam Prasanna Vencatachella Reddiar* v. *Chettikulum Kumara Vencatachella Reddiar* (1)]. On the fourth issue he found that the evidence was insufficient to establish a custom disentitling plaintiff to maintenance. In the result he decreed maintenance at the rate of Rs. 800 per month.

The judgment in Appeal No. 27 of 1907 was given by Wallis and Sankaran Nair, JJ., on August 3, 1909, in *Chettikulam Prasanna Vencatachella Reddiar* v. *Chettikulam Kumara Vencatachella Reddiar* (1) The material part of the judgment is as follows:—

"The learned Advocate-General...contended that in the case of an impartible Zemindari the junior members of the family have no legal right to maintenance, a conclusion, which he argues, follows logically from the recent decisions of the Privy Council as to the nature of an impartible Zemindari. We are not prepared to accept this contention which, we may observe, was

(1) 4 Ind. Cas. 302; 7 M. L. T. 31; 20 M. L. J. 394.

given up in the Court below. In *Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu* (2) their Lordships distinctly recognise the right to maintenance of the junior members of a Raj or other impartible estate. A similar claim was allowed without opposition in the *Udayarpalayam case* (*Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar*) (3) and so far as our knowledge extends, is in accordance with the usage prevailing in Southern India."

In the present case both parties appealed to the Madras High Court, which varied the agent's decree to the extent of allowing plaintiff Rs. 5,000 for a house, but otherwise confirmed it.

Thereafter both parties appealed to the Privy Council. The plaintiff subsequently withdrew his appeal (which was on the question of amount only) on an undertaking to pay costs.

At the hearing of defendants' appeal

Messrs *De Gruyther*, *K. C.*, and *Kenworthy Brown*, for the Appellants, submitted that the appeal was concluded by the recent decision of the Board in *Gangadhara Rama Rao* v. *Rajah of Pittapur* (4).

Plaintiff's claim was based on the general Hindu Law: in view of the recent decision it is no longer tenable. It was not based on custom or family usage, nor did plaintiff adduce any evidence to prove any such usage. The burden of proof was wrongly placed: it lay on plaintiff to allege and prove a custom under which he could claim maintenance. The lower Courts have proceeded on decisions which are now overruled.

Messrs. *Dunne*, *K. C.*, and *Dube*, for the Respondent.—Plaintiff's claim was based on the custom of the family as well as on Hindu Law. Defendants have failed to prove the custom they set up in variation of that alleged by plaintiff. In any case we should have an opportunity of adducing evidence: the suit should be remitted for the trial of an issue on the footing of what is now settled to be the law.

[Mr. *DeGruyther*, *K. C.*, submitted that if the case were remitted the question as to the amount of the maintenance allowance should be left open.]

Mr. *Dunne*, *K. C.*—Both Courts have concurred as to the amount of the allowance. We submit the Board will not interfere with their finding, the more so as the matter is largely one of discretion.

JUDGMENT.

VISCOUNT CAVE.—This is an appeal from a decree of the High Court of Madras, which affirmed, with a variation, the decree of the Agent to the Governor at Vizagapatam, dated the 22nd December 1909.

The suit was brought by the plaintiff, who is the cousin of the first defendant, the Maharajah of Jeypore, for maintenance out of the impartible estate held by the defendant. In consequence of previous decisions of the Courts, the case took a course which makes it impossible finally to determine the matter to day.

The plaintiff in the action rested his case upon the contention that, according to the general Hindu Law, he, as the son of a brother of the late Maharajah, was entitled to maintenance out of the estate. The defendants, in their statements, proceeded more or less upon the same basis, but alleged a special custom which deprived the plaintiff of that which was treated as being his *prima facie* right.

Upon that, issues were framed, the important issues being the third and fourth. The third issue was:—Whether, if the plaintiff reverted to his natural family, by reason of his adoption into another family being invalid, the first defendant is bound to maintain him according to Hindu Law out of the income of the Jeypore Zemindari. The fourth issue was:—"Whether according to the custom among Uriya Zemindars or the custom of the family, the first defendant is not liable to maintain the plaintiff out of the income of the Jeypore Zemindari.'

Both Courts acting, as they considered, upon the existing authorities, answered the first issue in the affirmative and, upon the evidence, answered the second issue in the negative and, accordingly, maintenance was decreed to the plaintiff.

(2) 24 M. 147 at p. 157; 5 C. W. N. 74; 27 I. A. 151 (P. C.); 10 M. L. J. 294; 2 Bom. L. R. 945; 7 Sar. P. C. J. 761.

(3) 28 M. 508; 2 C. L. J. 241; 10 C. W. N. 95; 15 M. L. J. 312; 2 A. L. J. 845; 7 Bom. L. R. 907; 1 M. L. T. 12; 32 I. A. 261; 8 Sar. P. C. J. 855 (P. C.).

(4) 47 Ind. Cas. 354; 45 I. A. 148; 35 M. L. J. 392; 24 M. L. T. 276; 16 A. L. J. 833; 41 M. 778; 28 C. L. J. 428; 5 P. L. W. 267; 20 Bom. L. R. 1056; 23 C. W. N. 173; (1918) M. W. N. 922.

Since those decisions were given this Board, in the case of *Gangadhara Rama Rao* v. *Rajah of Fittapur* (4), has decided that, apart from custom and from certain near relationships to the holder, the junior members of the family of a Zemindar entitled to an impartible Zemindari have no right to maintenance out of it, and that there is no invariable custom by which any member of the family beyond the first generation from the last holder can claim maintenance as of right.

In view of that decision, it is plain that the issue which should have been tried was not that which in fact was tried but "Whether according to the custom among Uriya Zemindars, or the custom of the family, the plaintiff is entitled to maintenance out of the income of the Zemindari"; in other words, the burden should have been put upon the plaintiff to prove the custom entitling him to maintenance, and not upon the defendants to prove a custom negativing the ordinary law.

That being so, it appears to their Lordships that, in order to do justice, the case must be sent back, in order that the issue which their Lordships have defined should be tried, and accordingly the case should be remitted to the High Court in order that they may direct that issue to be tried, and may dispose of the case in accordance with the finding.

Their Lordships have considered whether the question of amount should also be remitted; but, upon the whole, they have come to the conclusion that if as the result of the issue now directed, the plaintiff is found entitled to maintenance, the amount fixed by the High Court should not be disturbed.

Their Lordships will, accordingly, humbly advise His Majesty to remit the matter for the purpose mentioned.

The costs incurred in the Courts below will follow the ultimate event of the proceedings. There will be no costs of this appeal.

As regards the cross appeal which was withdrawn on an undertaking to pay the costs, that undertaking will, of course, remain unaffected by the present order as to costs.

Case remitted.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*.

Solicitor for the Respondent: Mr. *Douglas Grant*.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1194 OF 1917.

July 2, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Das.

HANUMAN BUX AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAL NILMONI NATH SAHI DEO—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 16, 74—Undue influence, what is—Mortgage-bond—Interest, higher rate of, payable on default, whether penalty.

A mortgage-bond provided that interest should be paid at 3 per cent. per month, and that the mortgage-money should be repaid on a specified date, and that in case of default in such payment interest would run at the rate of 6 per cent. per month. The mortgagee sued to recover the money by sale of the mortgaged property. The trial Court held that the stipulations as to interest were in the nature of a penalty and decreed the suit, allowing interest at 12 per cent. per annum. On appeal the lower Appellate Court held that the stipulation to pay higher interest in default alone was in the nature of a penalty, but it found that there had been undue influence and, in consideration of this, dismissed the appeal. The plaintiff appealed to the High Court, contending that the decision as to undue influence was wrong as no issue was framed as to this, and maintaining that the stipulation to pay interest at 6 per cent. per month was not in the nature of a penalty:

Held, (1) that, in order to establish undue influence, it must appear that there was something unconscionable either in the original dealing or in the subsequent stages of the transaction, and as nothing unconscionable had been made to appear in this case and there was no plea as to undue influence, the stipulated rate of interest could not be disallowed on the ground of undue influence; [p. 386, cols. 1 & 2.]

(2) that the stipulation to pay interest at the rate of 6 per cent. per month on default was in the nature of a penalty. [p. 336, col. 2.]

Appeal against the decision of the Judicial Commissioner, Chota Nagpur.

Messrs. *Shoroshi Charan Mitter* and *S. K. Mitter*, for the Appellants.

Mr. *Rai Gurusaran Prosad*, for the Respondent.

JUDGMENT.

COUTTS, J.—This is an appeal against the decision of the Judicial Commissioner of Chota Nagpur in an appeal arising out of a suit on a registered mortgage bond. The bond, which is dated the 21st June 909, was for Rs. 300 and in the bond it was stipulated that interest should be paid at 3 per cent. per month and that the mortgage-money should be repaid in Sraban 1966 Sambat. In default of payment the interest was to

run at the rate of 6 per cent. per month. The total amount claimed in the suit was Rs. 1,479, which the plaintiffs sought to recover by sale of the mortgaged property.

Two issues were raised in the Court of first instance:—

1. Did the defendant receive the entire consideration money mentioned in the bond?

2. Whether the rate of interest stipulated for in the mortgage-bond is in the nature of penalty? Can the plaintiffs recover the interest claimed in this suit?

On the first of these issues it was found in the Court of first instance that the whole amount of the consideration money mentioned in the bond had been received, but on the second issue it was held that both the interest at 3 per cent. per month and the interest at 6 per cent. per month on default were in the nature of penalties and the suit was decreed for interest at only Rs. 12 per cent. per annum. On appeal by the plaintiffs to the Judicial Commissioner it was held that interest at the rate of Rs. 3 per cent. per month was not in the nature of penalty but that the interest at Rs. 6 per cent. per month was in the nature of penalty. The learned Judicial Commissioner found, however, that there had been undue influence and in consideration of this he upheld the decision of the Munsif and dismissed the appeal with costs. The plaintiff has again appealed to this Court.

The first point urged before us is that the learned Judicial Commissioner's decision in the matter of undue influence is wrong. No issue was framed in regard to this and the only reference to it in the pleadings is in paragraphs 2 and 3 of the written statement. In paragraph 2 defendant states that in order to meet the expenses of a criminal case he was badly in need of money so he negotiated with the plaintiff's father for the loan, and in paragraph 3 he says that the plaintiff's father, seeing the necessitous condition of this defendant and putting undue pressure on him, gave him Rs. 240 only and got the bond executed for Rs. 300 *i.e.*, with an increase of Rs. 25 per cent. and made him promise to pay a high rate of interest of Rs. 3 per cent. per month. This is the only reference to undue influence and it cannot be said that by this vague reference to undue influence was in fact pleaded by the defendant; that this was not pleaded is also clear from the fact that no issue was raised on the point. The learned Judicial Commissioner, therefore, should not have allowed the issue to be raised. In any case there is no ground for the finding that there was undue influence. The learned Judicial Commissioner has presumed that, because the security was good and that the interest was high, there was undue influence and he has relied on the case of *Abdul Majid* v. *Ksherode Chandra Pal* (1). The facts of that case, however, were entirely different from the facts of the present case and it was on these facts that that case was decided In *Lala Balla Mal* v. *Ahad Shah* (2), their Lordships of the Privy Council quoted with approval the law as stated by the District Judge that in order to come to the conclusion that there has been undue influence it must appear that there was something unconscionable either in the original dealings or in the subsequent stages of the transaction. It does not appear that in this case there was anything unconscionable at either of these stages and the learned Judicial Commissioner has wrongly applied *Abdul Majid* v. *Ksherode Chandra Pal* (1) to this case. There is then no reason for supposing that undue influence has been exercised.

The only other point for consideration is whether interest at Rs. 6 per cent. per month is in the nature of penalty. On the face of it, it is in the nature of penalty and both the lower Courts have come to the conclusion that it is in fact in the nature of penalty. No reason has been shown to us why we should disagree with this view which has been adopted by both the lower Courts, and I am of opinion that their decision on this point is correct.

I would accordingly modify the decree of the learned Judicial Commissioner and would decree this suit with interest at Rs. 3 per cent. per month from the date of the bond until repayment with proportionate costs.

DAS, J.—I agree.

Decree modified.

(1) 29 Ind. Cas. 843; 42 C. 630; 19 C. W. N. 809.
(2) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

AHMAD JAN *v.* KISHEN CHAND.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2370 OF 1917.

June 23, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Dundas.

AHMAD JAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KISHEN CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 3 (5) (a)—Civil Procedure Code (Act V of 1908), O. XXI, r. 83 (2)—Pre-emption—Private sale by judgment-debtor with leave of executing Court, whether liable to pre-emption—Pre-emptor bidding at auction—Waiver.

A sale of property executed by the judgment-debtor in virtue of a certificate granted to him by the executing Court under Order XXI, rule 83 (2), Civil Procedure Code, is a private sale, and, even though it does not become absolute until confirmed by the Court, it cannot be said to be a sale by a Court in execution of the decree and thus not liable to pre-emption. [p. 338, col. 1.]

Piare Lal v. *Ganeshi Lal*, 1 Ind. Cas. 474; 46 P. R. 1909; 41 P W. R. 1909; 72 P. L. R. 1909, *Nawab* v. *Jawaya*, 8 Ind. Cas. 777; 40 P. R. 1911; 203 P. L. R. 1910; 105 P. W. R. 1911, distinguished.

Failure of a person entitled to pre-empt to outbid the purchaser at an auction sale does not amount to waiver. [p. 338, col. 1.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 30th June 1917, affirming that of the Subordinate Judge, 2nd Class, Ludhiana, dated the 11th March 1917, dismissing the claim.

FACTS.—One *J.* got a decree against *T.* on 3rd December 1914, in execution of which *T.'s* property, including six houses situated in the same compound, was attached on 9th November 1915. A sale warrant, dated 13th January 1916, was issued by the Court directing that the *ihata* consisting of the six houses should be sold on 22nd February, on which date the bailiff reported that the decree-holder was not willing to have the property put to public auction, that the *ihata* was divided into lots and each lot sold by auction privately through one *Z*, on 20th February. The Court granted a certificate to the judgment-debtor on 22nd February authorising him to raise the decretal amount by private alienation within a month and the sale money was deposited into Court on 23rd March and paid to the decree-holder on 7th April 1916. The plaintiffs, who were present at the auction sale and actually bid for the property but ceased to compete when the price began to go up higher, now brought this suit for possession by pre-emption.

Mr. *Kanwar Narain* for Mr. *Shah Nawaz*, for the Appellants.

Lala *Hargopal* for Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the District Judge of Ludhiana, upholding the order of the Court of first instance dismissing the suit of the plaintiffs for pre-emption, on the grounds (1) that the sale took place in execution of a decree, and that, therefore, there can be no pre emption having regard to section 3 (5) (*a*) of the Punjab Pre emption Act, I of 1913, and (2) that the plaintiffs waived their right to pre-empt because they were present at the time when the property was sold and failed to purchase it.

The property of which pre-emption is sought was privately sold by the judgment-debtors in virtue of a certificate granted to them by the executing Court under Order XXI, rule 83 (2), of the Civil Procedure Code. Counsel for the respondents supports the order of the lower Courts by reference to *Piare Lal* v. *Ganeshi Lal* (1) and *Nawab* v. *Jawaya* (2). In the first of these two cases the sale was by a Receiver under directions of the Court, and the case is obviously distinguishable from the present one. In the second case also it was held that the sale actually took place in execution of the decree. In *Baroda Kanta Bose* v. *Chunder Kanta Ghose* (3) it is said: "A sale in execution differs in many essential particulars, as need hardly be said, from a sale *inter partes*. It is not a sale by the owner of the property, but by a Court which has a statutory power conferred upon it of transferring the interest of the judgment debtor to the purchaser, and to that end a certain course of procedure is prescribed terminating with the sale certificate, which confers on the persons named therein his title." In the present case the Court stayed its hand and gave the judgment-debtors a certificate authorizing them to raise the amount due privately by mortgage, lease or sale. The sale which took place

(1) 1 Ind. Cas. 474; 46 P. R. 1909; 41 P. W. R. 1909; 72 P. L. R. 1909.

(2) 8 Ind. Cas. 777; 40 P. R. 1911; 203 P. L. R. 1910; 105 P. W. R. 1911.

(3) 29 C. 682 at p. 686; 6 C. W. N. 706.

in consequence of this was a private one, and even though it did not become absolute until confirmed by the Court, it could not, in our opinion, be said to be a sale by the Court in execution of the decree. It has been argued that the sale was really by the Court, as it was by the judgment-debtors as agents of the Court. We are unable to accept this argument. In our opinion the Court gave opportunity to the judgment debtors to raise the money due from them in any way they could by transfer of their property.

We, therefore, hold that the suit for pre-emption is not barred by section 3 (5) of the Punjab Pre-emption Act.

The next question is that of waiver. The private sale was conducted by auction. The plaintiffs made a bid at that auction: but refrained from bidding up against the actual purchaser. The rulings are conflicting as to whether such conduct constitutes waiver. In *Mula* v. *Nihal Chand* (4) it was held that the failure of a person entitled to pre-empt to outbid the purchaser in a sale in execution of the decree did not amount to waiver, and in *Shah Bodhraj* v. *Sundar Singh* (5) the Judges doubted whether omission to bid at auction amounted to waiver. A similar view was expressed in *Muhammad Bakhsh* v. *Sardar Rajindar Singh* (6) but a contrary one was taken in *Mahomed Baksh* v. *Hira* (7), *Rullia Mall* v. *Dulo Mal* (8) and *Chithru Singh* v. *Bhagwant Singh* (9). In our opinion it cannot be said that the plaintiffs have waived their claim.

There is no reason why they should bid at the auction, and in this way enhance the price. We see no reason why they should not have stood by and waited to see what the actual price obtained was, and then have made their claim to pre-empt. As a matter of fact this is what they actually did, for a few days after the sale they sent a notice to the purchaser offering to pay him the actual price. We hold that there has been no waiver in the present case. The existence of the custom of pre-emption has not been admitted in this case, and there has been no decision on this point by either of the lower Courts. We, therefore, accept the appeal, and setting aside the orders of the lower Courts remand the case to the Court of first instance for re-decision on the merits. Stamp in this and the lower Appellate Court will be refunded and other costs will be costs in the cause.

Appeal accepted; Case remanded.

(4) 78 P. R. 1881.
(5) 100 P. R. 1885.
(6) 121 P. R. 1888.
(7) 47 P. R. 1873.
(8) 7 P. R. 1876.
(9) 46 Ind. Cas. 106; 16 A. L. J. 492.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 56 OF 1918.

July 7, 1919.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Jwala Prasad.

MADHAB KOERI—APPELLANT

versus

BAIKUNTHA KARMAKER AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 11—Minor, mortgage in favour of—Suit on mortgage by minor, whether maintainable.

There is nothing in law to prevent a minor, in whose favour a mortgage has been executed, from suing to recover the money, principal and interest, advanced by him on the mortgage. [p. 342, col. 2.]

Letters Patent Appeal from a decision of Justice Sir Ali Imam, dated the 9th April 1918, affirming a decision of the Subordinate Judge, Manbhum.

Mr. *Abani Bhusan Mukharji*, for the Appellant.

Mr. *Surendra Mohan Das*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal under clause 10 of the Letters Patent from a decision of a single Judge of this Court, dated the 9th April 1918, affirming a decision of the Subordinate Judge.

On the 7th April 1908 the defendant executed a mortgage bond in favour of Baikuntha Karmaker and Ghasi Ram Karmaker, the plaintiffs Nos. 1 and 3 who were minors, to secure payment of a loan of Rs. 200. The plaintiff No. 2, Bhuban Karmaker, is the father of the plaintiff No. 1 and claims that the latter was merely his Benamidar in the mortgage

transaction. On the 28th July 1915 the plaintiffs instituted the present suit claiming a sum of Rs. 389 principal and interest due under the said bond. The defence to the suit was, first, that it was barred by *res judicata*, and secondly, that the mortgage being in favour of minors was void and could not be enforced.

The Munsif before whom the case originally came decided both points in favour of the defendant and dismissed the suit. He further found that the mortgaged property, being an ordinary *raiyati* holding situate within a district governed by the Chota Nagpur Tenancy Act, was not liable to sale under the provisions of that Act.

The Subordinate Judge overruled the Munsif on both points but having regard to the provisions of the Act referred to, considered that he could not pass a mortgage decree granting a sale of the property but decreed the suit as a money decree for the amount claimed. The claim of the plaintiff No. 2 was not established.

On appeal to this Court the learned Judge dismissed the appeal with costs. Hence the present appeal.

So far as the question of *res judicata* is concerned, the judgment relied upon in support of this plea has not been placed before us by the appellant but the material facts relating to it may be gathered from the judgment of the lower Courts. It appears that the mortgage bond in question was in the custody of one Dwarika Lohar, the plaintiffs' agent, who had received interest amounting to Rs. 63 from the defendant for the year 1911. He refused to deliver up the bond or to pay the interest received to the plaintiffs, who on the 28th February 1911 instituted a suit against Dwarika Lohar and the present defendant claiming the sum of Rs. 63 received as interest from Dwarika Lohar and delivery up of the mortgage bond by him to the plaintiffs, with an alternative prayer that if it should be found that Dwarika Lohar and the present defendant were in collusion, then the whole amount of the money covered by the mortgage should be adjudged to the plaintiffs. The Subordinate Judge passed a money decree against both the defendants. From this decision Dwarika appealed to the High Court in Calcutta. The High Court only dealt with the first part of the plaintiffs' claim and made a decree for the delivery up of the mortgage bond by Dwarika Lohar and payment by him of the interest received. With reference to the alternative part of the plaintiffs' claim, the Court observed that after obtaining possession of the bond it would be open to the plaintiffs to take proceedings against the present defendant for enforcing their security, but in the course of the judgment there is a *dictum* to the effect that as the plaintiffs were minors the mortgage would be void. The defendants now contend that this decision operates as *res judicata* and bars the plaintiffs' claim in the present suit. It will be observed that the present defendant was not actively a party to that appeal and was apparently content to rest satisfied with the decision of the Subordinate Judge, secondly, the liability of the present defendant under the bond was not a matter which was determined in that appeal but was expressly left undecided and any expression of opinion in that judgment as to the validity of the mortgage would not, in my opinion, be binding as between the present plaintiffs and defendant.

With regard to the second point the appellant relied upon the case of *Mohori Bibee* v. *Dharmodas Ghose* (1), where their Lordships of the Privy Council decided that a mortgage granted by an infant in favour of a money-lender to secure money advanced to the minor was void and that notwithstanding sections 64 and 65 of the Contract Act the mortgagee was not entitled to recover back from the minor any portion of the money advanced. The actual decision in that case was that an infant was not a person competent to bind himself by a contract of the description then under consideration. In dealing with the effect of sections 38 and 41 of the Specific Relief Act their Lordships held that those sections no doubt gave a discretion to the Court, but the Court of first instance and subsequently the Appellate Court in the exercise of such discretion came to the conclusion that under the circumstances of the case justice did not require them to order the return by the respondent of money advanced to

(1) 30 C. 539 (P. C.); 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374.

him with full knowledge of his infancy and they saw no reason for interfering with the discretion so exercised. It appears from the report of that case that the mortgagee's attorney, whilst the negotiations for the mortgage by the minor were proceeding, received definite instructions from the minor's mother that he was an infant and that any one lending him money would do so at his own risk and peril. Nevertheless, the respondent proceeded with the transaction, obtained the mortgage and induced the infant to sign a declaration stating that he was then of age. It is obvious that, in such circumstances, the respondent, who entered into the transaction with full knowledge that he was dealing with a minor, was not entitled to any consideration at the hands of the Court in their discretion under the sections of the Specific Relief Act referred to.

This judgment was the subject of consideration by a Full Bench of the Madras High Court in the case of *Raghava Chariar* v. *Srinivasa Raghava Chariar* (2), where the question for consideration was whether a mortgage executed in favour of a minor who had advanced the whole of the mortgage money was enforceable by him or by any other person on his behalf. The learned Judges of the Madras High Court came to the conclusion that the decision of their Lordships of the Privy Council referred to did not affect the question, whether a transfer by way of mortgage in favour of the minor was enforceable. They pointed out that there was nothing to prevent a minor from acquiring full ownership of property or of a mortgage interest in immoveable property by way of gift or inheritance, and that although under their Lordships' decision a minor could not bind himself by contract to pay the price or advance the mortgage money, there was no reason why, when once the consideration for a sale had been paid by the minor or a loan advanced by him, a transfer or a mortgage executed in his favour in consideration of the price paid or the loan advanced should not take effect. They accordingly overruled the previous decision of the same Court in *Navakoti Narayana Chetty* v. *Loyalinga Chetty* (3), to the effect that a sale made in favour of a minor was void and not merely voidable at his option. It may be pointed out in passing that Benson, J., one of the Judges who decided *Navakoti Narayana Chetty* v *Loyalinga Chetty* (3), was also a member of the Bench which decided the later case of *Rungarazu Sathrurazu* v. *Maddura Basappa* (4), where it was held that a promissory note executed in favour of a minor who sued upon it was not void but only voidable, provided that the minor had not subjected himself to a detriment by accepting the note and so incurring liability upon it. In the course of his judgment in *Raghava Chariar* v. *Srinivasa Reghava Chariar* (2) the learned Chief Justice Sir John Wallis points out: "The provision of law which renders minors incompetent to bind themselves by contract was enacted in their favour and for their protection, and it would be a strange consequence of this legislation if they are to take nothing under transfers in consideration of which they have parted with their money. This precise question cannot arise in England where a purchase by a minor of immoveable property is voidable by him on attaining majority but not void *ab initio*, as it is only the contracts specified in the Infants Relief Act which are void. However even in the case of a contract which was void under the Infants Relief Act, Lord Coleridge, C. J., and Bowen, L. J., held that a reasonable construction must be put upon the Statute and that when an infant had paid for something under a void contract and had used or consumed it, it would be contrary to natural justice that he should recover back the money which he had paid on the ground that the contract was void, *Valentini* v. *Canali* (5). I do not think this decision is inconsistent with *Nottingham Permanant Benefit Building Society* v. *Thurston* (6), which decided, as I understand it, that the mortgage given by the minor as security for a

(2) 36 Ind. Cas. 921; 40 M. 308; 31 M. L. J. 575; 20 M. L. T. 407; (1916) 2 M. W. N. 363 (F. B.).

(3) 4 Ind. Cas. 383; 33 M. 312; 19 M. L. J. 752; 7 M. L. T. 233.

(4) 18 Ind. Cas. 968; 24 M. L. J. 363; 13 M. L. T. 325; (1913) M. W. N. 415.

(5) (1889) 24 Q. B. D. 166; 59 L. J. Q. B. 74; 61 L. T. 731; 38 W. R. 231; 54 J. P. 295.

(6) (1903) A. C. 6; 72 L. J. Ch. 134; 87 L. T. 529; 51 W. R. 273; 67 J. P. 129; 19 T. L. R. 54.

void contract entered into by him was also void. Applying the same reasoning to the present case it would be even more opposed to natural justice to allow the transferor to a minor by way of sale or mortgage to question the transfer for which full consideration has been paid to him." The present case is not one of an executory contract where the minor has bound himself by any contractual obligation. He has advanced the whole of the mortgage money and in return, therefore, the mortgage has been executed in his favour. He is subject to no further obligation and merely claims to exercise the rights incidental to the transfer to him by that mortgage. There is no contract by the minor which still remains to be performed as in the case of *Mohori Bibee* v. *Dharmodas Ghose* (1) (*ubi sup.*), and the reasoning which is at the root of all the cases relating to the contractual obligations of minors appears to me to have no application to the present case.

It was held by the Allahabad High Court in the case of *Munni Koer* v. *Madan Gopal* (7) that there was nothing in law to prevent a minor from becoming a transferee of immoveable property and hence a minor in whose favour a valid deed of sale had been executed was competent to sue for possession of the property conveyed. It was contended on the authority of *Mohori Bibee* v. *Dharmodas Ghose* (1) that the contract for the sale of the house was absolutely null and void, but the Court found that where the purchase money had been paid and the conveyance executed, the minor became entitled to possession of the property and could successfully sue for possession. It was pointed out in that judgment that different considerations would arise if after having agreed to sell the property, the defendant before receiving the price had refused to execute a conveyance and the minor plaintiff had been driven to a suit for specific performance. The case of *Narain Das* v. *Dhania* (8), where a minor in whose favour a registered sale deed had been executed was permitted to sue to recover possession of the purchased property upon tender of the balance of the purchase money, is another instance where the Allahabad High Court held that a contract entered into in favour of a minor whereby he acquired an interest in immoveable property was not void. Again in *Hari Mohan (Bhaggabhor) Mondal* v. *Mohini Mohan Banerjee* (9) the High Court at Calcutta decided that where a mortgage had been executed in favour of minors who sued on the bond and themselves purchased the property in execution of the decree, the sale could not be set aside on the ground that the mortgage was void as being a contract with minors It was held that the case was not concluded by the decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1), inasmuch as there was no covenant which it was for the minors to perform. The cases of *Mir Sarwarjan* v. *Fakhruddin Mahomed* (10) and *Pramila Bali Dass* v. *Jogeswher Mandal* (11) were also relied upon by the appellant. Those cases, however, are clearly distinguishable. The first was a suit for specific performance by a minor of a contract for the purchase and sale of immoveable property entered into by his guardian and the manager of his estate on his behalf as purchaser. Their Lordships held that it was not within the competence either of the manager of the minor's estate or of the guardian of the minor to bind him or his estate by an executory contract for the purchase of immoveable property, and as he was not bound there was no mutuality, and consequently the minor could not enforce specific performance after attaining his majority. That was clearly a case where the contract was one imposing obligations upon the minor which could not be enforced by the defendant, and consequently a lack of mutuality put it out of the minor's power to enforce the contract. In the case now under consideration no questions arise or can arise as to any obligation to be performed by the minor arising out of the contract. The second case was the case of a lease executed in favour of a minor imposing upon him a liability to pay rent and perform certain covenants. It was held that the lease

(7) 31 Ind. Cas. 792; 38 A. 62; 13 A. L. J. 1084.
(8) 35 Ind. Cas. 23; 38 A. 154; 14 A. L. J. 65.
(9) 33 Ind. Cas. 994; 22 C. W. N. 120.
(10) 13 Ind. Cas. 331; 39 I. A. 1; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 11 M. L. T. 8 (P. C.).
(11) 46 Ind. Cas. 670; 3 P. L. J. 518; (1913) Pat. 241; 5 P. L. W. 147.

was null and void and that a person who entered into possession of the land under a lease which was void was a mere trespasser and could not claim protection from ejectment under section 41 of the Chota Nagpur Tenancy Act, 1908. Here, again, the lease in question imposed a continuing liability upon the lessee to pay the rent and perform the other covenants of the lease and on that account was not enforceable as against the minor. These cases do not apply to a completed contract where the minor's obligation has been wholly performed resulting in the transfer to him under the contract of an interest in property.

It is contended, however, that the principle laid down in *Raghava Chariar* v. *Srinivasa Raghava Chariar* (2) (*ubi sup.*) only applies to transfers of an interest in immoveable property and that as the decree in the present case is a money decree only imposing a personal obligation on the defendant and not a mortgage decree affecting the property hypothecated, the principle governing that case has no application. It appears, however, that the mortgage bond in the present case was executed on the 7th April 1908 and the Chota Nagpur Tenancy Act which has no retrospective application was not passed until the 11th November 1908 and was not extended to Manbhum in which district the property in suit is situate until the following year, so that it would appear that the learned Munsif as well as the Subordinate Judge were wrong in holding that only a money decree and not a mortgage decree could be passed in the present suit. There was no appeal by the plaintiffs from this part of the Subordinate Judge's decision and so far as the relief claimed is concerned, they must be content to accept the lesser relief granted by the decree. This, however, does not prevent them from contending that as a matter of law they would have been entitled to a mortgage decree had they chosen to insist upon it in second appeal, and it seems difficult to see why their failure to insist upon a mortgage decree which would have directed the defendant to pay the decretal amount under penalty of the sale of the mortgaged property should deprive them of the right of insisting upon the lesser remedy only. Moreover the case of *Rungirazu Sathrurazu* v. *Maddura Basappa* (4), which decided that a promissory note executed in favour of a minor and not involving any promise on his part or any contractual obligation by him can be enforced, appears to me to be based on a principle which would govern the present case. Further, even if it should be held that the instrument in question in this suit ought to be cancelled on the ground that it is void, it must be remembered that the defendant has had the benefit of the sum advanced by the plaintiffs under it and in such circumstances it would be within the competence of the Court under section 41 of the Specific Relief Act in granting relief to the defendant to make him pay such compensation as justice may require. Their Lordships of the Judicial Committee inthe case of *Mohori Bibee* v. *Dharmodas Ghose* (1) (*ubi sup.*) appear to have considered that the said section would have been applicable to the case then under consideration, had justice required that they should exercise their discretion in favour of the appellant. If the contention of the appellant in the present case should be upheld, it would follow that the law relating to the contracts of minors which is meant for their protection would in numerous cases have an exactly opposite effect and result in manifest injustice. To take a simple instance, if a minor agreed to sell a horse and in pursuance of the agreement delivered it to the purchaser before payment of the price, the purchaser would be entitled to keep the horse and refuse to pay the purchase money on the ground that the contract was void and unenforceable; or again if a minor sent a money order to a shopkeeper in payment of certain selected goods to be forwarded, the shopkeeper could keep the money and refuse to deliver the goods. In the cases supposed the purchaser and the shopkeeper might be within their rights in refusing to complete the contract entered into with a minor, but justice demands that they should at least restore the horse in the one case and the money in the other. Here the appellant has had the benefit of the loan and even if the contract should be declared void, justice demands that he should make compensation to the minor which would include the principal and interest claimed. In my opinion the appeal should be dismissed with costs.

JWALA PRASAD, J.—I agree.

Appeal dismissed.

GOPAL PRASAD *v.* KASHINATH.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 315 OF 1916.

July 11, 1919.

Present :—Mr. Justice Stuart and Mr. Justice Ryves.

GOPAL PRASAD—PLAINTIFF—APPELLANT

versus

KASHINATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Execution of decree—Attachment set aside by mistake—Restoration of attachment, effect of—Sale during interval, validity of.

Where property is attached before judgment, and under a misunderstanding the order of attachment is set aside, but the attachment is subsequently restored, the restoration of the attachment has the effect of reverting the parties to the position they occupied when the property was originally attached, and a private sale of the property in the *interim* is void. [p. 343, col. 2.]

First appeal from the decision of the First Additional Subordinate Judge, Aligarh, dated the 23rd June 1916.

The Hon'ble Dr. *Tej Bahadur Sapru* and *K. N. Katju*, for the Appellant.

Messrs. *M. Ishaq Khan*, *P. L. Banerji* and *Panna Lal*, for the Respondents.

JUDGMENT.—Kashi Nath brought a suit against Keshab Deo and others and attached before judgment two shops and other property belonging to the defendants on the 20th of August 1909 under the order of the Subordinate Judge of Aligarh. On the 27th of August 1909 the Subordinate Judge set aside that order. It appears that he did so owing to his having misunderstood an order of the High Court. The High Court ordered the attachment to be restored on the 16th of March 1910. In the interval between the 27th of August 1909 and the 16th of March 1910 when as a matter of fact there was no order in existence attaching the property, Gopal Prasad, the plaintiff-appellant here, purchased the two shops in dispute. In execution of the decree against Keshab Deo and others it was sought to attach and bring these two shops to sale. Gopal Prasad objected that they were his property and on his objection being disallowed, brought this suit for a declaration that they were not liable to sale in execution of the decree. The lower Court has dismissed the suit on a single ground, namely, that it must be held in law that the shops were under attachment during the whole period from 20th of August 1909, because the order of the High Court of the 16th of March 1910 was to restore that attachment which had, as a matter of fact, been removed by a mistake and to put back the parties into the position which they had occupied on the 20th of August 1909. The lower Court has decided this case on the authority of two cases of this Court, namely, *Ali Ahmad Khan* v. *Bansidhar* (1) and *Aziz Bux* v. *Kaniz Fatima Bibi* (2).

On appeal before us it has been argued that those two decisions do not apply. And secondly it has been argued that in any case, as there is no provision in the Civil Procedure Code itself, no order even by the High Court could bind innocent third parties who were no parties to the suit. In this particular suit there is no finding of collusion or anything of that kind between Gopal Prasad and the defendants. It is argued that it is extremely hard that an outsider who had no connection with the judgment-debtor and who purchased *bona fide* a property which he knew was not then under attachment, should find the sale rendered void because subsequently a previous attachment which had been removed was restored. The appellant must obviously have one's sympathy, but the question remains whether in law he is not bound by the subsequent order restoring the attachment. The view in Calcutta seems to have been consistent since 1874. See *Mahomed Warris* v. *Pitambur Sen* (3), *Bonomali Rai* v. *Prosunno Narain Chowdhry* (4), *Ram Chandra Marwari* v. *Mudeshwar Singh* (5). The case in *Bonomali Rai* v. *Prosunno Narain Chowdhry* (4) was approved of by this Court in *Ali Ahmad Khan* v. *Bansidhar* (1). But we find apart from these cases in this Court relating to property belonging to Keshab Deo and others which was similarly affected by this attachment. In one of these cases there was also a finding by the Court below that the purchaser in that particular case had been colluding with the defendants. The decision, therefore, in that case is not quite

(1) 1 Ind. Cas. 951; 6 A. L. J. 434; 31 A. 367.
(2) 15 Ind. Cas. 49; 10 A. L. J. 48; 34 A. 490.
(3) 21 W. R. 435.
(4) 23 C. 829; 12 Ind. Dec. (N S.) 551.
(5) 33 C. 1158; 10 C. W. N. 978.

in point here, but in both the other cases, namely, Original Suit No. 86 of 1915 decided in first Appeal No 381 of of 1915 and Original Suit No. 22 of 1916 decided in First Appeal No. 208 of 1916, the Court below held that the purchase in those two particular cases was rendered void by the order of the High Court restoring the attachment, and that was the only point decided in both appeals here. In both those cases the view of the lower Court was held to be correct. That being so, it seems to us that the appeal must fail. We dismiss it with costs.

Appeal dismissed.

PATNA HIGH COURT.
CIVIL REVISION No. 151 OF 1919.
June 16, 1919.
Present:—Mr. Justice Mullick and
Mr. Justice Jwala Prasad.
LACHMI NARAIN AGARWALA—
PETITIONER
versus
KALI PROSONNO BHATTACHARJI
AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 89—Execution of decree—Sale—Application to set aside sale—Judgment-debtor, whether entitled to make application after parting with his interest in property sold to third person—Purchaser from judgment-debtor, whether can make application—Court refusing to accept deposit—Revision—High Court, interference by.

The fact that a judgment-debtor has parted with his interest to a third party in property attached and sold in execution of a decree is no bar to his making an application under Order XXI, rule 89 of the Civil Procedure Code, to have the sale set aside. [p. 345, col. 1.]

A purchaser by means of a private deed of the property of a judgment-debtor attached and sold in execution of decree has no *locus standi* to make an application under Order XXI, rule 89 of the Civil Procedure Code. [p. 346, col. 1; p. 345, col. 1.]

When a deposit is made under rule 89 of Order XXI of the Civil Procedure Code, it is the duty of the Court to proceed to set aside the sale. [p. 345, col. 1.]

Where a Court declines to accept the deposit from the judgment-debtor, its action amounts to a refusal to exercise jurisdiction and the High Court can interfere under section 115 of the Civil Procedure Code. [p. 345, col 2]

Civil revision from a decision of the District Judge, Manbhum.

Messrs. *Sushil Madhab Mullick* and *Abhani Bhushan Mukherji*, for the Petitioner.

Messrs. *Jayaswal* and *Haribhusan Mukherji*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—This matter arises out of the sale of two plots of land in the town of Dhanbad in execution of a rent-decree. After the sale an application was made under Order XXI, rule 89 of the Civil Procedure Code, by the judgment-debtor to set aside the sale. The Subordinate Judge, without hearing the auction purchaser and the decree-holder, accepted the deposit and granted the prayer of the judgment debtor.

The auction-purchaser then took the matter up in appeal to the District Judge, and it being discovered that the judgment-debtor was dead, he brought the heirs of the judgment debtor upon the record of the appeal. The order passed by the District Judge after hearing the parties was that the application should be reheard by the Subordinate Judge in the presence of the decree-holder, the auction-purchaser and all parties affected.

The case went back to the Subordinate Judge. The judgment debtor's heirs were apparently unwilling to prosecute the matter, or at any rate they did not take any steps to adduce evidence: but a private purchaser, the petitioner before us, subsequent to the sale came forward and put in a petition before the Subordinate Judge asking that he should be allowed to prosecute the application on behalf of the judgment debtor. That petition was made on the 7th January 1919, and the order made by the Subordinate Judge thereupon was that the application would be taken into consideration at the time of the hearing of the case.

It appears that thereafter the petitioner was allowed to deposit the various process fees necessary for service of notice upon the parties to the case and also to get summonses issued upon the witnesses for this purpose. It also appears that at the hearing he was allowed to file a document in support of the judgment-debtor's prayer and that his Vakil or Pleader was heard when the case was finally argued.

The result was that the Munsif, the case having been in the meantime transferred to

his Court by the Subordinate Judge, dismissed the application, holding that under Order XXI, rule 89, it was not competent to the judgment debtor to make a deposit after he had already parted with his interest in the property by sale to a third party.

The petitioner then took the matter up in appeal to the District Judge, who affirmed the finding of law of the Court below and added a further ground for dismissing the appeal, namely, that the petititioner was entitled neither to support the application of the judgment-debtor nor to prosecute the appeal, inasmuch as he was not the legal representative of the deceased.

The present application has been made to us under section 115 of the Civil Procedure Code against the order of the District Judge.

Now upon the point of law as to whether Order XXI, rule 89, permits a judgment-debtor to make an application for the purpose of setting aside a sale, even though at the time of the application he has parted with his interest in the property, the decision of this Court in the case of *Musammat Dhanwanti Kuer* v. *Sheo Shankar Lall* (1) is conclusive. So far as this Court is concerned, it is settled for the present that the judgment-debtor in such a case is still competent to avail himself of the provisions enabling him to make a deposit.

It is contended, however, that as the petitioner had no *locus standi* in the Court of the Munsif, he ought not to have been allowed to appeal, and as the appeal was incompetent the order of the District Judge therein was a nullity, and, therefore, there is no order with which we can interfere in revision.

Now in my opinion the petitioner was not a person whom the Munsif should have heard. *He, as the assignee after the sale, had no interest in the property*: but that circumstance did not debar the Munsif from disposing of the application according to law. The Munsif had before him the judgment debtor's representatives who had been brought upon the record in the appeal; and indeed the law says that when a deposit is made, the Court shall proceed to set aside the sale.

In this case, therefore, the proper course was to refuse to hear the petitioner, but to set aside the sale.

(1) 51 Ind. Cas. 873; 4 P. L. J. 340.

As for the contention that the order of the Appellate Court was a nullity, I do not think there is any substance in it whatsoever.

The Munsif though wrongly did in fact accept the petitioner as a party; the mere omission to enter the petitioner in the heading of the judgment or in the record as a party does not make any difference. The petitioner was allowed to adduce evidence, to pay process fees, to address the Court, and to carry on the litigation on behalf of the judgment-debtor. He must, therefore, be held to have been in fact joined as a party in the proceedings before the Munsif. That being so, he had a right of appeal if he was affected by the order made by the Court. It was open, no doubt, to the District Judge to decide in the appeal that he ought not to have been allowed to appear before the Munsif, but it cannot be said that the appeal was incompetent by the petitioner because the petitioner was an entire stranger to the proceedings. It was open, no doubt, to the District Judge to hold as he has done that the petitioner was not a person entitled to relief, but it was incumbent upon him nevertheless to decide the other point in the case, namely, whether or not the deposit had been legally made by the judgment-debtor. His order, therefore, cannot be treated as a nullity and the petitioner is right in seeking to have it set aside. But even if it be held that the order is a nullity, the Munsif's order stands in the petitioner's way and is liable to revision by us.

Both Courts, in my opinion, refused to exercise jurisdiction in declining to accept the deposit from the judgment-debtor. The order of both will be set aside under section 115 of the Civil Procedure Code.

It is said that the heirs of the judgment-debtor are no longer willing to have the sale set aside. There is no evidence of this. The mere omission on the part of the heirs to prosecute the application made by their predecessor before the Munsif is not conclusive upon the point. Even if the allegations were true and they had after the sale to the petitioner sought to defraud him by siding with the auction-purchaser and intimated their

unwillingness to have the sale set aside the Court could not have given effect to that fraudulent act. We have, however, nothing to show that the heirs are in fact unwilling, and, therefore, the proper order that ought to be made is that the deposit, if it complies with the provisions of the law, be accepted and the sale set aside. The application will be allowed with costs. Hearing fee two gold *mohurs*.

JWALA PRASAD, J.—The deposit in this case was properly made by the judgment debtor under Order XXI, rule 89. The judgment-debtor expressly stated his intention to have the sale set aside. The sale was accordingly set aside on the 16th August 1918. The judgment debtor in the subsequent proceedings died. The legal representatives of the judgment debtor are on the record and they do not object to the application having been made by the judgment-debtor to have the sale set aside. The mere silence of the heirs of the judgment-debtor cannot be construed as a withdrawal of the application made on behalf of deceased judgment-debtor. There does not appear, therefore, to be any alternative but to set aside the sale under rule 92 of Order XXI. I agree, therefore, with the order made in the case by my learned brother and I also agree that the petitioner, the purchaser of the property by means of a private deed from the judgment-debtor, had no *locus standi* to make an application under rule 89 of Order XXI, but that does not affect the position in the case that the sale must be set aside under the said order.

Application allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1165 OF 1915.

July 5, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

BIHARI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

AMIN CHAND AND ANOTHER, MINORS, THROUGH TEJA—PLAINTIFFS—RESPONDENTS.

Minor, suit against—Guardian ad litem, *duty of—Minor, whether bound by decree passed against him—Gross negligence of guardian—Burden of proof.*

If a minor is properly represented by a next friend or a guardian for the suit and there is no fraud or collusion on the part of the next friend or guardian or of the opposite party, and his next friend or guardian is not guilty of gross negligence, the minor is as much bound by a decree or order made in a suit or proceeding to which he is a party as if he were of full age, and it can be executed against him or his property, as the case may be, in accordance with law. [p. 347, col. 1.]

It is not the duty of a guardian *ad litem* to raise frivolous or untenable defences. The amount of care and attention which the guardian of a minor is expected to bestow upon the case of his ward is the same as a reasonable person would devote to his own case. [p. 347, col. 2.]

Plaintiff's father executed a mortgage-deed by way of conditional sale in favour of the defendant on the 14th December 1896. It was stipulated that the mortgage-money would be paid within 3 years and that, in the event of default, the foreclosure clause would come into operation. No payment having been made, the mortgagee, after making a demand and issuing a notice of foreclosure, brought the usual action for possession and obtained a decree against the minor sons of the mortgagor, who had died before the institution of the suit. The minors now brought the present suit to set aside the decree. It appeared that in the previous suit their mother acted as guardian *ad litem* and resisted it on various grounds:

Held, (1) that the onus lay upon the plaintiffs to establish gross negligence on the part of their guardian in defending the previous suit; [p. 348, cols. 1 & 2.]

(2) that having failed to do so, they could not impugn the decree passed against them. [p. 448, col. 2.]

First appeal from the decree of the District Judge, Hissar, dated the 1st December 1913, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellants.

Lala *Kishen Chand*, for the Respondents.

JUDGMENT.—On the 14th December 1893 Balu, the father of the plaintiffs, executed a mortgage-deed by way of conditional sale in favour of the defendant Bihari Lal and his father Ram Dial. One of the stipulations in the deed was that the mortgagor had to pay the amount due from him within three years and that in the event of default the foreclosure clause would come into operation. No payment was made within the prescribed period, and the mortgagees, after making a demand and issuing a notice of foreclosure, brought, after the expiry of the year of grace, the usual action for possession of the land, alleging themselves to be the vendees of the property.

BIHARI LAL *v.* AMIN CHAND.

It appears that the mortgagor Balu had died before the institution of the above-mentioned suit; and that his sons, who were then minors, were impleaded as defendants with their mother as their guardian *ad litem*. The mother resisted the suit on various grounds, but the Court after enquiring into all the issues rejected the defence and passed a decree on the 28th March 1905 in favour of the *quondam* mortgagees.

The minors through one Teja as their next friend have brought the present action for setting aside the aforesaid decree, and their claim has been allowed by the District Judge, Sayad Wali Shah. The judgment of the District Judge is a very unsatisfactory document and betrays an utter ignorance of the law applicable to a case of this character. The Judge not only attempts to criticise the conclusions reached in the previous suit as if he were a Court of Appeal from the judgment in that case, but also misstates certain facts and even tries to find in favour of the plaintiffs on one or two matters which were rightly admitted on their behalf and did not consequently constitute the subject-matter of any issue between the parties.

The principle of law is beyond dispute that if a minor is properly represented by a next friend or a guardian for the suit, and there is no fraud or collusion on the part of the next friend or guardian or of the opposite party, and his next friend or guardian is not guilty of gross negligence, the minor is as much bound by a decree or order made in a suit or proceeding to which he is a party as if he were of full age; and it can be executed against him or his property, as the case may be, in accordance with law, *vide* Law relating to Minors by Trevelyan, 4th Edition, pages 284 85. Now, the plaintiffs do not allege any fraud or collusion on the part of their guardian, and they base their claim upon negligence pure and simple. The case as built up by the District Judge on their behalf is contained in the following extract from his judgment:—

"The *jawab-i-dawa* of the minor's mother, her statement and the issues show that she (guardian of the minors) omitted to raise many objections regarding the conditions of the mortgage deed, nor did she raise any objection respecting demand, nor yet did she raise any objection as to consideration or necessity, nor yet did she even raise any objection regarding the service of notice."

The fact that this sentence contains some misstatements is apparent from the perusal of the pleas and issues copied out in the judgment by the District Judge himself from the record of the previous case. We find that the guardian did raise the question of the failure of the mortgagees to make a demand before issuing the notice of foreclosure and that this led to the framing of issue No. 2. As to the service of notice there does not appear to be any distinct plea, but the matter was clearly embodied in issue No. 3. On both the questions evidence was led, and the Court found in favour of the plaintiffs. There can be no doubt that the District Judge has indulged in reckless statements, and Mr. Kishen Chand for the plaintiffs frankly admits that he is unable to support the decision in favour of his clients on the strength of these two points.

It is true that there was no plea challenging the consideration and necessity for the mortgage, but it must be remembered that it is not the duty of a guardian *ad litem* to raise frivolous or untenable defence. The amount of care and attention which a guardian of a minor is expected to bestow upon the case of his ward is the same as a reasonable person would devote to his own case. The litigants in a Court of law are not expected to put forward all sorts of absurd pleas which cannot be sustained, and it is only right that they should confine their attention to matters upon which there is a real and genuine controversy and upon which there is something to be said on their behalf.

Applying this principle to the case before us, we find that the entire consideration for the transaction was paid before the Sub-Registrar, and the guardian was accordingly well advised not to put forward a plea which she would have found exceedingly difficult to establish. As regards necessity, it must be borne in mind that in December

1896 there was a severe famine in the Hissar District, and that many a proprietor owning *barani* land (and the land in dispute is *barani* and of a poor quality) stood in need of borrowing money in order to maintain himself and his family. Indeed the mortgage-deed executed by Balu distinctly recites this necessity, and there can be no reasonable doubt as to the correctness of the recital. The clause as to conditional sale was a common feature of the mortgages executed in this district and other neighbouring districts: and the rate of interest, though high, cannot be regarded as unconscionable in view of the nature of the security offered by the debtor, the security referred to above and the stringency of the money market prevailing at that time. As to the rate of interest, reference should be made to the observations of their Lordships of the Privy Council contained in *Lala Balla Mal* v. *Ahad Shah* (1).

The facts set out in the preceding paragraph do not admit of any reasonable doubt, and the mortgagor's widow, who was assisted by her son-in-law, was apparently fully cognizant of them. In these circumstances her omission to plead the want of necessity and the alleged onerous nature of the terms of the transaction cannot be regarded as gross negligence, such as would justify a Court of law in holding that the previous decree should be inoperative against the minors. We consider that the alienation was for necessity, and it is very doubtful whether Balu, circumstanced as he was, would have got better terms from any other mortgagee.

It is unnecessary to refer to the gratuitous remarks made by the District Judge as to the execution of the mortgage by Balu. It is to be observed that even the next friend of the minors admitted the execution of the deed in the plaint filed by him, and the attempt of the District Judge to impeach the genuineness of the instrument is utterly futile and shows a lack of judicial spirit. The learned Vakil for the plaintiffs has not referred to this matter in his arguments, and we do not think that we should waste any more words over it.

For the aforesaid reasons we hold that the plaintiffs, on whom the onus lay, have failed to establish gross negligence on the part of their guardian in defending the previous suit; and they cannot impugn the decree passed against them. We accordingly accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

(1) 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 16 A. L. J. 905; 23 C. W. N. 233; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1192 OF 1917 AND 1405 OF 1918.

July 2, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Das.

IN S. A. NO. 1405 OF 1918

PUNJAB SINGH—APPELLANT

versus

RAMAUTAR SINGH—RESPONDENT.

IN S. A. NO. 1192 OF 1917

SHEODHARY SINGH AND OTHERS—APPELLANTS

versus

RAMAUTAR SINGH AND OTHERS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 89—Malicious prosecution, cause of action for, survival of—Evidence Act (I of 1872), s. 23—Admission before arbitrator, admissibility of.

Section 89 of the Probate and Administration Act expressly excludes from its operation all causes of action in respect of personal injuries not causing the death of the party. [p. 351, col. 1.]

Therefore, a cause of action for malicious prosecution does not survive to the legal representatives of the deceased plaintiff. [p. 351, col. 1.]

A. was prosecuted by *B.* and was acquitted, whereupon he brought a suit to recover damages for malicious prosecution which was dismissed by the trial Court. Shortly after this he died and his legal representatives appealed and obtained a decree. On second appeal to the High Court:

Held, that the Appellate Court was wrong in entertaining the appeal, as the cause of action did not survive to the legal representatives of the deceased plaintiff and they could not continue the action after his death [p. 351, cols. 1 & 2.]

B brought a suit against *A* to recover specific articles alleged to have been taken by *A.* or for their value. Prior to the institution of the suit, the matter in dispute was referred to a *panchayat* before which *A.* admitted *B.*'s claim and undertook to return the articles *B.* produced one of the members of the *panchayat* to prove *A*'s admission, but the lower Appellate Court excluded from its consideration the evidence of this witness and dismissed the suit:

Held, that the lower Appellate Court was wrong in excluding the evidence from its consideration. [p. 352, col. 1.]

PUNJAB SINGH *v.* RAMAUTAR SINGH.

An admission before an arbitrator is admissible in evidence, although it is for the Court dealing with the facts to attach whatever weight it thinks proper to such an admission. The rule enunciated in section 23 of the Evidence Act does not apply to such admissions. [p. 352, col. 2.]

Appeal from the decision of the District Judge, Muzaffarpur, reversing that of the Subordinate Judge, Muzaffarpur.

FACTS.—Punjab Singh instituted a case of loot against Khublal Singh, alleging that he had committed theft of articles and ornaments worth Rs. 200. Khublal Singh was tried and acquitted. Then Khublal brought a suit for recovery of Rs. 2,521-2-3 as damages for malicious prosecution, which amount was made up of expenses of the criminal case, loss of business and damages for bodily and mental injuries. Punjab Singh (along with his father Sheodhari Singh) also brought a suit against Khublal for the recovery of Rs. 200, the value of articles and ornaments. The suits were tried together and Khublal's suit was dismissed and Punjab Singh's suit decreed by the first Court. Khublal preferred separate appeals to the District Judge and died pending the hearing of the appeals. In Punjab Singh's suit, Khublal's son was substituted for his father, but in the other suit he was ordered by the District Judge [following *Krishna Behari Sen* v. *Corporation of Calcutta* (1)] to take out Letters of Administration before he could be allowed to prosecute the appeal. This he did. Both the appeals were heard and decreed by the District Judge. Punjab Singh preferred the second appeals.

Mr. *Manuk* (with him Mr. *Panchanan Banerji*), for the Appellants, contended that the suit abated with the death of Khublal as the cause of action did not survive. Act XII of 1855 has no application; nor does section 89 of the Probate and Administration Act cover the case. The words 'personal injuries' in the section should be taken *ejusdem generis* with the words 'defamation,' 'assault', which precede them. *Krishna Behari Sen* v. *Corporation of Calcutta* (1), even if correctly decided, does not give any reasons. That case has not been followed by other High Courts: *Haridas Ramdas* v. *Ramdas Mathuradas* (2), *Ranchode Doss* v. *Rukmany Bhoy* (3), *Tummala Nagabhushnam* v. *Sri Raja Venkatdari Appa Row* (4), *Subramania Iyer* v. *Venkataramier* (5), *Gadigi Mareppa* v. *Firm of Marwadi Vannajee Vajanjee* (6).

Secondly, the District Judge has wrongly held that the evidence of Harnandan is inadmissible. The entire examination-in-chief of the witness is as follows:

"There was a compromise in the loot case at village Mahesoul where the Sub-Divisional Officer of Sitamarhi was holding Court in camp. Myself, Jugal Singh, Ramphal Singh and Rudal Singh were the Punches. The Punchayet was held at the request of Khublal. The Punches decided that Khublal should return the ornaments, cash and other articles taken by him from Punjab Singh's house and by way of security for due fulfilment would deposit Rs. 200 with me and the criminal case would be compromised and not proceeded with. Khublal actually deposited Rs. 200 with me, but in the end he wanted that Punjab Singh should exchange his *parti* plot with some land of Khublal and as Punjab Singh refused to do this, the compromise fell through and I returned Rs. 200 to Khublal. I have no connection with Punjab Singh."

This evidence is not inadmissible under section 23 of the Evidence Act. *Meajan Matbor* v. *Alimmuddin Mea* (7), which the District Judge relies on, is in my favour. Besides it is not evidence of compromise but of arbitration, which is not at all touched by section 23: Woodroffe's Law of Evidence, 6th Edition, page 249; Taylor's Evidence, 10th Edition, section 795. Moreover, this evidence was not objected to at the trial Court, and it is not *per se* inadmissible: *Ambar Ali* v. *Lutfe Ali* (8).

Mr. *C. C. Das* (with Mr. *Baikuntha Nath Mitter*), for the Respondents, contended that the word "personal" in section 89 was equivalent to "physical."

(1) 31 C. 993; 8 C. W. N. 745.

(2) 13 B. 677; 7 Ind. Dec. (N. S.) 449.

(3) 28 M. 487.

(4) 17 Ind. Cas. 226; 23 M. L. J. 255; 12 M. L. T. 383; (1912) M. W. N. 899.

(5) 31 Ind. Cas. 4.

(6) 38 Ind. Cas. 823; 20 M. L. T. 303; (1916) 2 M. W. N. 280; 31 M. L. J. 772.

(7) 34 Ind. Cas. 571; 44 C. 130; 20 C. W. N. 1217; 25 C. L. J. 42.

(8) 41 Ind. Cas. 116; 21 C. W. N. 996; 25 C. L. J. 619; 45 C. 159.

Krishna Behari Sen v. *Corporation of Calcutta* (1) has been correctly decided. Can any one imagine any injury not physical, which causes death? The Patna High Court has always preferred the decisions of the Calcutta High Court. Pollock's Torts, 10th Edition, pages 64, 66, etc.

With regard to the second point, the test laid down in *Meajan Matbor* v. *Alim-uddin Mea* (7) is satisfied in this case. That the circumstances bring it within section 23 of the Evidence Act will appear from paragraph 6 of Punjab Singh's own plaint, which runs thus:—

"In connection with the loot and assault a criminal case was brought by plaintiff No. 2 against defendants 1st party and 2nd party, in which only defendant No. 1 1st party was summoned. During the pendency of the criminal case an arbitration award was made by the Punches of Mouza Murserh, etc."

Mr. *Manuk*, was not called upon to reply.

JUDGMENT.

DAS, J.—These two analogous appeals come before us from the judgment of the District Judge of Muzaffarpur and arise out of two suits, one instituted by Khub Lal, who is now dead and who is now represented in this appeal by the respondents, against the appellants for recovery of Rs. 2,521 2 3 as damages for malicious prosecution and the other instituted by the appellants for recovery of specific articles of goods belonging to the appellants and alleged to have been carried away by the respondents or for the value thereof.

The appellants' case is that on the 27th of October 1913, the respondents or some of them rushed into the house of the plaintiffs, broke open a chest and took away from it a box containing ornaments of gold and silver, a sum of Rs. 35 kept in a *lota*, as well as clothes, shawls, utensils, etc., to the value of Rs. 200 and in respect of this occurrence, the appellants instituted a criminal case against Khub Lal Singh, which ultimately ended in the acquittal of Khub Lal. The appellants thereafter instituted a suit, being Suit No. 775 of 1915, for recovery of specific articles alleged to have been taken away by the respondents or for recovery of Rs. 200 as the value of these articles: and it is out of this suit that Second Appeal No. 1192 of 1917 comes before us.

After his acquittal in the criminal case, Khub Lal brought a suit, being Suit No. 461 of 1914, against the appellants, for recovery of Rs. 2,521·2·3 as damages for malicious prosecution; and it is out of this suit that Second Appeal No. 1405 of 1918 comes before us.

The Court of first instance disposed of both the suits by one judgment, and it dismissed Suit No. 461 of 1914, but granted a decree for Rs. 200 in Suit No. 775 of 1915. On appeal the lower Appellate Court has set aside the judgment and decree passed by the Court of first instance and has dismissed appellants' suit No. 775 of 1915 and has decreed the respondents' suit No. 461 of 1914 for Rs. 1,000.

I will, first of all; deal with second appeal No. 1405 of 1918. It appears that Khub Lal died after the dismissal of the suit by the Court of first instance, and the point that has been urged before us, and on which, in my opinion, the appellants are entitled to succeed, is that the cause of action died with Khub Lal and did not survive to his legal representatives. The learned District Judge, relying on the case of *Krishna Behari Sen* v. *Corporation of Calcutta* (1), held that the cause of action in this case did survive to the legal representatives, and he followed the procedure laid down in that case. In my experience, that case has never been followed subsequently in the Calcutta High Court and was expressly dissented from in the Madras High Court in the case of *Gadigi Mareppa* v. *Firm of Marwadi Vannajee Vajanjee* (6).

It seems to me that on a plain reading of section 89 of the Probate and Administration Act, the appellants' contention must succeed. Now section 89 of the Probate and Administration Act runs as follows:—

"All demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except

also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory." The question for our determination is what effect must be given to the words "or other personal injuries not causing the death of the party."

"As a matter of ordinary construction", said Lord Bramwell in *Great Western Railway Co.* v. *Swindon and Cheltenham Ry. Co.* (9), "where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all." It is argued on behalf of the respondents that the general words, *viz*, "other personal injuries not causing the death of the party," do not apply to defamation at all but only apply to assault, and, therefore, those general words can be read as *ejusdem generis* only with assault and not with defamation. With this contention I am wholly unable to agree. It seems to me that defamation is a personal injury not causing the death of the party, and in the same way it may be said in this case that malicious prosecution is a personal injury not causing the death of the party. It will be noticed that the words deliberately chosen by the Legislature are "personal injury" and not "physical injury." The words "personal injury" have a wider significance than the words "physical injury" and, in my view, they apply to all kinds of injury whether physical or otherwise. In my view, the general words in section 89 of the Probate and Administration Act must be read *ejusdem generis* with the word "defamation" and when so read, it is clear to my mind that section 89 of the Probate and Administration Act expressly excludes from its operation all causes of action in respect of personal injuries not causing the death of the party. It seems to me, therefore, that the cause of action for malicious prosecution did not survive to the legal representatives of Khub Lal. This view is supported by a long series of decisions of the Bombay High Court and the Madras High Court.

I hold, therefore, that the lower Appellate Court clearly erred in allowing the legal representatives of Khub Lal to continue the action after his death.

I would, therefore, allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore the judgment and decree of the Court of first instance. The appellants are entitled to their costs throughout.

I now come to Second Appeal No. 1192 of 1917.

The lower Appellate Court excluded from its consideration the evidence of Hur Nandan and having excluded that evidence from its consideration, it came to the conclusion that it had not sufficient evidence before it to enable it to grant a decree in favour of the plaintiffs.

The sole question that we have to determine is, was the lower Appellate Court right in excluding from its consideration the evidence of Hur Nandan?

It appears that Hur Nandan was a member of a Panchayet before which Khub Lal undertook to return the articles looted. We are not concerned in this appeal with the weight to be attached to that evidence, but we are clearly of opinion that the lower Appellate Court erred in excluding from its consideration the evidence of Hur Nandan.

The lower Appellate Court relied upon section 23 of the Evidence Act. Section 23 provides that "in civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." It is conceded that there was no express condition that evidence of it was not to be given, but it is strongly urged that there are circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. The learned Counsel appearing on behalf of the respondents relies strongly upon paragraph 6 of the plaint. His argument is, that the parties definitely agreed to settle their disputes and his contention before us is that if they agreed to settle their disputes once for all, they must impliedly have agreed among themselves that evidence of it shall not be given in any Court of law if, unfortunately, the settlement fell through. I cannot agree

(9) (1884) 9 App. Cas. 787 at p. 808; 53 L. J. Ch. 1075; 51 L. T. 798; 32 W R. 957; 48 J. P. 821.

with this contention. The learned commentators of Woodroffe and Amir Ali's well known work on the Evidence Act say: "The rule" (that is to say the rule enunciated in section 23 of the Evidence Act) "does not apply to admissions made before an arbitrator" and they cite English cases in support of their opinion. In the case before us the admission was made before an arbitrator, and if the learned commentators are right in the view which they have expressed in their well known work on the Evidence Act, it is clear that the lower Appellate Court erred in excluding this evidence from its consideration. The lower Appellate Court relied upon the case of *Meajan Matbor* v. *Alimuddin Mea* (7). It seems to us that that case is an authority in favour of the appellants. That was a suit for rent where there was a talk of settlement between the plaintiff's Pleader and one of the defendants, and it was held that the mere fact of a conversation taking place when the parties were contemplating that a suit might be instituted is not in itself sufficient to prevent the conversation from being put in evidence. In the course of his judgment Mr. Justice Mookerji had to discuss a decision of Mr. Justice Phear in *Mohabeer Singh* v. *Dhujjoo Singh* (10). That learned Judge in the course of his judgment had said as follows:—"An offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession, is rejected, though nothing at the time was expressly said respecting its confidential character, only if it clearly appears to have been made on the faith of a pending treaty into which the party was led by the confidence of an arrangement being effected." Mr. Das on behalf of respondents argues very forcibly that there was a pending treaty between the parties and one of the parties was led into making an admission by the confidence of an arrangement being effected, and, therefore, that admission cannot be admitted in any proceeding between the parties. But Mr. Justice Mookerji, commenting on the passage cited, said as follows:—"In the absence, however, of any express or strongly implied restriction as to confidence, an offer of compromise is clearly admissible and may be material as some evidence of liability, although, as has been said, it may not be proper to inquire into the exact terms offered, as such an offer might have been made for the sake of purchasing peace and without any intention to admit liability to the extent of the claim." In my view, the passage, which I have just cited, very completely establishes that an admission made before an arbitrator is admissible in evidence, although it is for the Court dealing with facts to attach whatever weight it thinks proper to such an admission.

I think, therefore, that the lower Appellate Court was clearly in error in excluding the evidence of Hur Nandan from its consideration.

I would, therefore, allow this appeal, set aside the judgment and decree of the lower Appellate Court and remit the case to the lower Appellate Court for its decision according to law. The appellant is entitled to the costs of this appeal. The costs incurred in the Court below will abide the result and will be disposed of by the lower Appellate Court.

COUTTS, J.—I agree.

Appeals allowed.

(10) 20 W. R. 172.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 153 OF 1918.

June 26, 1919.

Present:—Mr. Justice Scott-Smith.

KISHEN LAL AND OTHERS—PLAINTIFFS—PETITIONERS

versus

JAI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 24, Sch. II, para. 8—Transfer of cases—Power, whether can be delegated—Senior Subordinate Judge, whether can transfer case to junior Subordinate Judge—Court becoming seised of case in irregular manner—Failure to object—Waiver—Acquiescence—Arbitration—Award not filed within time, effect of—Extension of time, power of.

The power to transfer cases under section 24, Civil Procedure Code can be delegated by the

District Judge to a Subordinate Judge, but when so delegated it must be exercised in accordance with law. It can only be exercised in regard to cases pending in a Court subordinate to the Court exercising the power. [p. 353, col. 2; p. 354, col. 1.]

A Senior Subordinate Judge cannot transfer a case from his own Court to that of the Junior Subordinate Judge as the Court of the latter is not subordinate to him. [p. 354, col. 1.]

Where there is jurisdiction over the subject-matter, but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. [p. 354, col. 2.]

The parties to a suit agreed to refer the dispute to arbitration. After the arbitration, but before the award, the Junior Subordinate Judge, in whose Court the case was pending, took leave for 2 months on the 25th April 1916. No one was appointed in his place and on the 2nd May 1916, the Senior Subordinate Judge ordered that the case should be kept in his Court The award not having been filed within the time originally fixed, several extensions were granted. On the 10th October the case was re-transferred by the Senior Subordinate Judge to the Junior Subordinate Judge on his return from leave, and on the same date at the request of the parties further time was allowed. Time was again extended several times and eventually the award was filed on 9th January 1917, and a decree was passed in accordance with the award. The defendants applied for revision:

Held, (1) that the order of the Senior Subordinate Judge re-transferring the case to the Junior Subordinate Judge was *ultra vires*; [p. 354, col. 1.]

(2) but that the parties, having acquiesced in the jurisdiction of the Junior Subordinate Judge, after the case was re-transferred to him, could not subsequently object to it; [p 354, col. 2; p. 355, col. 1.]

(3) that when once the Court became seised of the case, it had full power to extend the time for filing the award, even though the time originally fixed had previously expired; [p. 355, col. 1.]

(4) that, consequently, the award was a valid one and the Court was right in passing a decree in accordance therewith. [p. 355, col. 1.]

Petition, under section 44 of Act III of 1914, for revision of the decree of the Subordinate Judge, 2nd Class, Hissar, dated the 29th October 1917.

The Hon'ble Pandit *Sheo Narain* and Lala *Shamair Chand* for Lala *Ram Chand Manchanda*, for the Petitioners.

The Hon'ble Mr. *Muhammad Shafi*, Pandit *Nanak Chand* and Lala *Mehr Chand Mahajan* for Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This is an application for revision of the order of the Subordinate Judge, 2nd Class, Hissar, passing a decree in plaintiffs' favour in accordance with an award after rejecting defendants' objections. Notice issued on the second ground only in which it is contended that the award, not having been made within the time allowed by the Court referring the matter to the arbitrators, was a nullity in law. The case was pending in the Court of Pandit Gulal Chand, Junior Subordinate Judge of Hissar, who on the 25th April 1916, after the matter had been referred to arbitration and before the award was filed, took two months' privilege leave. No successor was appointed in his place, and on the 2nd May 1916 the Senior Subordinate Judge recorded an order that the case should be kept in his Court. The award not being filed within the time originally fixed an extension of time was granted on the following dates:—8th and 31st May, 30th June and 27th July. On the 10th of October the case was re-transferred by the Senior Subordinate Judge to Pandit Gulal Chand who had previously returned from leave, and on the same date in the presence and at the request of the parties time for filing the award was extended by that officer up to 15th of November. Time was again extended to the 18th of December, to the 8th January 1917 and to the 9th January 1917, on which latter date the award was filed. Objections to the award were subsequently put in and having been disposed of, the Senior Subordinate Judge passed the order of which revision is now sought.

There is nothing to show that the Senior Subordinate Judge had the power to transfer the case to his own Court after the departure of Pandit Gulal Chand on leave. The distribution of civil work amongst Subordinate Courts is frequently in this Province delegated by the District Judge to the Senior Subordinate Judge, and it is probable that this delegation was made in Hissar for we find that when this suit was originally instituted, it was made over by the Senior Subordinate Judge to the Junior Subordinate Judge. The power to transfer cases under section 24, Civil Procedure Code, can also be delegated by the District Judge to a Subordinate Judge, but there is no evidence before me, and I have been unable to ascertain, that the Senior Subordinate Judge of Hissar was invested with the powers under section 24, Civil Procedure Code. Even if he was those powers must be exercised in accordance with law. Section 24 (1) (*a*) enables a Court to exercise such powers to trans-

fer any suit pending before it for trial or disposal to any Court subordinate to it. Similarly section 24 (1) (*b*) enables a Court to withdraw any suit pending in any Court subordinate to it and to transfer the same for trial or disposal to the Court from which it was withdrawn. The power can only be exercised in regard to cases pending in a Court subordinate to the Court exercising the power, and I do not think that the Senior Subordinate Judge could in any event have transferred a case of his own Court to that of the Junior Subordinate Judge, which is not subordinate to him within the meaning of the section. It seems, therefore, that the order of the 10th August re-transferring the case to the Court of the Junior Subordinate Judge was *ultra vires*.

Mr. Muhammad Shafi on behalf of the respondents urges that if we are to consider that one of the orders of transfer was wrong, we are to consider that they both were wrong. If they were both wrong, then the orders passed between the time when Pandit Gulal Chand went on leave and the time when he again became seized of the case are all *ultra vires*, and when he again became seized of the case he had full power to extend the time for filing the award, even though the time for filing it originally fixed had previously expired, see Second Schedule, paragraph 8, Civil Procedure Code.

He also points out that this very objection as to jurisdiction was raised before the lower Court and was decided by it against the present petitioner and that whether it decided it rightly or wrongly it had jurisdiction to decide it, and the mere fact that it decided it wrongly is no ground for revision by this Court. There appears to be considerable force in this argument; but, in my opinion, his strongest argument is that the parties, having acquiesced in the jurisdiction both of the Senior Subordinate Judge during Pandit Gulal Chand's absence and of Pandit Gulal Chand after the case was re-transferred to that officer, cannot now object thereto. In this connection he has referred *inter alia* to *Gurdeo Singh* v. *Chandrikah Singh* (1). It is pointed out there that distinction has often been drawn between elements which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised. It is said that the distinction is well founded and the case of *Pisani* v. *Attorney General of Gibraltar* (2) is referred to wherein their Lordships of the Judicial Committee held "that, where there is jurisdiction over the subject-matter, but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived." It is said "the same principle was adopted in *Pratt, Ex parte* (3) and *May, Ex parte* (4), which are authorities for the proposition that where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation and negligence." It is further stated "that defects of jurisdiction arising from irregularities in the commencement of the proceedings may be waived by the failure to take objection at the proper stage of the proceedings," see the rulings quoted at the top of the page 208* of the same volume. Now, in the present case there can be no doubt that the lower Court had jurisdiction over the subject-matter of the present case, and the only objection urged is that there was non-compliance with the procedure prescribed as essential for the exercise of the jurisdiction, *viz.*, that the case had not been transferred to that Court by the District Judge who was the only officer authorised to make such transfers. There is, however, the authority referred to above in support of the proposition that any defect of jurisdiction arising from such an irregularity may be waived. Now, in the present case we find that on each date on which time was extended the parties were present either in person or by Pleader or by agent, and they not only never objected to the jurisdiction of the Court but joined in requesting that time should be extended. In these

(1) 1 Ind. Cas. 913; 36 C. 193 at p. 207; 5 C. L. J. 611.

(2) (1874) 5 P. C. 516; 30 L. T. 729; 22 W. R. 900.

(3) (1884) 12 Q. B. D. 334; 53 L. J. Ch. 613; 50 L. T. 294; 1 Morrell 37.

(4) (1884) 12 Q. B. D. 497; 53 L. J. Q. B. 571; 50 L. T. 744; 32 W. R. 839; 1 Morrell 50.

*Page of 36 C.—*Ed.*

circumstances it is quite clear that the plaintiffs submitted to the jurisdiction of the lower Court and raised no objection to the irregular way in which the Court had become seized of the case. I, therefore, hold that this objection to jurisdiction cannot be listened to now. The time for making the award had been duly extended from time to time in accordance with the provisions of rule 8 of the Second Schedule to the Civil Procedure Code. The award, therefore, was a valid award and the lower Court was right in passing a decree in accordance therewith.

The application for revision accordingly fails and is rejected with costs.

Application rejected.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 2550 OF 1917.

May 20, 1919.

Present:—Mr. Justice Newbould.

BISWAMBHAR MANDAL—

DEFENDANT NO. 1—APPELLANT

versus

NASARAT ALI—PLAINTIFF—RESPONDENT.

Landlord and tenant—Under-raiyati *interest, transferee of, position of—Purchaser of holding at collusive sale, whether can eject transferee of under*-raiyati *interest.*

Apart from custom, a transferee of an under-*raiyati* interest has no interest in the land, and is liable to be ejected at the instance of a purchaser of the holding, even though the purchase is collusive. [p. 356, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 5th September 1917, modifying that of the Munsif, 2nd Court, Patiya, dated the 3rd August 1916.

FACTS appear from the judgment.

Babu *Ramdayal De*, for the Appellant.—The defendant is the appellant. Plaintiff, who is the landlord of a *raiyati* holding, purchased in execution of a decree against the tenant. The plaintiff brought this suit for ejectment. Defendant is the transferee of an under-*raiyat*. The decree has been found to be collusive. The defence *inter alia* was that notice under section 49 of the Bengal Tenancy Act was necessary and that the transfer of the holding was not an encumbrance. The first Court dismissed the suit. The lower Appellate Court decreed it. My submission is that notice under section 49 ought to have been given to me. The sale in which plaintiff purchased has the effect of a private sale. If the holding were non-transferable then I would become a trespasser and even then I would be entitled to a notice. My transfer has not been challenged. There was no annulment and no notice. The interest of a trespasser is to be taken as an encumbrance. See *Bhusan Chandra Ghosh* v. *Srakanta Banerjee* (1). The decree being collusive, the sale is private which entitles me to a notice. See *Amirullah Mahomed* v. *Nazir Mahomed* (2), *Amirullah Mahomed* v. *Nazir Mahomed* (3) and *Lal Mahomed Sarkar* v. *Jagir Sheikh* (4). An under-*raiyat's* interest is protected under section 22 (1), Bengal Tenancy Act. Plaintiff is a lessee of the co-sharer landlord. The decree obtained by a co-sharer landlord cannot have the effect of sale under the Bengal Tenancy Act. There has been a merger as the holding has been purchased by the landlord. The under-*raiyat* has, therefore, acquired the status of a *raiyat*.

Babu *Dhirendra Lal Kastigir* (with him Babu *Tarkeswar Nath Mitra*), for the Respondent.—The plaint clearly states that the defendant is a trespasser. No tenancy could be made transferable except under the provisions of the Transfer of Property Act. See *Aminunnisa* v. *Jinnat Ali* (5). So the defendant being the transferor of a non-transferable holding has acquired the interest of a trespasser. He is not entitled to notice. See *Gangadhar Mandal* v. *Rajendra Nath Ghosh* (6). A collusive decree means nothing but a decree by consent. The question of merger does not arise as the defendant was never accepted as a tenant.

Babu *Ramdoyal De* replied in brief.

JUDGMENT.—This appeal arises out of a suit in ejectment. It was contested

(1) 33 Ind. Cas. 957; 21 C. W. N. 155; 23 C. L. J. 485; 45 C. 756.
(2) 31 C. 932.
(3) 34 C. 104; 3 C. L. J. 155.
(4) 2 Ind. Cas. 654; 13 C. W. N. 913.
(5) 27 Ind. Cas. 271; 20 C. L. J. 548; 42 C. 751; 19 C. W. N. 43.
(6) 19 Ind. Cas. 652 17 C. W. N. 860.

on several grounds before the lower Appellate Court, but now the only contention is that the defendant-appellant is an under-*raiyat* and as such cannot be ejected without notice. It is stated in the judgment of the lower Appellate Court that the contesting defendants are the transferees of one Sarafat Ali who was an under-tenant of Judhistir and Ramratan. The plaintiff has been found to be a holder of a Putni tenure. He brought a rent suit against his occupancy *raiyats*, Judhistir and Ramratan, and in execution of the decree he purchased the holding. Both the Courts below have found that the purchase of the plaintiff in this rent suit was collusive. It is contended that the plaintiff by his purchase obtained no higher rights than he would have got in a private sale. It appears to me that the appeal must fail on the ground that the appellant as a transferee of an under-*raiyati* interest had no interest in the land. See the case of *Aminunnisa* v. *Jinnat Ali* (5). No attempt was made to prove that there was any custom by which under-*raiyati* holdings were transferable. But apart from this, it has not been shown that the result of the finding that the sale in execution of the decree was collusive, diminished the plaintiff's rights. There is no finding that there was any fraud and consequently the decree must be held to be a valid decree obtained by the consent of the defendants. The consent decree and the sale thereunder gave the purchaser as good a title as he would have had at a sale held in execution of the decree under contest.

The appeal fails and must be dismissed with costs.

Appeal dismissed

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 3169 OF 1918.

June 12, 1919.

Present:—Mr. Justice Bevan-Petman.

RAM RATTAN AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

Sardarni DATAR KAUR—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2, 47, 51, 72, O. XXI, r. 11—Execution of decree—Order refusing to execute decree, whether decree—Court, whether can act suo motu under s. 51—Attachment of land—Refusal of Collector to intervene, effect of—Court, whether can make temporary alienation—Punjab Alienation of Land Act (XIII of 1900), s. 16.

Any and every order passed in execution proceedings is not a decree within the meaning of section 2 of the Civil Procedure Code; the decision whether an order is such a decree depends on its nature and contents. [p. 357, col. 2.]

A. applied for execution of his money decree by attachment and sale of certain land belonging to the judgment-debtor. Notice was issued to the Collector asking whether he desired to intervene under section 72 of the Civil Procedure Code. The Collector refused to intervene and the Court held that, under the circumstances, it was useless to send the record to the Collector and that the decree-holder should seek some other remedy for the realization of the decretal money. The District Judge dismissed an appeal from this order holding that it was not open to a Civil Court to take any further action. The decree-holder appealed to the High Court:

Held, (1) that the question whether the appellant was entitled to have the provisions of section 72 of the Civil Procedure Code carried out for his benefit was one relating to the execution of the decree and within section 47 of the Code, and the order was a decree within the meaning of section 2 of the Code: [p. 357, col. 2.]

(2) that the refusal of the Collector to take action was wrong and the executing Court erred in accepting the position taken up by the Collector; [p. 360, col. 2.]

(3) that as the land could not be sold in execution, it was open to the Court to grant something less than a sale and to act under section 72, Civil Procedure Code. [p. 360, col. 2.]

Although section 51, Civil Procedure Code, provides that the Court shall act on the application of the decree-holder, yet an application may be inferred from an action of the Court. [p. 359, col. 2.]

Miscellaneous second appeal from the order of the District Judge, Amritsar, dated the 12th August 1918, confirming that of the Subordinate Judge, 2nd Class, Amritsar, dated the 5th June 1918.

Lala *Tirath Ram*, for the Appellants.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—The facts of this case are that on the 13th June 1904 the appellants obtained a monetary decree against the respondent and the present proceedings arise out of an application for execution made on the 15th April 1913 in which the appellants applied, *inter alia*, for the attachment and sale of certain land of the respondent. The application was made in accordance with section 51 and Order XXI, rule 11 of the Code of Civil Procedure and, on the 26th June 1913, the Court attached the land. Objections with regard to the liability of the land to attachment and again with regard to limitation were ultimately disposed of by the Chief Court of the Punjab in the appellants' favour, and then, on the 6th June 1917 the appellants moved the Court to proceed with the execution. Notice was issued to the respondent and also to the Collector asking the latter whether he desired to intervene under section 72 of the Code of Civil Procedure. The Tahsildar reported in favour of intervening, but the Collector, following a decision of the Financial Commissioner, *Ahmad Khan* v. *Parmanand* (1), held that the Civil Court could not order the land to be sold and refused to intervene. The respondent is a member of an agricultural tribe. The executing Court passed an order holding that, in view of the action of the Collector, it was useless to send the record of the case to him for the purpose of taking action under section 72 of the Code and suggesting that the appellant should seek some other remedy for the realization of the decretal money. The lower Appellate Court, holding that it was not open to a Civil Court to take any further action, dismissed the appeal.

For the respondent a preliminary objection is taken that no appeal lies from the said order because, though it is one under section 47 of the Code of Civil Procedure, it is not one finally determining the question of satisfying, or discharging, the decree, that the order merely suggested some other course to be adopted and that, instead of so doing, the appellants have wrongly chosen to appeal to the lower Appellate Court and then again to this Court. Counsel argues that not every interlocutory order in execution proceedings comes within the definition of a decree in section 2 of the said Code and supports his contention by the decisions in *Behary Lal Pundit* v. *Kedar Nath Mullick* (2), *Jogolishury Debea* v. *Kailash Chundra Lahiry* (3) and *Deoki Nandan Singh* v. *Bansi Singh* (4). For the appellants reliance is placed on the wideness of the words "and the determination of any question within section 47" in section 2 of the Code. Whilst agreeing that any and every order passed in execution proceedings may not be a decree within the meaning of section 2 of the Civil Procedure Code, I am of opinion that the decision whether an order is such a decree depends on its nature and contents. An order, for example, refusing to summon a witness would not be within section 47 and could not be held to be a decree. In the present case the executing Court refused to execute the decree by again calling upon the Collector to submit a proposal for a temporary alienation of the land and the remedy of the appellants in this respect was finally disposed of. The question whether the appellants were entitled to have the provisions of section 72 carried out for their benefit was certainly one relating to the execution of the decree and within section 47. I hold that the order is a decree within the meaning of section 2 of the Code of Civil Procedure and I overrule the objection.

On the merits the Counsel for the appellants, relying on *Badar Din* v. *Bura Mal* (5), contends that, though a Civil Court may not, owing to the prohibition contained in section 16 of the Punjab Alienation of Land Act, order the sale of land, the property of a member of an agricultural tribe, such Court may attach the land and proceed to give satisfaction to a decree-holder by means short of a sale. He further contends that the remarks in *Ahmad Khan* v. *Parmanand* (1) were *obiter dicta* and that

(1) 43 Ind. Cas. 356; 8 P. R. 1917 Rev; 7 P. W. R. 1917 Rev.

(2) 18 C. 469; 9 Ind. Dec. (N. S.) 313.

(3) 24 C. 725 (F. B.); 1 C. W. N. 374; 12 Ind. Dec. (N. S.) 1152.

(4) 10 Ind. Cas. 371; 14 C. L. J. 35; 16 C. W. N. 124.

(5) 4 P. R. 1903.

still more recently in *Salih Mohammad* v. *Mehar Singh* (6), after a full consideration of the subject, the opinions expressed in the former case had been dissented from and the decision of the Chief Court had been agreed with and he, therefore, contends that the executing Court should have ignored the refusal of the Collector to intervene and have directed him to make a temporary alienation of the land, or, at least, have appointed a Receiver to manage the land and to pay the income into Court for the benefit of the decree-holders.

For the respondent it is contended that the application for execution contained merely a prayer for attachment and sale and that no other specific relief after the attachment was sought, and that by referring to the Collector with a view to making a temporary alienation, the executing Court was acting on its own motion, that at no time did the appellants seek relief by the appointment of a Receiver and that in this last respect any appeal was premature. Attention is called to the words "on the application of the decree-holder" in section 51 of the Code of Civil Procedure and it is contended that a Court has no power to take action under that section of its own motion. It is further sought to distinguish *Badar Din* v. *Bura Mal* (5), because in that case a reference had been made by the Collector to the Civil Court and it was, therefore, necessary for the Chief Court to refer to section 326 of the Code of Civil Procedure, 1882, which corresponds to section 72 of the present Code. Finally reliance is placed on *Ahmad Khan* v. *Parmanand* (1).

The points involved are of some importance to the appellants because if the contentions of the respondent are to prevail, their remedies by a fresh application praying that a Receiver be appointed or that a temporary alienation of the land be made are time-barred. Section 72 (1) of the Code of Civil Procedure is as follows:—"Where in any local area... the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorise the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share."

In *Badar Din* v. *Bura Mal* (5) it was pointed out that section 16 of Act XIII of 1900 did not prohibit the attachment in execution of a decree of the land belonging to members of an agricultural tribe and that a decree-holder is, therefore, still entitled to claim a declaration that the land of the judgment-debtor, even though the latter happens to be a member of such tribe, is liable to attachment and to be thereafter dealt with as in section 326 (now section 72), Civil Procedure Code, provided. The relevant portion of paragraph 56, Chapter II, section 21, Volume I, of the Rules and Orders of the Chief Court of the Punjab is: "The Act (The Punjab Alienation of Land Act) does not prohibit the attachment of land belonging to members of an agricultural tribe and action under section 72, Civil Procedure Code, may be taken in regard to such land."

In the present case the Collector had made temporary alienations of the land for a certain number of years in the execution of the decree of another decree-holder and what was now sought was that he should make similar and further temporary alienations in the execution of the decree of the appellants, but which he refused to do on the strength of *Ahmad Khan* v. *Parmanand* (1).

In that case the Financial Commissioner held that under section 51 and Order XXI, rule 30, of the Code there was no power of temporarily transferring the property of the judgment-debtor to any person and that a temporary alienation of the immoveable property of the judgment-debtor is only possible under the conditions specified in section 72 of the Code (section 68 and Schedule III not being in force in the Punjab) and such alienation is not made by the executing Court but by the Collector in his executive capacity after he has been formally authorised in that behalf by the Court in the manner described in that section. He further held that as a sale in execution of a decree of land belonging to

(6) 51 Ind. Cas. 399; 1 P. R. 1919 Rev.

a member of an agricultural tribe is illegal under the provisions of section 16 (1) of the Punjab Alienation of Land Act and section 72 of the Code of Civil Procedure clearly postulates and implies that the Collector's representation is to be made with reference to, and in view of, a proposal to sell attached land, it follows that no temporary alienation of the land of such member can be made by the Collector under the authority of the latter section and that the executing Court, though it can attach the land, can take no further action towards satisfying the decree by selling or otherwise dealing with, that land. In this respect the learned Financial Commissioner differed from *Badar Din* v. *Bura Mal* (5) and the portion of the Rules and Orders of the Chief Court, Punjab, already quoted. As the Collector had made no reference to the Court and the latter had made no representation to the former suggesting a temporary alienation, it was rightly held that the procedure of the Collector was irregular and *ultra vires* but the further matters dealt with did not arise and the decision as to them was *obiter dictum*. In *Salih Mohammad* v. *Mehar Singh* (5), a case in which the executing Court had asked the Collector to intervene with a proposal for a temporary alienation under section 72 of the Code of attached land of a member of an agricultural tribe and the Collector did propose a temporary alienation for some years, the learned Financial Commissioner held that the Collector had under that section jurisdiction to make the proposal notwithstanding the provisions of section 16 (1) of the Punjab Alienation of Land Act and approved of *Badar Din* v. *Bura Mal* (5) and dissented *pro tanto* from *Ahmad Khan* v. *Parmanand* (1). It was pointed out, with reference to the word 'objectionable' in section 72, that a representation by a Collector that an order of sale is illegal by reason of section 16 (1) of the Punjab Alienation of Land Act would fall within the language of that section, that an order did not cease to be 'objectionable' because it is contrary to law, that the word 'objectionable' was applicable to any process to which objection might legally be taken and that by the passing of the Punjab Alienation of Land Act it had never been intended to prohibit the method of temporary alienation. It was also held that the position of a Revenue Officer executing a decree of a Civil Court by attachment, or temporary alienation, or otherwise, is that of a ministerial officer of the Civil Court taking his orders from such Court and he has no power in himself to order a temporary alienation.

In my opinion there is no force in the contention of the appellants that the executing Court should, when it found that the Collector would not take action, have, at least, appointed a Receiver of the land to realize the income. They had not applied to the Court for this remedy and it was never refused and when by its order the Court expressly suggested that they would apply for some remedy other than a temporary alienation by the Collector, they failed to do so. It was no part of the duty of the executing Court to grant remedies unasked and unsolicited and which possibly a decree-holder may not desire. But I am also of opinion that the contention of the respondent that the attempt by the executing Court to have a temporary alienation of the land made through the Collector was *ultra vires* and that the application for execution by the appellant must be regarded as strictly limited to a demand for attachment and sale, is erroneous. No doubt, section 51 of the Code provides that the Court shall act on the application of the decree-holder, but it has been repeatedly held that an application may be inferred from an action of the Court. There is no doubt but that the Court must have been moved, possibly orally, to take action under section 72. No objection was raised at the time and it is too late now to take exception for the first time to the form of such an application. But it is not clear that such a further application was legally necessary. The appellants had complied with section 51 and Order XXI, rule 11 of the Code, which do not expressly relate to temporary alienations and apparently, they had complied with the law when they applied for attachment and sale. When it was seen that the land could not be sold in execution, it was open to the Court to grant something less than a sale and to act under section 72.

The questions which arise are not free

from difficulty. As explained in *Darya Singh* v. *Mahtab* (7), the natural meaning of section 72 of the Code is that the initial proceedings are taken by the Civil Court as if it were going to sell the land itself in the ordinary way, but section 72 empowers the Collector to intervene and represent to the Civil Court (1) that the sale of the land is objectionable, (2) that the decree may be satisfied by a temporary alienation, or some other way, in a reasonable time. On receiving this representation the Civil Court may either authorize, or refuse to authorize, the Collector to take action and, in the latter case, execution will proceed in the ordinary way and an appeal would lie from the order of the Civil Court either giving or refusing authority to the Collector. In practice apparently the executing Court requests the Collector to make the proposal and having received the proposal, the Court disposes of the matter by giving the authority. But what is to happen if the Collector refuses to move in the matter? Can the Court compel him to do so, and if so, by what process? or is the Court, on such refusal, competent to itself make a temporary alienation? If the Collector is merely a ministerial officer of the Court, the Court presumably has the power. Again, it may be argued that section 72 recognises the inherent power of the Civil Court to make temporary alienations, the introduction of the Collector being merely the means by which power is exercised.

In *Raja Ram* v. *Durga Dut* (8) it was held that there was no appeal to the Commissioner from a refusal of the Collector to intervene and make a proposal when a Civil Court had sent the record to the Collector for the purpose of giving him an opportunity to act under section 72 of the Code. We are here concerned with an appeal from the action of the Civil Court. Apparently in the cases already referred to there was a reference by the Collector to the Civil Court, whether induced by the Court or not, and I am not aware of any case in which, like the present, the Collector has refused to comply with the request of a Court to make the proposal and the consequent action to be adopted by the Civil Court has been discussed or dealt with. It appears to me that the Legislature has not expressly provided for a case where the decree-holder himself desired that the provisions of section 72 should be acted upon for his benefit, it being assumed that he would always prefer a sale. The section is in the interest of judgment-debtors. A Receiver is appropriately appointed when a share in a partnership is involved and in other cases, but, apart from the directions of the Chief Court contained in its Rules and Orders, the appointment of a Receiver in cases like the present would not be very appropriate and would be attended by considerable difficulties. The Chief Court has indicated that the provisions of section 72 should be applied.

I am by no means sure that I am right in so doing, but, following the authorities in so far as they appear to be applicable, I hold that the refusal of the Collector, based solely on *Ahmad Khan* v. *Parmanand* (1), was wrong and that the executing Court erred in accepting the position taken by the Collector. The Court should have continued to follow the instructions laid down for its guidance and have moved the Collector again, and its refusal to do so gave the appellants the right to appeal from its order. I, therefore, accept the appeal, remand the proceedings to the executing Court and direct it to move the Collector again to make a proposal under section 72 of the Code of Civil Procedure. In view of the recent decision in *Salik Mohammad* v. *Mehar Singh* (6), the Collector may probably see his way to complying with the reference by the Court. I do not award any costs to the appellants because, as the admitting order of this Court will show, they primarily pressed their right to have a Receiver appointed.

Appeal accepted.

(7) 25 P. R. 1894.
(8) 8 Ind. Cas. 391; 5 P. R. 1910 Rev

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 11 AND 12 OF 1919.

July 14, 1919.

Present:—Mr. Justice Das.

TAFAZUL KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DR. MOHAMMAD BAKSHI KHAN—PLAINTIFF, AND ALTAF HOSAIN KHAN—DEFENDANT—RESPONDENTS.

(*Limitation Act (IX of 1908), Sch. I, Arts.* 48, 49, 144—*Misappropriation of materials of house—Suit to recover price of materials—Limitation, commencement of —Suit to recover possession of property and for correction of entry in Record of Rights—Limitation.*

A suit to recover the price of materials of a house removed and misappropriated by the defendants must be brought within the period of limitation prescribed by Article 48 of Schedule I to the Limitation Act, and time begins to run from the date when the plaintiff first learns in whose possession the materials are. [p. 362, col. 1.]

A suit for possession and mesne profits in which the plaintiff asks for a declaration that an entry in the Record of Rights is incorrect is governed by the 12 years' rule of limitation. [p. 362, col. 1.]

Appeals from an order of the Officiating District Judge, Patna, dated the 16th September 1918, reversing a decision of the Munsif, Bihar, dated the 4th June 1918.

FACTS.—The plaintiff is the step-brother of the defendants. He was in the Government service in the Medical Department in the Punjab and N. W. P. When the father of the plaintiff and the defendants died, the defendants got possession of the entire family property. The plaintiff instituted a civil suit which was compromised on 4th January 1900. Under the compromise the plaintiff got amongst other things a *pucca* house and some trees as his share. After the compromise decree the plaintiff again went back to join his service, asking defendant No. 1 to look after his property during his absence. In the survey proceeding which was finally published on 10th June 1910, the plaintiff's name was recorded in pursuance of the compromise in respect of the house, but in respect of the trees the names of defendants were recorded. When the plaintiff came to his native village to permanently reside, he found that the defendants were wrongfully in possession of a *kothri* (room) of the aforesaid house and had wrongfully removed the materials of the house. He further was resisted in his possession of the trees. He, therefore, brought two suits against the defendants Nos. 204 and 205 of 1917 on the 10th of July 1917. The Suit No. 204 of 1917 was in respect of possession of the portion of the house of which he had been dispossessed and for recovery of Rs. 307-12-0 as damages for the materials of the house removed by the defendants. In paragraph 8 of the plaint in Suit No. 204 of 1917 the plaintiff stated as follows:—"When the plaintiff began to make search and enquiry about the house and other properties, then he learnt that defendants Nos. 1 to 4 have illegally and without having any right removed all the materials of his house, as per details given below, on different dates and appropriated the same to his own use." It was out of this suit that Second Appeal No. 11 of 1919 has arisen. Suit No. 205 was for possession of the trees with a declaration that the Survey Khatian was incorrect. The Second Appeal No. 12 of 1919 arose out of this suit. The defendants, amongst other things, pleaded that the suits were barred by limitation. The Munsif, without deciding the merits of the cases, dismissed both the suits as barred by limitation. The District Judge on appeal held that the suits were not barred by limitation, set aside the decision of the Court of first instance and remanded them to be tried on merits. The defendants appealed in both the cases to the High Court.

Mr. *Siva Narain Bose*, for the Appellants.

Mr. *Fakhruddin*, for the Respondent.

JUDGMENT.—I think the lower Appellate Court is right in the view which it has taken on the question of limitation. Miscellaneous Appeal No. 11 of 1919 arises out of Suit No. 204 for possession of a portion of a house and the price of materials alleged to have been removed by the defendants. The Record of Rights was finally published on the 10th June 1910. Therefore the plaintiff must be presumed to have been in possession on the 10th June 1910. The suit was instituted on the 9th July 1917. Therefore the suit for possession of a portion of the house was clearly within time.

So far as the suit for materials is concerned, the question for my determination is whether Article 48 or Article 49 of the Limitation Act applies. Article 48 applies to

suits for specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion. Article 49 applies to a suit for specific moveable property not falling within Article 48. It will be noticed that Article 49 is a general section and it will apply unless it is clearly established that the case comes under Article 48. It is, therefore, necessary to examine the plaint in order to see whether the case comes under Article 48. In my opinion, the plaint makes a definite case of conversion. I hold, therefore, that Article 48 applies and that the plaintiff is entitled to bring his suit within three years from the date when he first learns in whose possession the property is. The plaintiff says that he came to know of the illegal acts of the defendant on the 31st May 1915 The suit, having been filed on the 10th July 1917, is clearly within time.

On these findings Miscellaneous Appeal No. 11 of 1919 must be dismissed with costs.

I now come to Miscellaneous Appeal No. 12 of 1919. The only point that has been argued before me is that the suit is in substance a suit for the correction of an entry in the Record of Rights and that, therefore, the suit not having been brought within six years from the date of the final publication of the Record of Rights is barred by limitation. I cannot agree that the suit is in substance a suit for the correction of an entry in the Record of Rights. The suit is a suit for possession and mesne profits, though the plaintiff has asked for a declaration that the entry in the Record of Rights is incorrect. It is well-settled that the 12 years' rule applies to a suit of this nature. The suit is, therefore, within time. I would dismiss Miscellaneous Appeal No. 12 of 1919 with costs.

It must be distinctly understood that for the purpose of these decisions I have assumed that every allegation in the plaint is correct. I have come to the conclusion that on the allegations made in the plaint the plaintiffs' suits are not barred by limitation. It is, of course, still open to the trial Court to hold on evidence that the plaintiff's suits are barred by limitation, but it must, of course, be guided by the principles which I have laid down in this judgment.

Appeals dismissed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 171 OF 1918.

July 16, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Wallach.

QADAM SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

NATHU SINGH AND ANOTHER—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of instalment decree—Payment of instalment out of Court—Admission by decree-holder and judgment-debtor—Certification, whether necessary—Limitation.

N. obtained a decree against *Q.* for a specific sum of money payable by six annual instalments, with the proviso that in case of default *N.* could realise the whole sum with interest. *N* applied to execute the decree alleging that the second and third instalments had been paid, but the fourth had not. *Q.* contended that the application was barred by limitation inasmuch as *N.* had not certified payment of the second and third instalments to the Court, and that the fourth instalment had also been paid:

Held, that as *Q.* admitted payment, no question of certifying to the Court of any payment out of Court arose in the circumstances, and that it was not necessary for *N.* to prove such payment. [p. 363 col. 1.]

Execution second appeal against the order of the District Judge, Meerut, dated the 27th May 1918.

Mr. *Uma Shankar Bajpai*, for the Appellant.

Mr. *R. Malcomson* (for Mr. *A. E. Ryves*), for the Respondents.

JUDGMENT.—This appeal is in our judgment wholly without merit. A decree was passed against the appellant on the 13th of August 1910 for payment of Rs. 1,446 by six annual instalments of Rs. 241 payable on the 1st of August of each year. The decree further provided that in the event of default being made in the payment of any of the instalments the decree holders would be entitled to realise the whole of the decretal amount with interest. The first application for execution was made on the 21st of February 1912 on the allegation that the first instalment had not been paid. That application was subsequently withdrawn upon the judgment-debtor paying to the decree-holders the amount of the first instalment On the 4th of August 1915 the second application for execution was made on the allegation that the second and third instalments

had been paid but default had been made in the payment of the fourth instalment. The present application for execution was made in 1917. The contention on behalf of the judgment-debtor, the appellant before us, in the Court below was that the application of the 4th of August 1915 was time-barred, and this contention is based on the fact that the payment of the second and the third instalments had not been certified to the Court as required by Order XXI, rule 2 of the Code of Civil Procedure. In our opinion this contention is without force inasmuch as the judgment-debtor, so far from denying that the second and third instalments had been paid, admitted by a petition in Court the payment of those instalments and only contended that he had paid the fourth instalment also and that no default had been made. As the judgment-debtor admitted payment, it was not necessary for the decree-holders to prove that the second and the third instalments had been paid and that default had been made in payment of the fourth instalment only. No question of certifying to the Court of any payment made outside the Court arises in the circumstances of this case. In this view the rulings to which the learned Vakil for the appellant has referred have no bearing on the present case. We express no opinion as to whether we agree or not with the decision of this Court in *Chhattar Singh* v. *Amir Singh* (1), which is one of the cases cited to us. We dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

(1) 32 Ind. Cas. 590; 38 A. 204; 14 A. L. J. 132.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 676 OF 1918.

July 14, 1919.

Present:—Mr. Justice Das.

Babu JAGDEEP SAHAY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SONU LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (4) (b)—Vendor and purchaser—Consideration, part of, non-payment of, effect of—Title, whether passes—Lien of vendor—Contract to contrary—Burden of proof—Election—Remedies, several—Choice of one, whether bars rest.

In a sale of immoveable property, title to the property passes to the purchaser on the execution of the deed of sale, although the seller is entitled to a charge on the property for the amount of the purchase-money or any portion thereof remaining unpaid to him with interest thereon, unless there is a contract between the parties that title to the property will not pass to the purchaser until the full consideration has been paid: but such a contract must be alleged and proved by the party setting it up. [p. 364, col. 2.]

If two remedies are equally available to a party, and he pursues one remedy and fails therein, equity will step in and prevent him from pursuing the other remedy, because he chooses one remedy at his own peril and cannot turn round and say, when he fails therein, that he will now pursue the other remedy open to him. [p. 365, col. 1.]

Appeal against the decision of the District Judge, Patna, confirming that of the Munsif, Bihar.

Messrs. *S. N. Palit* and *Bimola Charan Sinha*, for the Appellants.

Messrs. *Kulwant Sahai* and *Siveshwardayal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellants against the respondents for an order upon the defendants to make over a sale-deed to the plaintiffs, for possession of the property covered by the sale-deed, dated the 6th January 1916, and for other incidental reliefs.

The facts so far as they are necessary for the determination of this appeal are as follows:—

On the 6th January 1916, defendant No. 1 did execute a properly registered conveyance in respect of the properties in suit in favour of the plaintiffs. Subsequently defendant No. 1 sold the same properties to defendants Nos. 2 to 4, and it is on the basis of the sale-deed, dated 6th January 1916, that the plaintiffs have brought the suit out of which this appeal arises.

The defence of defendant No. 1 is that the document was procured from him under circumstances which negative the implication of a free consent on his part and that, therefore, he never executed the document in favour of the plaintiffs and that he is not bound by it at all. It will be noticed that he does not set up a case that there was a contract between him and the plaintiffs that

the conveyance would not be operative until the full consideration money is paid. It is important to remember this fact in view of the finding of fact arrived at by the lower Appellate Court.

The Court of first instance found that the document of the 6th January 1916 was a genuine document and was executed for consideration. It found that the consideration of the conveyance was Rs. 450 and that the plaintiffs had out of that consideration deducted Rs. 175 and Rs. 160 in respect of the money due to them from defendant No. 1 on account of certain other transactions. It further found that Rs. 20 was paid by the plaintiffs in cash to the defendant No. 1 and that Rs. 95 still remained to be paid by the plaintiffs to the defendant No. 1. Upon this finding the Court of first instance gave a decree to the plaintiffs conditional on the plaintiffs paying in Rs. 95 within one month to defendant No. 1. The Court of first instance further decreed that on failure on the part of the plaintiffs to pay in Rs. 95 within a month, the plaintiffs should get a money decree for Rs. 160 which was due from defendant No. 1 to the plaintiffs and for Rs. 20 which had been paid by the plaintiffs to defendant No. 1. Against this decree there was an appeal to the lower Appellate Court. But it will be convenient to deal with another matter before I deal with the decision of the lower Appellate Court.

It appears that the plaintiffs could not pay Rs. 95 into Court within the time specified in the decree of the Court of first instance. Therefore, on the 12th July 1917, the plaintiffs made an application to the Court of first instance for enlargement of the time to enable them to pay Rs. 95 into Court. That application was refused, and as I have stated before, the plaintiffs appealed from the decision of the Court of first instance. The lower Appellate Court does not dissent from the finding of the Court of first instance that the sale-deed was duly executed for a consideration of Rs. 450, but it thought that because the plaintiffs had not paid the full consideration money to defendant No. 1, the plaintiffs' suit should have been dismissed by the Court of first instance. In my opinion that is entirely erroneous It is obvious that the title accrued to the plaintiffs on the execution of the sale deed. If the full consideration had not been paid by the plaintiffs to the defendant, the defendant would have a lien on the property sold for the unpaid purchase-money, but it cannot for a moment be argued that title to the property would not pass until the full consideration money had been paid. Section 55 of the Transfer of Property Act is perfectly clear on this point. Section 55, clause (4) (*b*), provides that where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, the seller is entitled to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part. Therefore it recognises that the title passes to the purchaser on the execution of the document, although the seller is entitled to have a charge on the property for the amount of the purchase-money or any portion thereof remaining unpaid to him with interest thereon. No doubt the opening words of section 55 of the Transfer of Property Act are: "In the absence of a contract to the contrary." There may, no doubt, be a contract between the parties that title to the property will not pass to the purchaser until the full consideration money has been paid, but such a contract must be alleged and proved and the onus would undoubtedly lie on the party setting up the contract. As I read the judgment of the lower Appellate Court, it finds that there was such a contract in this case, but, in my opinion, the lower Appellate Court was not entitled to make a case for the defendant which the defendant himself did not make. The whole case of the defendant in the written statement filed before it is that he never executed the conveyance dated the 6th January 1916. That was the only matter before the Courts below and the Courts below have found that the story told by the defendant is false. In my opinion the lower Appellate Court was not entitled to go into the question whether there was or was not a contract to the contrary in this case. I am of opinion, therefore, that so far as this question is concerned, it must be held that title to the property passed to the plaintiffs and unless there be some sort of equity in favour of the defendant, the plaintiffs are entitled to the reliefs claimed by them in the plaint.

But it is urged on behalf of the respondents that there is in fact such an equity

in this case in favour of the defendants. The learned Vakil appearing on behalf of the respondents relies upon the petition for enlargement of time put in by the plaintiffs on the 12th July 1917. The argument, so far as I have been able to understand the same, is that the plaintiffs by putting in the application on the 12th July 1917 adopted in its entirety the decree which was passed by the Court of first instance, and, therefore, the plaintiffs could not file an appeal from the decree of the Court of first instance. The argument, so far as I understand the same, is an argument that the plaintiffs have elected one remedy and, therefore, are estopped from pursuing another remedy. In my opinion the argument is not well-founded. It has been repeatedly held that election is the choice between two or more co-existent and inconsistent remedies. It is really based on the principle of estoppel. If two remedies are equally available to a party and if with his eyes open he pursues one remedy and if he fails therein, equity will step in and prevent him from pursuing the other remedy, because he chooses one remedy at his own peril and cannot turn round and say when he fails therein that he will now pursue the other remedy which was available to him. But in this case can it be said that the plaintiffs had two inconsistent remedies? On the findings of the Court of first instance there was a sum of Rs. 95 undoubtedly due by them to defendant No. 1. They could pay in Rs. 95 to defendant No. 1 and yet challenge that portion of the decree which said that unless they paid in Rs. 95, they could not get a conveyance of the property in their favour In my opinion the remedies were not inconsistent at all. The plaintiffs are undoubtedly liable to pay Rs. 95 and they could appeal from the decree passed by the Court of first instance and yet pay in Rs. 95 to defendant No. 1. If the remedies available to the plaintiffs were not inconsistent in any way, then no question of estoppel by election arises in the case at all. In my opinion the judgment and decrees of the Courts below cannot be sustained.

I would, therefore, allow this appeal, set aside the judgments and decrees of the Courts below and give the plaintiffs a decree in terms of the reliefs Nos. 1, 2, 3 and 4 claimed by them. The defendant No. 1 is undoubtedly entitled to a lien on the property in respect of the money still remaining unpaid. He can pursue that remedy, but I do not think that I should in this decree fix a time within which the plaintiffs must pay Rs. 95 to defendant No. 1. I make no order as to costs.

Appeal allowed.

S. A. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 84 B OF 1917.

October 5, 1918.

Present:—Mr. Mittra, A. J. C.

SITABAI—APPLICANT

versus

SHANKAR AND OTHERS—NON-APPLICANTS.

Guardians and Wards Act (VIII of 1890), s. 41 (2) (3)—Order directing delivery of property, when can be made.

A Court has no power to order the guardian of the person and property of a minor to deliver possession of the property in respect of which he has been appointed guardian under the Guardians and Wards Act, unless the powers of the guardian have ceased for any of the reasons enumerated in section 41 (2) of the Act. [p. 366, col. 1.]

The power of compelling a guardian to deliver possession of the minor's property is meant for the protection of the minor, and can only be exercised in the interests of the minor. It cannot be invoked by persons claiming adversely to the minor, who have their remedy in a regular suit. [p. 366, col. 1.]

Revision of the order of the District Judge, Amraoti, in Miscellaneous Case No. 18 of 1914, dated the 9th May 1917.

Mr. *G. V. Deshmukh*, for the Applicant.

Messrs. *M. V. Joshi* and *V. D. Sathaye*, for the Non-Applicant.

JUDGMENT.—The minor Narain was adopted by Sitabai, the widow of Mr. P. N. Jog, who left a Will with certain directions for the adoption of a son. It has been decided by this Court that the adoption is invalid, but there is an appeal pending against that decision before His Majesty in Council.

Sitabai was appointed guardian of the person and property of the minor when the executors under her husband's Will retired with the permission of the Court and handed

over the estate to her by the order of the Court.

The present proceedings have been taken at the instance of persons claiming to be interested under the Will. The District Judge has passed an order purporting to be under section 41, sub-section 3 of the Guardians and Wards Act, 1890, calling upon Sitabai to deliver possession of all the property handed over to her as guardian. The ground upon which this order is based is that her guardianship has now ceased by reason of the decision of this Court. All that has been decided is that the adoption is invalid, but pending the appeal to the Privy Council it will be the duty of the adoptive mother to protect the minor's interest by prosecuting the appeal. I have been informed that the boy is still living with the adoptive mother and that there is no question of any adverse interest between them. I do not think that upon a fair construction of the pleadings the guardian can be said to have set up an adverse title for herself. In order to defeat the non-applicants she urged that even if the adoption is invalid, she is entitled to the estate of her husband as owner.

Section 41 (2) enumerates the cases where the powers of the guardian to the property cease. This is not one of them. No order has been passed for the removal of the guardian. Therefore the lower Court had no power to call upon Sitabai to deliver the property in her possession.

The power of compelling the guardian to deliver possession of the property can only be exercised in the interests of the minor. These summary powers are meant for his protection. They cannot be invoked by persons claiming adversely to the minor. The remedy for such adverse claimants lies in a regular suit.

The minor is lawfully in possession of the estate, though possession was obtained from the executors with the consent of the Court. The Court has no power to deprive him of that possession, merely because a declaratory decree regarding the minor's adoption has been passed.

The result is that the proceedings of the District Judge culminating in the order, dated the 9th May 1917, are set aside. The non-applicants will pay Rs. 50 as costs of this application to the applicant.

Application allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 321 OF 1917.

June 17, 1919.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

JAI CHAND—PLAINTIFF—APPELLANT

versus

GIRWAR SINGH—DEFENDANT—RESPONDENT.

Adverse possession, title by—Burden of proof—License—Revocation, proof of.

In a suit for ejectment, the plaintiff's case was that the defendant had been put in possession for certain purposes by leave and license. The defendant denied the license and set up an adverse title; but in appeal to the High Court it was urged on his behalf that it was not proved that the license was ever granted or revoked:

Held, that the plaintiff having based his case upon the license, from the moment the defendant repudiated the license and set up adverse possession, it was no longer possible for him to rely upon the license, or to deny its revocation, and that his position was that of a trespasser without any defence unless he established his title by adverse possession. [p. 367, col. 1.]

On the defendant's plea of adverse possession the lower Appellate Court, holding that the onus lay on the plaintiff to prove not only his title but also his possession within twelve years of the suit, dismissed the suit. In appeal to the High Court:

Held, that the decision of the lower Appellate Court was erroneous in law, which was that the onus of establishing a title to property by reason of possession for a certain stipulated period lay on the person asserting such possession. [p. 367, col. 2.]

Second appeal from a decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Cawnpore, dated the 13th December 1916.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Mr. *Baldeo Ram Dave* and Dr. *Surendra Nath Sen*, for the Respondent.

JUDGMENT.

WALSH, J.—This appeal must succeed. The plaintiff is the Zemindar of the

village and his title has been held established in both Courts. He alleges that the defendant was put in possession for certain purposes, unnecessary to mention, by leave and license. The defendant denied the license in his written statement and set up an adverse title. Mr. Baldeo Ram for the defendant says that it is not proved that the license was ever granted or revoked. In our opinion that is now immaterial. The plaintiff based his case upon it and from the moment that the defendant repudiated the license and set up adverse possession, it was no longer possible for the defendant to rely upon the license or to deny its revocation. He was in the position of a trespasser without any defence to the suit, unless he succeeded in establishing his title by adverse possession.

With reference to that part of the case, I propose to cite two passages from the judgment of the lower Appellate Court. Having held that the plaintiff had shown title the learned Judge said: "It is equally obvious that the appellant failed to substantiate his allegation of adverse possession. It was not at all asserted when the title of the Zemindar was denied and his own asserted." This being so, there is no finding of adverse possession and in our opinion the defence fails and the plaintiff is entitled to succeed. The reason why the Judge in the lower Appellate Court gave judgment for the defendant is contained in the following words which I propose to quote, for the reason that, in my opinion, a false impression of what is the actual law has prevailed for a very considerable time in the lower Courts. There is at least one authority in the Law Reports of this Province by which the lower Courts, unless they happen to be familiar with the Privy Council decisions, may reasonably hold themselves bound, and it is high time that a clear indication was given as to the actual law as it stands at the present moment in this Province, as throughout India upon this question. The learned Judge says:—"In this case which was an action for ejectment, where the defendant advanced the plea of adverse possession, in my opinion, the onus lay on the plaintiff-respondent to prove not only his title but also his possession within twelve years of the suit. It was held in *Inayat Husen* v. *Ali Husein* (1) that the plaintiff should lay the foundation for his case by proving that he was in possession of the land within limitation." In our view that is not the law and never has been the law in this or in any other Province in India. The matter was recently made perfectly clear by an important decision of the Privy Council reported as *Secretary of State* v. *Chelikani Rama Rao* (2). The importance of that decision is this:—The Madras High Court in that particular case had followed a view which the Madras Court had been taking from time to time since the year 1885; the same view apparently as that which is declared in *Inayat Husen* v. *Ali Husein* (1), namely, that in a suit by an owner of property for possession, to which Article 144 of the Limitation Act applied, the plaintiff had to show what is called a subsisting title. The Privy Council overruled that decision and in doing so clearly overruled the three antecedent decisions of the Madras High Court cited and relied upon in the judgment of the Madras High Court which was under review, and they did so in language contained in the opinion of Lord Shaw which to our mind is as binding upon us and upon inferior Courts of this Province as any Statute can be. Their Lordships," says Lord Shaw, "are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say: 'I am here, be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.' Such a singular doctrine can be well illustrated by the case of India. .....It would be contrary to all legal

(1) 20 A. 182; A. W. N. (1898) 19; 9 Ind. Dec. (N. S.) 478.

(2) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession." We hold ourselves bound by that declaration of the law and compelled to say that *Inayat Husen* v. *Ali Husein* (1) and similar cases are no longer law, and inasmuch as the lower Appellate Court has held itself bound by *Inayat Husen* v. *Ali Husein* (1), we must reverse its decision.

I now propose, as shortly as I can in justification of our view that the law is really settled and has only become unsettled by misunderstanding, to mention the history of the authorities upon this subject. The point arose in *Parmanand Misr* v. *Sahib Ali* (3), where it was disposed of by a three Judge Bench. It is important to observe that the character of the suit in that case was one to which Article 142 of the Limitation Act would have applied. "There is a clear distinction," they said, "as to the onus of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In each case the plaintiff must plead his title, and if that title is in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. Where the defence is twelve years' adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been proved or admitted, was lost."

In *Jafar Husain* v. *Mashuq Ali* (4) the same question as to burden of proof in cases of adverse possession arose in a suit to which also Article 142 of the present Act would have been applicable, and the Chief Justice in his judgment in that case again made the matter perfectly clear. He said: "We are satisfied that where a plaintiff comes into Court alleging that he has been dispossessed within limitation, and when the defence is adverse possession, the question of limitation becomes a question of title; the plaintiff must at least give some *prima facie* evidence to satisfy the Court in the first instance that he was in possession within twelve years before the defendant can be called upon to make out his defence of twelve years' adverse possession."

Whether the expression that the question of limitation becomes a question of title is accurate or not, that case makes it quite clear that there is a clear distinction between cases such as those covered by Article 142 where the plaintiff claims possession by reason of dispossession, and cases such as those covered by Article 144 where the plaintiff stands upon his title and leaves the defendant to show that he has lost it. And the decision which I have just cited from I. L R. 14 Allahabad [*Jafar Husain* v. *Mashuq Ali* (4)] was itself based upon a decision of the Privy Council reported as *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (5), where their Lordships held: "That the claimants had shown that they were formerly proprietors of the land to which they alleged title but they had been dispossessed some years before the suit was brought by them and the land was occupied by the defendants who denied their title. That being so, the burden of proof was on the claimants to prove their possession at some time within the twelve years next preceding the suit."

The action being one to which Article 142 of the Limitation Act applied, it was on the claimants or plaintiffs to prove their possession at some time within the twelve years. The reasoning of that decision, if it is not presumptuous to say so, is quite clear. Where a plaintiff comes into Court complaining of dispossession, and founds his cause of action upon a specific act of the defendant of that kind, it stands to reason that inasmuch as he is compelled to establish a cause of action of some kind within limitation he must show that he was in possession within limitation; otherwise he could not have been dispossessed, and dispossession is the grievance of which he complains. So that, in our opinion, at any rate down to the year 1897 the law as enunciated by this Court was based upon the decision of the Privy Council and ought to have been accepted without controversy. Unfortunately a

(3) 11 A. 438; A. W. N. (1889) 155; 6 Ind. Dec. (N. S.) 708.

(4) 14 A. 193; A. W. N. (1892) 55; 7 Ind. Dec. (N. S.) 494.

(5) 16 C. 473 (P. C.) 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312.

case crept into the Law Reports which is difficult to explain and certainly never should have been reported, namely, the case upon which the learned Judge has acted in this particular decision. That is the case of *Inayat Husen* v. *Ali Husen* (1). We are not concerned to say whether or not the case in point was rightly decided, but the vice of the decision is contained in a sentence in the judgment which I propose to quote and which unfortunately formed a prominent feature of the head-note. "It is contended," said the Court, "that the suit is governed by Article 144...and the burden of proof was on the defendants to establish adverse possession alleged by them. In our opinion in every suit for possession, the plaintiff must prove not only a legal title to possession, but a subsisting title not barred by the law of limitation."

Where that statement of the law came from it is impossible to say. It is sufficient to say that it is inconsistent with the Privy Council decision in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (5) and has been definitely overruled by the Privy Council in *Secretary of State* v. *Chelikani Rama Rao* (2). Inasmuch as the attention of the Privy Council was directed to the several Madras decisions it is not likely that *Inayat Husen* v. *Ali Husen* (1) was cited to them. It so happens that each of us sitting alone on different occasions has taken the same view of the law as we think is now established. I happen myself to have expressed my opinion in a judgment which was reported as *Muhammad Kamil* v. *Habibullah* (6), where the District Judge had taken the same view as the District Judge in this case and had based himself upon the same authority, and recognizing the danger of holding this view I went out of my way to point out that the Privy Council had really removed all possible misunderstanding upon the question and that any cases in this country which had laid down the law to the contrary must be taken to be no longer binding. I observe that in his supplement to the most recent addition of his book Mr. Rustomji refers to that report and says that my observation must be received with some degree of caution. I hope that advice will always be followed with every observation of mine which happens to find its way into reported cases. The only value of a reported case is the bearing of the principle enunciated upon the particular facts of the case and, therefore, the observations in the judgment must always be received and examined with a degree of caution. But inasmuch as what I said has been referred to in the text book in question, I have taken the trouble again to review the citation of cases in Mr. Rustomji's note and the various decisions on which I had arrived at the conclusion I had formed. I cannot find anything in Mr. Rustomji's note to shake the view which I have expressed more than once that the Privy Council decision in *Secretary of State* v. *Chelikani Rama Rao* (2) has in effect overruled the Madras cases and *Inayat Husen* v. *Ali Husen* (1). And I think it is not saying too much to ask the inferior Courts, when this question arises again, as it undoubtedly frequently arises, to pay attention to these observations and to examine the Privy Council decision and no longer to hold themselves bound by the decision in *Inayat Husen* v. *Ali Husen* (1).

RYVES, J.—I agree generally. The finding of the lower Appellate Court is: "The fact remains that the plaintiff is the Zamindar and the defendant has been in long possession of the land." It has also found that the possession of the defendant has not been proved to have been adverse. That being so, it seems to me that since the publication of the ruling of the Privy Council reported as *Secretary of State* v. *Chelikani Rama Rao* (2), the plaintiff must succeed inasmuch as the defendant has failed to prove his adverse possession. I concur in the order proposed.

BY THE COURT.—For these reasons our order is that the appeal must be allowed with costs, including in this Court fees on the higher scale.

Appeal allowed.

(6) 37 Ind. Cas. 794.

MADRAS HIGH COURT.

CIVIL APPEAL No. 307 OF 1917.

December 11, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

K. T. V. R. T. VEERAPPA CHETTY—DEFENDANT No. 1—APPELLANT

versus

VELLAYAN AMBALAM AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 TO 4—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), ss. 30, 32, 36, 64, 91, 92, 93, 94, 119—Bill of exchange payable at sight or on demand—Dishonour by non-acceptance—Notice of dishonour by non-payment, whether necessary—Presumption on proof of protest, when arises—English Law.

In the case of a bill of exchange payable at sight or on demand there can be dishonour by non-acceptance, though the law does not require that, in the case of such bill, there should be a presentment for acceptance. But if the drawee of such a bill refuses to accept it, it practically amounts to a refusal to pay and becomes dishonour by non-payment. That is to say, there is nothing in law which precludes a bill payable on demand being presented for acceptance, although that may not be necessary. In order, however, to sustain an action against the drawee, there must be dishonour and notice of dishonour given within reasonable time. [p. 372, col. 1.]

Under section 119 of the Negotiable Instruments Act, a Court is entitled to presume the fact of dishonour, but that is only so where there is a proper protest. No such presumption would arise from a mere entry by a Notary Public of the words 'noted for non-payment' without giving the date of dishonour, and in the absence of a certificate of protest [p. 371, col. 1.]

Per *Oldfield, J.*—The refusal to pay referred to in section 92 of the Negotiable Instruments Act includes a refusal to accept, such as is contemplated in section 91, which is a possible, though not an invariable or obligatory, preliminary to payment being demanded at all. [p. 373, col. 2.]

The Negotiable Instruments Act should be read conformably to the provisions of the English Law, which follows the general commercial law of the rest of the world. [p 373, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 117 of 1915.

Messrs. *L. A. Govindaraghava Ayyar* and *K. N. Kumaraswamy Ayyar*, for the Appellant.

The Hon'ble the Advocate-General and Mr. *R. Ganapathy Ayyar*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The suit which we are dealing with in this appeal was instituted with respect to a Hundi drawn by the 1st defendant, the appellant, on S. R. M. S. Ranganathan Chetty in Rangoon in favour of the 2nd defendant, who assigned it to 3rd defendant and the 3rd defendant assigned it to the 4th defendant's father, who assigned it to the plaintiff. Several defences were raised but we need not deal with all of them. We wish to deal with the questions of fact whether there was presentment of the Hundi and in due time, whether there was dishonour and notice of dishonour, if any, given to the drawer as required by law. The question whether the Hundi was discharged by payment has also been argued before us. The learned Advocate-General has also raised a rather interesting question of law based on the provisions of sections 61 and 74 of the Negotiable Instruments Act read with sections 91, 92, 93, and 94. The case cannot be said to have been tried as satisfactorily as it might have been; but we have to come to a conclusion upon the evidence on record. The whole evidence regarding presentment and dishonour and the alleged discharge is of a very unsatisfactory kind. No witness from the firm of the drawer was examined in support of the case of the plaintiff as to presentment and no explanation is forthcoming for this omission. Nor has there been any attempt to produce the books of that firm which, it is likely, would have contained some record as to the fact of presentment of this bill if it was actually presented as is spoken to by P. W. No. 2. The bill is alleged to have been sent at the request of the 4th defendant's father by a firm in Madura, called V. E. R. M. Firm, for collection. One of the men from that firm, the son of the proprietor, was examined as plaintiff's witness No. 5. He says that he received a letter saying that the bill had been presented for payment and that it was dishonoured. But no attempt was made to produce that letter, nor has any book of account or anything in writing been produced in support of the plaintiff's allegation. It was quite easy for the plaintiff to produce absolutely conclusive evidence on this point. It was argued by the learned Advocate-General that we ought to accept the evidence given by the plaintiff even though it is not the best evidence available, and such as it is, is unsatisfactory because the probabilities of the case, he contends, show that the allegations of the plaintiff are true. But the transaction to say the least

was of a very peculiar character. We do not find any proper explanation for the fact that although the bill was presented some time in May or June 1913, if the evidence of the plaintiff is to be accepted on that point, it was noted on only in 1915 and no action was taken on the bill for two years. Then there is really no evidence that any notice of dishonour was given to the first defendant within a reasonable time after such dishonour. The plaintiff says that before instituting the suit, that is, some time in 1915 he asked the 1st defendant for payment and that he promised to pay. That seems to me to be an absolute untruth. The defence of the 1st defendant is that the bill had been long ago discharged. It is inconceivable that, if the plaintiff made a demand upon him, he should have promised to pay. The learned Advocate-General has not really relied on the noting such as there is on this bill for the purpose of drawing any presumption of presentment and dishonour. It is a most peculiar entry by the Notary Public of Rangoon. All that it contains is 'noted for non-payment.' It does not give the date of dishonour as required by section 99 of the Negotiable Instruments Act. Then there is no certificate of protest within the meaning of sections 100 and 101 of the Act. It is only where there is a proper protest that section 119 would apply requiring the Court to presume the fact of dishonour.

As regards the question of discharge, it is one of the pleas of the 1st defendant. Of course the onus lies upon him to prove it. His allegation is that this bill was drawn in order to pay the price of some diamonds which he bought from the 2nd defendant. He says that at his instance the 3rd defendant pledged these diamonds as well as some of his own jewels with one Puduvayal firm and that the 3rd defendant retained this Hundi as a sort of security, although afterwards he (1st defendant) paid off the Puduvayal firm and redeemed the jewels by raising the money from one Thenappa Chetty. This Thenappa Chetty has not been examined, although he was present in Court being brought up under warrant. Nor is there any receipt to show payment either to the 2nd defendant or to the Puduvayal firm. While I am not prepared to say that the entire story of the defence in this connection is unfounded since there is no explanation forthcoming as to why no action was taken nearly two years after the alleged dishonour, at the same time the onus being on the 1st defendant to prove this plea it cannot be said that the evidence, such as it is, has made it out. However, the 1st defendant seems to be entitled to succeed on the other points which I have dealt with.

Then the learned Advocate-General drew our attention to the unhappy wording of sections 91 to 94 of the Negotiable Instruments Act. Section 91 defines dishonour by non-acceptance, section 92 defines dishonour by non-payment and says: 'A promissory note, bill of exchange or cheque is said to be dishonoured by non payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.' Section 93 provides for notice being given in case of dishonour by non-acceptance or non-payment. The learned Advocate-General's argument is that these sections cannot apply to the present case inasmuch as this is not a bill payable after sight or after a fixed date, and, therefore, there can be no question here of acceptance or non-acceptance. Section 92 which defines dishonour by non-payment only deals, it is said, with the default of the acceptor of the bill and not the default of the drawee in cases where the bill does not require to be accepted. But the effect of this argument, if sound, pushed to its logical conclusion must be that there was no dishonour at all in this case, and the suit must on that account fail, because the effect of section 30 of the Act is that the drawer of a bill of exchange is bound to compensate the holder only in case of dishonour by the drawee or acceptor. We were referred to section 37 as also defining the liability of the drawer. That section only says that the drawer of a bill of exchange until acceptance is liable as principal debtor. But if the argument of the Advocate General is right, there could be no question of acceptance in this case and section 39 would have no application.

Apart from that, I do not think that

the Legislature intended to lay down that in the case of a bill payable at sight or on demand there can be no dishonour by non-payment. In fact such a position seems to me to be so untenable that the Court would not be justified in imputing any such intention to the Legislature, if it could be helped. As is well known, the Negotiable Instruments Act was based on the principles of English Law. The drafting of some of these sections seems to be rather loose, especially as regards the collocation of certain important phrases. For instance section 93, paragraph 2, is to this effect: "Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note or the drawee or acceptor of the dishonoured bill of exchange or cheque." Now if we were to proceed on the line of interpretation suggested by the learned Advocate-General, then we will have to apply the word acceptor to cheques, while in the case of cheques there could hardly have been any question of acceptance within the contemplation of the Legislature. Similar wording occurs in other sections as well. For instance, section 99 says: "When a promissory note or a bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a Notary Public upon the instrument;" surely the Legislature could not have intended non-acceptance to be applicable to promissory notes and not to bills of exchange, although that will be the result of the order in which the words are allocated. I think the difficulty suggested by the arguments on behalf of the respondent may be met at least in two ways. Section 30 lays down that a drawee is liable to compensate the holder in case of dishonour, provided due notice of dishonour has been given as provided by the Act. Then section 93 says that in case of non-acceptance or non-payment of a promissory note, bill of exchange or cheque, the holder must give notice that the instrument has been dishonoured. I take it that what the Legislature meant was that notice of dishonour should be given either of non-acceptance or non-payment, whichever may be the case in the transaction in question. Then section 94 lays down that such notice must be given within a reasonable time after dishonour. Section 93 indicates the parties to whom notice is to be given in cases where there is a succession of indorsers. But section 30 is specifically applicable to the case of a drawer, and that read with section 94 would be sufficient, so far as the liability of the drawer is concerned, to show that notice of dishonour is to be given in reasonable time. But it seems to me to be quite reasonable on the other hand to go further and say that sections 91, 92 and 93 were intended to be applicable to a bill payable on demand. It is quite true that the law does not require that in case of such bills there should be a presentment for acceptance. But if the drawee of a bill payable on demand refused to accept it, its practical effect is refusal to pay and becomes dishonour by non-payment. That is to say, there is nothing in law which precludes a bill payable on demand being presented for acceptance, although that may not be necessary. The word 'acceptance' is not defined but 'acceptor' is: the drawee becomes the acceptor when he has signed his assent upon the bill. The English Statute, Bills of Exchange Act, defines acceptance as the signification by the drawee of his assent to the order of the drawer. That is clearly what is implied in the definition of the word *acceptor* in the Negotiable Instruments Act, and I do not see why it should not apply as much to a bill payable on demand as to a bill payable after sight or on a fixed date. Section 18 of the English Act says that a bill may be accepted when it is overdue. That would apply as well to a bill payable on demand as to a bill payable after sight. Section 30 of the same Act corroborates this interpretation. It says that in the case of a bill payable after sight presentment for acceptance is necessary in order to fix the maturity of the instrument, but in no other case is presentment for acceptance necessary in order to render liable any party to the bill. That implies that there may be presentment for acceptance of a bill payable on demand although it is not required by the law. The Negotiable Instruments Act does not expressly lay down that bills payable on demand or bills other than those payable after sight need not be presented for payment. But this undoubtedly followed

from sections 61 and 64 which describe the bills that are required to be presented for payment or acceptance.

I am fortified in my interpretation of the Act with respect to this matter by a decision of the Bombay High Court in *Ram Ravji Jambhekar* v. *Pralhaddas Subkarn* (1). That was a case of a bill payable after a fixed date, but it was presented for acceptance before the expiry of that date although the Negotiable Instruments Act does not contemplate such presentment. The drawee refused to accept the bill and it was never presented for payment afterwards. It was held that there was a good cause of action and the learned Judges observe at pages 141 and 142 that although the law does not require presentment for acceptance of a bill payable after a fixed date before such date has arrived, yet under the English Law it was not only allowable but was strongly advisable to do so, and that the Negotiable Instruments Act made no alteration in that respect. They point out that presentment for acceptance must always and in every case precede presentment for payment, and that the drawer of a bill contracts that whenever a bill is duly presented, it will, subject to the provisions of section 63, be accepted. Then they say when it is dishonoured by non-acceptance, as well as when it is dishonoured by non-payment, the provisions of Chapter VIII (in which sections 91 to 94 occur) come into play. They point out: 'It is true that there is no explicit declaration of the law upon this subject as in section 43 of the English Act. But the whole scope and tenor of Chapter VIII of the Indian Act appear to contemplate the same result as is there declared to follow from non acceptance.' I may also refer to a ruling of the Calcutta High Court in *Jeetun Lall* v. *Sheo Churn* (2), which was before the passing of the Negotiable Instruments Act. It shows that the provisions of the Negotiable Instruments Act are really based on the principles of the English Common Law relating to mercantile instruments, and there can be no doubt whatever that, as pointed out there, the law has always been both in England and in India that there must be dishonour and notice of dishonour given within reasonable time in order to sustain an action against the drawee or any other holder of the bill.

The appeal of the 1st defendant must, therefore, be allowed and the decree of the Subordinate Judge as against him will be set aside and the suit against him dismissed with costs here and in the Court below.

OLDFIELD, J.—I agree with my learned brother's decision on the questions of fact and of law.

As regards the latter I wish to add only that the law of negotiable instruments is, as it has been described, cosmopolitan: and in the present case, where we have no special considerations arising with reference to the circumstances of Indian business we are justified in endeavouring to read the Statute, if it is possible to do so, conformably to the provisions of the English Law, which follows the general commercial law of the rest of the world. There is no dispute that under the English Law the argument of the learned Advocate-General would be absolutely unsustainable, and a reference to the Bills of Exchange Act is sufficient to show that. In those circumstances it is our duty to scrutinize the language used in the Negotiable Instruments Act most carefully, and I am glad to be able to hold that the refusal to pay referred to in section 92 includes the refusal to accept such as is contemplated in section 91, which is a possible, though not an invariable or obligatory, preliminary to payment being demanded at all. That is shortly the ground on which I agree with my learned brother.

M C P.

Appeal allowed.

(1) 20 B. 133; 10 Ind. Dec. (N. S.) 647.
(2) 2 W. R. 214.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 696 OF 1918.
May 14, 1919.
Present:— Mr. Justice Walsh and
Mr. Justice Stuart.
PURAN MAL—DEFENDANT—APPELLANT
versus
MESSRS. FORD AND MACDONALD AND COMPANY, LTD.—PLAINTIFFS RESPONDENTS.

Accounts, settled, re-opening of—Fraud, proof of—

PURAN MAL *v.* FORD AND MACDONALD & CO., LTD.

Error, whether ground for re-opening accounts—Principal and agent—Agent, duty of—Suit by principal for account of profits earned by agent out of rival business, nature of—Limitation, commencement of—Limitation Act (IX of 1908), Sch. I, Arts. 62, 90.

As the law on the question of re-opening settled accounts is not contained in any Indian legislative enactment, the guiding principles of English law must be applied, whereby a Court will re-open an account only where the accounts are shown to be erroneous to a considerable extent both in amount and the number of items, or where fiduciary relations exist and a less considerable number of errors is shown, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown. [p. 375, col. 2; p. 376, col. 1.]

A firm instituted a suit against its former agent, (*a*) to re-open a settled account, and (*b*) for an account of the profits which the defendant had made in a business similar to that of the plaintiff firm and owned by the defendant. It appeared that the plaintiff firm were engaged in an extensive brick-making business, and had employed the defendant as one of their agents in charge of an agency. After very many years' service, they discovered that the defendant was interested in, if not the actual proprietor of, a brick-making business at a place some 5 or 6 miles from where the firm's agency was located, and which, in some respects, was adverse to the interests of the firm. His services were accordingly dispensed with but, before he made over charge of the agency, a settlement took place between himself and an accredited representative of the firm, an entry being made in the ledger that the accounts had been checked and the cash balance found correct. Charge was then made over on that date of the stock and cash in hand, the entry being signed by the defendant and the representative of the firm. Subsequently, the firm instituted the present suit. The trial Court dismissed the suit. The lower Appellate Court, however, decreed the re-opening of the account, and for a rendition of accounts of the defendant's business, holding that in at least five instances fraud had been established against the defendant, and that in one instance an error of very great importance was shown. On appeal to the High Court:

Held, (1) that there was no legal justification for the finding of fraud, inasmuch as no specific instance of fraud had been alleged in the plaint and the finding was based on a superficial investigation and either on no evidence or on a careless view of the evidence; [p. 376, col. 1; p. 377, cols. 1 & 2; p. 378, col. 1.]

(2) that, therefore, the claim for re-opening of the accounts was not sustainable: [p. 378, col. 1.]

(3) that as regards the claim for rendition of the accounts of the defendant's business, the suit was governed by either Article 62 or Article 90 of the First Schedule to the Limitation Act, and not having been brought within the period prescribed therein, it was barred by limitation. [p. 378, col. 2; p. 379, col. 1.]

It is the duty of an agent not merely to do nothing to injure the interests of his principal, but to do all in his power to further them, and, therefore, not to place himself in a position in which his interests might be adverse to those of his principal. [p. 378, col. 1.]

Second appeal from a decree of the Second Additional Judge, Aligarh.

Messrs. *G W. Dillon*, *Satya Chandra Mukerji* and *Girdhari Lal Agarwala*, for the Appellant.

Dr. *Surendra Nath Sen* and Mr. *Purshottam Das Tandon*, for the Respondents.

JUDGMENT.

WALSH, J.—This was a suit brought by a firm, Messrs. Ford and MacDonald and Co., Ltd., against their former agent Puran Mal and another man Badri Prasad who is not before us. The plaintiff Company is now a limited liability Company. It was formerly a firm of considerable standing and carried on an extensive business, a large portion of which was devoted to the making and selling of bricks. While it remained in its original form as a firm and for some two years after the formation of the limited Company, the present appellant, who was sued by the plaintiff Company, was their agent to manage the Saharanpur branch and others. There were in addition to the agencies committed to his charge other agencies, Badri Prasad being the agent for the Agra branch which included a sub-agency at Muttra. The defendant Puran Mal worked for this firm for very many years, and it is not unimportant, having regard to the charges now made against him, to bear in mind that he was given, according to the evidence in the case, a pretty free hand and apparently during a long period of service gave satisfaction. We mention that fact because we think that amidst the difficulties of ascertaining the exact truth with regard to each item in the books, perhaps sufficient importance has not been given to the fact that Puran Mal was left very much with a free hand, the result of that policy being not, of course, to entitle a man to rob his principal, but, on the other hand, necessarily to result in a somewhat less exact and precise method of recording his transactions. Mr. Parry, who was at the material time a principal of the firm, or director of the Company, and who is now Municipal Engineer at Cawnpur, gave evidence in the case and said that Puran Mal left the employment of the firm in December 1913 by mutual consent, largely on account of the firm having discovered at some prior date Puran Mal's connection

with, if not proprietorship of, a brick-making business in Bindraban, which is some six or seven miles from Muttra and which could hardly fail in some respects to be adverse to the interests of his employers who were largely concerned in the brick-making business. What he said was:— "We were annoyed with Puran Mal on his working a brick kiln at another place, probably at Bindraban, and so we dispensed with his services. We did not dismiss him. The work at Delhi agency was complete or nearly so and we could not find work for Puran Mal at another agency. That was also one of the reasons of his services being dispensed with." When Puran Mal left, the accounts up to that date between his principals and himself were necessarily considerable and the course of business had covered a considerable period. At that date, a settlement took place between Puran Mal himself and an accredited representative of the firm. It was not drawn up in any formal document but an entry was made in the ledger, which we have seen, stating that the accounts have been checked and the cash balance in hand is ascertained and found correct. The charge was made over on that date with stock and Rs. 9-8-9 in cash, some of which was noted to consist of bad coins. These entries in the ledger were signed by Puran Mal on his own behalf and Mr. Lansbury on behalf of the plaintiff firm; inasmuch as no other interview took place at which any suggested settlement was attempted, we are satisfied that this was, as it has been called, a settlement of accounts stated between the parties finally settling their respective claims up to that date, with the exception of a private account or bonus account in the form of commission which Puran Mal had against his employers. In respect to this latter transaction, Puran Mal was eventually driven to bring a suit in the year 1914 and he claimed in that suit Rs. 40,000 and the claim was compromised at a sum of Rs. 20,000. It is not without bearing upon the general aspects of the case that, although the plaintiffs' Counsel was justified in saying that the plaintiffs were not bound to bring a cross-claim or a cross-suit to assert the claim that they are now making, nonetheless they refrained from doing so. Subsequently, a person of the name of Manphul appeared upon the scene as a kind of expert, or private detective, and entered the employment of the firm after having been unsuccessfully prosecuted by them through Puran Mal, and it is largely the result of his industry that the plaintiff Company, the leading members of which had been replaced by some other persons who had taken an interest in the Company, filed this suit claiming against the two defendants, the present appellant and his co-defendant Badri Prasad, (*a*) to re open the settled accounts, and (*b*) an account of profits which Puran Mal had been making in a separate brick making business of his own at Bindraban, which Mr. Parry has mentioned as the cause of the determination of his agency. The first Court dismissed the plaintiffs' claim with a certain amount of contempt. On appeal the lower Appellate Court has decreed against both defendants the re opening of their accounts with the plaintiff firm, obviously leading to a very serious and elaborate enquiry, and also a rendition of account as against Puran Mal of the brick-making business at Bindraban. The question we have to decide is, whether those decisions or either of them is right. The judgment of the learned District Judge has been defended by the plaintiffs' Counsel, Mr. Bradley, who argued his case with great ability and gave us every assistance in the investigation of this troublesome matter. As we have stated, the claim consisted of two perfectly distinct causes of action. The first cause of action was sought to be established by six specific items which have been dealt with by the lower Appellate Court, being instances of cases in which it is alleged that it can now be shown that Puran Mal, to put the matter plainly, robbed his employers. In five of those instances the learned Judge has held that clear cases of fraud have been established. With regard to the sixth he has come to the conclusion that an error of very great importance is shown.

The law on the question of re-opening settled accounts is not contained in India in any express enactment. Applying the ordinary rule, we have, therefore, to as-

certain as best we can what are the guiding principles of the English Law upon the question, which is generally considered to be the test of equity, justice and good conscience. The leading case upon the subject appears to be *Williamson* v. *Barbour* (1) decided by the Master of the Rolls, Sir George Jessel, in 1877, and the rule applicable to this class of cases and which we propose to apply in this appeal is stated in these words: "Where you show a single fraudulent entry in the case of persons occupying the position of principal and agent, or trustee and *cestui que trust*, the Court has actually opened an account extending over a greater number of years and closed for a much longer period than the account I have before me. I mean in the case of *Allfery* v. *Allfery* (2) before Lord Cottenham. We, therefore, have this as a sort of guide without laying down any general rule, because every case must depend on its own circumstances, that where the accounts have been shown to be erroneous to a considerable extent both in amount and in the number of items or where fiduciary relations exist and a less considerable number of errors are shown or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown, there the Court opens the account and does not merely surcharge and falsify." So far as India is concerned, that authority has been adopted by the Bombay High Court in the case of *Boo Jinatboo* v. *Sha Nagar Valab Kanji* (3), and we adopt that as being the law governing the Courts in India.

Personally I would myself have thrown out a greater part of this suit, if not the suit in its entirety, upon the grounds laid down in the judgment of Lord Westbury in *Parkinson* v. *Hanbury* (4), that substantially no attempt was made in the plaint to specify any single instance upon which the plaintiffs relied for opening up the whole account. It is perfectly true that the burden of requiring the plaintiffs to do that lies on the defendant, and in this case the defendant did not exercise the right which he had. But nonetheless the Court cannot escape its own duty by the neglect of the parties and in my view, at any rate in a suit of this character, nothing can illustrate more forcibly, than the difficulty which we have ourselves experienced in hearing the appeal, the necessity of insisting upon the plaintiff making clear, both to the Court and his opponent, all the precise matters relied upon. Not a single instance of the specific fraud eventually found by the lower Appellate Court in this case is alleged with any approach to specification or any approximation to precision or accuracy in the plaint, and the learned Judge of the lower Appellate Court has, on a good deal of plausible suggestion, which after all was really based on a superficial investigation, found these five specific cases of fraud without, in our opinion, any legal justification for such finding. The fundamental defect which runs through the learned Judge's consideration of the case—I may note here that Mr. Bradley rightly urged upon us that we had no right to interfere, and we do not propose to interfere, with any specific findings of fact arrived at by the learned Judge if they are supported by any evidence—is that he overlooked the admitted fact which was common ground throughout the case that the accounts under enquiry had been submitted to a systematic and periodical audit by one of the employees of the plaintiff Company and also the whole account had in the ordinary way of business firms been audited from time to time by a firm of professional accountants. Neither of the auditors was called to explain how these matters, which the learned Judge has found were deceits practised upon the firm, escaped the observation of the auditors themselves. In most, if not all, of the important cases we have investigated the entries in the books. They contain auditors' checks, which lead us to think that they had been properly vouched in the presence of the auditors. No material vouchers have been produced by the plaintiff Company and no body in the plaintiffs' employment, who could throw any light upon these transactions and was employed by them at the time they took place, was called. The only person who could be described as a member of the firm

(1) (878) 9 Ch D. 529; 50 L. J. Ch. 147; 37 L. T. 698.

(2) (1847) 10 Leav. 353; 17 L. J. Ch. 30; 11 Jur. 981; 50 E. R 618.

(3) 11 B. 78; 6 Ind. Dec. (N. s.) 51.

(4) (1867) 2 H. L. 1; 36 L. Ch. 292; 16 L. T. 243; 15 W. R. 642.

and was put in the box is Mr. Parry, and his evidence as far as it went was in favour of the defendant. The whole case seems to have been built up by the investigation of this expert detective, who had no first hand knowledge of the subject, with the addition of surmise and suspicion resulting, as is not unusually the case, in a good deal of misunderstanding and vague inference.

The first case taken by the learned Judge, and as he candidly says in his judgment it was one which substantially influenced his mind in deciding at least one if not more than one of the other cases, was an alleged fraud by the defendant in wrongfully appropriating to himself a sum of Rs. 2,000. The highest at which this case can be put in fact against the defendant, and we are by no means satisfied that even this is shown by the books, but accepting the learned Judge's finding upon it, is this that from the 8th of April 1911 to the 31st of May 1911 the defendant kept in his own possession and used for his own purpose a sum of Rs. 2,000 which belonged to his principals. Inasmuch as the whole of the working capital was floating and considerable cross accounts were carried on between the various branches, it is by no means clear that the principals were deprived of the benefit of this sum. But if they were, all they could possibly have lost was a sum of Rs. 23 calculated as interest at the rate of eight per cent. for the use of the money during that period. Inasmuch as this money was used, whether rightly or wrongly, by Puran Mal at a time when his principals were indebted to him in a sum of at least Rs. 10,000, if not considerably more, it is difficult to understand how anybody could have convinced himself that this was a clear case of fraud. It does not bear a scintilla of fraudulent characteristic about it, and we do not agree with the view which Mr. Bradley pressed upon us that the facts so stated would constitute an offence under the Penal Code.

The next finding is even more lamentable, because the conclusion seems to have been arrived at by an extremely careless view of the material evidence on the point. In the account which the plaintiffs seeks to re-open was alleged to be a debt due to the firm from a man named Karehra of Rs. 230. This debt was the balance of an account earlier in date, shown to be due from the man in September 1912. The account, as we have said, was closed in December 1913. It was, therefore, necessary to show if this, as the learned Judge has said, were a clear case of fraud, that the Rs. 230 had been paid to Puran Mal and that when he carried it forward as a debt due to the firm he knew that the debtor had discharged it before September 1913. There is not a scrap of evidence upon the point. The man went into the box and told the story, which we have no right either to believe or disbelieve and which the learned Judge accepted, that he had at some time or another worked off this Rs. 230 with Puran Mal in labour. If that is true, it was a very improper proceeding on the part of Puran Mal, but it ought to have been obvious that if it took place after December 1913 it could have no bearing upon the account. Nobody condescended to ask him the question when the work was done in payment of this account, and it is entirely consistent with the evidence in the case that it was done in the year 1914 or even later. That being so, the case of fraud wholly breaks down.

As to the third item it is sufficient to say that it is not shown that the payment in question, namely Rs. 200, was not misappropriated by Badri Prasad if by anybody and the respondents' Counsel had to admit that the learned Judge himself had come to a finding on this point, namely, that the money was restored after nine months, without any evidence to justify it. It is clear that the learned Judge did not investigate this case.

In the fourth case a sum of Rs. 637 is alleged to have been paid in advance to a contractor. The learned Judge did not trouble to investigate whether a voucher existed for this payment although in fact it must have been vouched by the auditors, but further than that the learned Judge merely came to the same conclusion that either the defendant or somebody else must have received the money. Upon such a conclusion as this no charge of fraud can be held to be established.

In the fifth case, which is a small item and in which the defendant is supposed to have supplied flour to his friends at the expense of his principals, it is sufficient to say that the

learned Judge assumes, we have little doubt, because of the adverse findings at which he has arrived at the earlier stage of the case, that the defendant had in fact done so. There is really not evidence worthy of the name to establish fraud.

The sixth item is held by the learned Judge to be a serious error. It may have been an error in the account, we are not called upon to decide one way or the other; but if it be one, it is an error of the Agra agency for which Badri Prasad would be answerable and not this defendant.

So far as I am concerned, the five main charges having wholly broken down, I should in any event have been prepared to treat a mistake of this kind as one of little or no importance. Certainly there is no such ground as justifies the re-opening of the account within the rule of *Williamson* v. *Barbour* (1). In our opinion, the case for re-opening accounts fails and further the plaintiffs have also failed to make out a case for surcharging the defendant with any specific item. This portion of the suit must be dismissed with costs.

We now come to the second cause of action, which from the legal point of view has given us a little trouble. As I have already stated, the defendant in some way or another, the facts are not at all clearly found but the substance is not disputed by the defendant, became interested in, if not a proprietor of, a brick-making business in Bindraban and ran this concurrently with the agency which he was carrying on for the plaintiffs, so near to Muttra that it is impossible for anybody to say that within the meaning of section 88 of the Indian Trusts Act of 1882 his interest might not become adverse to Messrs. Ford and MacDonald and Co., Ltd. To put the matter plainly Messrs. Ford and MacDonald and Co., Ltd., had a sub-branch at Muttra interested in carrying on their business as a whole which, as I have said, included brick-making on a considerable scale and it was the duty of the defendant as agent, not merely to do nothing to injure the interests of the firm, but to do all in his power to further them, and, therefore, not to place himself in a position in which his interests might be adverse. It is quite obvious that with a brick-making business belonging to the defendant at Bindraban in the same district where prices would, no doubt, rule at the same rate, an order for bricks arriving addressed to him at Muttra and dealt with by one of his servants at Muttra might quite easily have been forwarded to and executed by his brick-making business at Bindraban. It is not necessary for us to look outside the provisions of the section. We think that that section made him hold any pecuniary advantage which he derived from the Bindraban brick business for the benefit of Messrs. Ford and MacDonald and Co., Ltd.

In this respect we agree with the lower Appellate Court. The question which has given us trouble has been whether this really gives the plaintiffs any cause of action and justifies us in ordering an account of that business to be taken. We have come to the conclusion that whichever way the thing is looked at, the present claim of the plaintiffs, brought as and when it was, is barred by Statute and must be dismissed. It is clear law that the liability of an agent for a specific sum in his hands, such as pecuniary benefit mentioned by section 88 of the Indian Trusts Act or any other money earned or stolen by him in his capacity as agent and which the law makes him liable to pay over to his employer, whether fraud enters into the cause of action or not, is money which could be, in ordinary common law Courts in England, recovered from the agent as money had and received to the use of the principal. In this view of the case Article 62 of the Limitation Act applies, and the time within which the suit must be brought begins to run from the time when the money is received. This suit was brought on the 12th of December 1916. There is no evidence that any profit had been derived from this business within three years of that date. It is not always possible to state with mathematical precision the precise scientific definition of an action of this kind. The cause of action arises out of mixed considerations, and we are not prepared to say that it may not come within the definition contained in Article 90 of the Limitation Act. It may well be described as a suit by the principal against the agent in respect of either misconduct, or at any rate neglect of his master's interests within the meaning of that Article. As a matter of fact most actions of this kind can

probably be brought within at least two if not three of the definitions given in the very long schedule to the Statute of Limitation. But this alternative does not assist the plaintiffs, and it is, therefore, immaterial whether the view which we prefer, namely, Article 62, or the view that Article 90 is applicable, be the correct view. In the case of Article 90 the plaintiffs would have to sue within three years of the neglect or the misconduct coming to their knowledge. The notice of dismissal in this case was given on the 12th of November 1913, more than three years before the institution of the suit. It is admitted by the only representative of the plaintiffs who was called that that notice was largely influenced by the knowledge of this business. The action is also, therefore, barred by limitation under that article The appeal must be allowed and as regards the defendant the suit wholly dismissed here and below with costs including in this Court fees on the higher scale.

STUART, J.—I have very little to add. I find that none of the instances as established can bring the case within the essential conditions laid down in *Williamson* v. *Barbour* (1). The re-opening of the account cannot be justified. I should have doubts, even if these instances had been established better than they were, whether they would be of sufficient importance to justify a re-opening of an account which had been closed, in view of the facts that the members of the firm had had every opportunity of ascertaining the accuracy or inaccuracy of the entries, that the accounts had been audited by competent auditors, and that Puran Mal's conduct had not been criticised or made the subject of complaint by any of the persons entrusted with the management until some period after he had severed his connection with the firm. With regard to the question of limitation in connection with the profits of the Bindraban business, the learned Counsel for the respondents has brought to our notice the decision of their Lordships of the Privy Council in *Asghar Ali Khan* v. *Khurshed Ali Khan* (5) and of a Bench of the High Court of Calcutta in *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (6). In the Privy Council case their Lordships have found that Article 89 applied to a suit brought by one brother against another brother in respect of old accounts connected with profits of joint family property. They held that each brother was an agent of the other brother and applying Article 89 in a suit for account of profits received, they found that money was moveable property within the meaning of the Article. In the second case it was also clear that the amount had been received by an agent on behalf of his principal, for his principal and in the name of his principal, and adopting the same view that money was moveable property, a Bench of the High Court of Calcutta applied the same Article. But here the case is very different. If Puran Mal had received the profits of the Bindraban business as agent for Messrs. Ford and MacDonald & Co., Ltd., Article 89 would undoubtedly apply, but here the case is that he was working against the interests of Messrs. Ford and MacDonald & Co., Ltd., and Messrs Ford and MacDonald & Co., Ltd., in preference to suing him for damages have chosen to claim under the provisions of section 85 of the Trusts Act the profits which he may have made in the business. I do not see how by any possible reasoning the profits of the Bindraban business could be considered to be moveable property received by Puran Mal on behalf of Messrs. Ford and MacDonald & Co, Ltd. Those profits were not received by Puran Mal for Messrs. Ford and MacDonald's use within the meaning of the word in English Law, for they were not received on their account. Therefore, it is established that Article 89 would not apply in this case. It is not of importance whether Article 62 or Article 90 applies. One must apply and under either this portion of the suit is barred by limitation. I agree with the decision that the appeal must be allowed and the suit against Puran Mal dismissed with costs.

BY THE COURT.—We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit as against Puran Mal with costs here and below. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(5) 24 A. 27; 28 I A. 227 (P. C.); 3 Bom. L. R. 576; 8 Sar. P. C. J. 142.

(6) 32 C. 719; 1 C. L. J. 232.

MALLAMPALLI SOMAYYA *v.* ANNAPURNAMMA.

MADRAS HIGH COURT.

CIVIL APPEAL No. 122 OF 1918.

February 26, 1919.

Present:—Sir John Wallis, KT, Chief Justice, and Justice Sir William Ayling, KT.

MALLAMPALLI SOMAYYA AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

MALLAMPALLI ANNAPURNAMMA —DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Authority to adopt set up by widow in Will—Suit by reversioner for declaration that Will is not genuine, maintainability of.

Where a Hindu widow sets up a power to adopt conferred on her under an alleged Will, it is open to a reversioner to sue for a declaration that he is a reversioner of the deceased and that the Will is not genuine.

Padmanabjudu v. *Buchamma*, 47 Ind. Cas. 702; 35 M. L. J. 144; 8 L. W. 335, followed.

Sreepada Venkataramana v. *Sreepada Ramalakshmamma*, 12 Ind. Cas. 176; 35 M. 592; (1911) 2 M. W. N. 194, not followed.

Appeal against the decree of the Subordinate Judge, Kistna at Ellore, in Original Suit No. 50 of 1917.

Mr. *V. Suryanarayana*, for the Appellants—The suit for declaration is maintainable under section 42 of the Specific Relief Act. The effect of the widow's setting up the Will giving her power to adopt is to challenge plaintiff's right to succeed to her. He can at once establish his right. The suit is in the nature of a suit *quia timet*. To deny to him the right to sue for a declaration would virtually be to deny to him the right to contest the Will. He need not wait to exercise his right till the best evidence has disappeared. This is a matter in which the Court will wisely exercise its discretion of allowing a declaratory suit. *Padmanabjudu* v. *Buchamma* (1).

Mr. *V. Ramadoss*, for the Respondent.—Section 42 of the Specific Relief Act bars the present suit. See *Sreepada Venkataramana* v. *Sreepada Ramalakshmamma* (2).

JUDGMENT.

WALLIS, C. J.—The Subordinate Judge has proceeded upon the authority of the decision in *Sreepada Venkataramana* v. *Sreepada Ramalakshmamma* (2), but this case

(1) 47 Ind. Cas 702; 35 M. L. J. 144; 8 L. W. 335.
(2) 12 Ind. Cas. 176; 35 M. 592; (1911) 2 M. W. N. 194.

ABDUL AZIZ *v.* BIBI TAUHIDUNNISSA.

has been dissented from in *Padmanabjudu* v. *Buchamma* (1), which I prefer to follow. I am unable to agree with the observation in the former case that section 42 of the Specific Relief Act does not authorize such a suit as this. The effect of the widow's setting up a Will giving her power to adopt is, in my opinion, to challenge the absolute right of the plaintiff to succeed on her death if he survives her, and to convert him, in the language of English Law, from an heir apparent into an heir-presumptive. The rule that Courts in India will not entertain a suit by the plaintiff for a declaration that he is a nearer reversioner than the defendant is not, in my opinion, based on the view that such a suit does not come within the terms of section 42, but on the settled practice of the Court in the exercise of its discretion under the section, and has been so treated by Lord Parker of Waddington in *Saudagar Singh* v. *Pardip Narayan Singh* (3). Where a Will giving authority to adopt is being set up by a widow, it is expedient that the question should be settled at once, and not left open until the best evidence has disappeared, and a suit such as this may, therefore, be regarded as in the nature of a suit *quia timet*. I would allow the appeal, reverse the decree, and remand the suit for disposal according to law.

Costs to abide.

AYLING, J.—I agree in the order proposed and adhere to my opinion expressed in *Padmanabhjudu* v. *Buchamma* (1).

M. C. P.

Appeal allowed.

(3) 43 Ind. Cas. 484; 45 C. 510; 4 P. L. W. 52; 34 M. L. J. 67; 23 M. L. T. 31; 16 A. L. J. 61; 7 L. W. 146; 27 C. L. J. 181; 22 C. W. N. 426; (1918) M. W. N. 323; 20 Bom. L. R. 509; 45 I. A. 21 (P. C.).

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 22 OF 1919.

June 26, 1919.

Present:—Mr. Justice Atkinson.

Shaikh ABDUL AZIZ AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

Musammat BIBI TAUHIDUNNISSA—DECREE-HOLDER—RESPONDENT.

Landlord and tenant—Co-sharer landlord seeking

ABDUL AZIZ v. BIBI TAUHIDUNNISSA.

to recover rent of more holdings than one in one suit without joining co-sharers—Decree, whether rent decree —Execution of rent decree—Tenant, whether can object to sale of holding on ground of non-transferability.

Where a plaintiff sues as a co-sharer proprietor to recover in one suit his share of the rent of more holdings than one without joining his other co-sharers as parties to the suit, the decree obtained by him in such a suit is a money decree and not a rent decree. [p. 381, col 1.]

A tenant is entitled to assert in execution proceedings the right that the landlord is not entitled to bring a holding to sale in pursuance of a rent decree, if the holding is not transferable. [p. 382, col. 1]

Appeal from a decision of the District Judge, Patna, dated the 2nd December 1918.

Mr. *Sd. Mohd. Hafiz*, for the Appellants.

Mr. *Sd. Mohd. Tahir*, for the Respondent.

JUDGMENT.—This miscellaneous appeal comes before me from the decision of the District Judge of Patna, dated the 2nd December 1918.

The plaintiff sues as a co-sharer proprietor to recover in one suit his share of the rent of more than one holding without joining his other co sharers as parties to the suit.

The tenant against whom the decree has been obtained contends, first, that the decree so obtained is not a rent decree in the ordinary acceptation of the term as understood and defined by the Bengal Tenancy Act, but that it is merely a money decree, and that consequently in the execution of such decree the plaintiff as a co sharer proprietor is not entitled to bring the holding to sale in respect of such decree. Secondly, it is contended by the tenant by way of petition against the sale of the holding in execution proceedings, that the holding being non-transferable by custom the tenant is entitled to prohibit the landlord from selling the same without the tenant's consent, if the holding is brought to sale in execution of a rent decree.

The learned Munsif found in favour of the respective contentions put forward on behalf of the tenant, and struck off the execution proceedings. On the other hand the learned District Judge took a contrary view and held that though the decree that was obtained was strictly speaking a money decree, that yet as it was a decree between two persons occupying the position of landlord and tenant, the tenant was debarred from raising as against the landlord the contention that the holding could not be sold by reason of there being no custom in favour of transferability, and the learned Judge, therefore, directed that the execution proceeding should proceed. In my opinion the learned Judge was clearly wrong in the conclusion at which he arrived.

It is established by a long and consistent line of authority that where a landlord seeks to recover in one suit the rent of more than one holding, a decree so obtained in such suit is a money decree and not a rent decree, and this is so in cases where a landlord as a co sharer seeks to recover in one suit his shares of the rent of more than one holding, without joining his co-sharer proprietors as parties to the suit. All the cases are collected in Mr. Sen's Book on Bengal Tenancy Act, page 602. In all there are some 12 or 15 authorities in support of the contention put forward by the defendant. The following authorities may be referred to:—

Hridaynath Das Chowdhry v. *Krishna Prasad Sircar* (1), *Baikanta Nath Roy* v. *Thakur Debendro Nath Sahi* (2), *Bipra Das Dey* v. *Rajaram Bandopadhya* (3) and *Rashmohini Dasi* v. *Debendra Nath Singha* (4).

Accordingly in my opinion the decree that was obtained by the plaintiff in this suit was not a rent decree, but a money decree; and the fact that the co-sharer proprietors of the plaintiff were not joined as parties to the proceedings, in my opinion, negatives the possibility of the decree that was obtained by the plaintiff being a rent decree.

The question remains to be considered whether the defendant as a tenant is entitled to object to the landlord selling the holdings in respect of which a decree for rent was obtained, on the ground that the holdings were not transferable by custom.

This proposition has been considered three times in this High Court since its constitution and the point now urged before me seems amply covered by authority. The case reported as *Macpherson* v. *Debi*

(1) 34 C. 293; 11 C. W. N. 497; 6 C. L. J. 153.
(2) 11 C. W. N. 676.
(3) 3 Ind. Cas. 306; 33 C. 765; 13 C. W. N. 650.
(4) 13 Ind. Cas. 604; 16 C. W. N. 395.

Bhushan Lal (5) is an express authority that a tenant in execution proceedings is entitled to assert the right that the landlord is not entitled to bring a holding to sale in pursuance of a rent decree if the holding is not transferable. A tenant's right of occupation of a non-transferable holding is merely a personal right which a tenant is entitled to assert as against his landlord, and a landlord has a corresponding right as against his tenant; and this is so whether the alienation contemplated by either is voluntary or involuntary.

The cases reported as *Macpherson* v. *Debi Bhushan Lal* (5) was followed in a later case reported as *Madhu Padhan* v. *Jagu Jena* (6). The case reported as *Madhu Padhan* v. *Jagu Jena* (6) is stated to be distinguishable by reason of the fact that it was a decision upon the construction of the transfer section of the Orissa Tenancy Act; but a perusal of that section would show that the principle of that decision equally applies to cases under the Bengal Tenancy Act where holdings are not transferable save by custom or consent.

Like authorities are to be found decided in the cases reported as *Sadari Kunwari* v. *Palaknath* (7). Therefore, I am satisfied on authority that the learned District Judge was wrong and that the decision of the learned Munsif was right. The plaintiffs are only entitled to a money decree and are not entitled by virtue of that fact to bring the holding to sale; and if the decree be a rent decree, the defendant as tenant is entitled as against the landlord to assert that the holding cannot be sold by reason of the fact that it is non-transferable.

Accordingly I reverse the order of the learned District Judge and I direct that the execution proceeding be struck off, and I award three gold *mohurs* costs as against the respondents.

Order reversed.

(5) 42 Ind. Cas. 36; 2 P. L. J. 530.
(6) 51 Ind. Cas. 139; 4 P. L. J. 294.
(7) 33 Ind. Cas. 937; 1 P. L. J. 257; 3 P. L. W. 104.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 737 OF 1917.

July 14, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Wallach.

Musammat LADDO BEGAM—PLAINTIFF—APPELLANT

versus

JAMAL UD-DIN—DEFENDANT—RESPONDENT.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 49—*Suit to recover moveables deposited for specified period--Limitation, commencement of.*

Where moveables are entrusted to any person on the condition that they will be returned on the expiry of a specified period, the fact that they are detained beyond that period and no demand is made for their return, does not render the detainer's possession unlawful. It is only when a demand is made and there is a refusal to comply with the demand that possession becomes unlawful, and the period of limitation for a suit for the return of the moveables, or, in the alternative, for their value, commences to run from the date of such refusal under Article 49 of Schedule I to the Limitation Act. [p. 383, col 1.]

Second appeal against the decision of the District Judge, Bareilly, dated the 28th March 1917.

Mr. *P. L. Banerji*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff against the brother of her deceased husband for recovery of certain moveable property or in the alternative for the value thereof. The plaintiff's allegation was that her husband died on the 22nd of March 1911, and that on that date she handed over the articles claimed by her to the defendant for safe custody, as she was a minor. It appears that she was prosecuted for having poisoned the wife of the defendant and was convicted and sentenced to transportation for life. This sentence she is now serving. Her brother on her behalf sent a notice to the defendant in May 1912 demanding the articles but as they were not returned and the defendant denied that he had received them, the present suit was instituted. The Court of first instance found in favour of the plaintiff and decreed the claim. Upon appeal the learned Judge did not go into the merits. The case on the face of it was not a very probable one. There was no writing as

to the receipt of the articles by the defendant and if it is true that they were handed over to the defendant and the latter, as alleged, falsely got up the criminal case and implicated her in connection with the death of his wife, it is somewhat strange that no claim was advanced until nearly three years after the date of her conviction. However, as we have said above, the learned Judge did not go into the merits of the case. He dismissed it on the ground of limitation. He holds that according to the allegation of the plaintiff's witnesses the articles were to be returned upon the expiry of the period of the plaintiff's *iddat*, that that period expired on the 1st of August 1911 and that the suit was instituted after three years from that date. The learned Judge was of opinion that Article 115 of the First Schedule to the Limitation Act was applicable to the case. He did not find that the evidence of the plaintiff's witnesses was true but he apparently decided the suit upon a mere hypothetical case. In our opinion the article applicable is Article 49, which provides for a suit for specific moveable property or for compensation for wrongfully detaining it. The present suit is for specific moveable property and in the alternative for compensation for wrongfully detaining it. The period of limitation is three years to be computed from the date when the property was wrongfully taken or when the detainer's possession became unlawful. In the present case, according to the plaintiff's allegation, the property was not wrongfully taken but it is said that the defendant detained it and his possession has thus become unlawful. The mere fact that the articles were not delivered back upon the expiry of the period of *iddat* did not, in our opinion, make his possession unlawful, unless a demand was made and he refused to comply with it. This was the view taken by the Madras High Court in the case of *Gopalasami Iyer* v. *Subramania Sastri* (1). That ruling was approved of by a learned Judge of this Court in *Singer Manufacturing Company* v. *E. Felyun* (2). The ground, therefore, upon which the suit has been dismissed is untenable. We allow the appeal, set aside the decree of the Court below, and as that Court has decided the suit on a preliminary point we remand the case under Order XLI, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and to dispose of it on the merits. Costs hitherto will be costs in the cause and the costs in this Court will include fees on the higher scale.

Case remanded.

(1) 12 Ind Cas. 207; 35 M. 636; 10 M. L. T. 572; (1911) 2 M. W. N. 190; 22 M. L. J. 152.

(2) 27 Ind. Cas. 637; 13 A. L. J. 81.

PATNA HIGH COURT.

MISCELLANEOUS APPEAL No. 115 OF 1919.

CIVIL RULE No. 122 OF 1919.

July 8, 1919.

Present:—Mr. Justice Das.

MEGHU SINGH AND OTHERS—PETITIONERS

versus

BASUDEVA JHA AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 97—Execution of decree—Application by auction-purchaser for recovery of possession as against prior auction-purchaser, nature of—Appeal, whether lies—Appeal, second, maintainability of.

An application by an auction-purchaser, alleging that he was obstructed by the opposite party in obtaining possession of the property purchased by him, on the ground that the latter was a prior auction-purchaser, and praying that he might be put in possession, is an application under Order XXI, rule 97, of the Civil Procedure Code and not under section 47 of the Code. [p. 384, col. 2.]

An order made under Order XXI, rule 97, of the Civil Procedure Code is not appealable to the District Court and is consequently not open to second appeal. [p. 384, col. 1.]

Appeal from a decision of the District Judge, Darbhanga.

Messrs. *Purnendu Narain Singh* and *Murari Prosad*, for the Petitioners.

Mr. *Lakshmi Kant Jha*, for the Opposite Party.

JUDGMENT.—These analogous matters come before me from the judgment of the District Judge of Darbhanga and arise out

of a proceeding instituted by the appellants for delivery of possession. It is a matter of dispute between the parties whether the application of the appellants was an application under section 47 of the Civil Procedure Code, or it was an application under Order XXI, rule 97, Civil Procedure Code. If it was an application under Order XXI, rule 97, Civil Procedure Code, then it is conceded that there was no appeal to the lower Appellate Court and consequently there is no second appeal to this Court.

The facts, so far as they are material for the purpose of these matters, are as follows. There was a decree against the respondents and in execution of that decree the appellants purchased the holding which was of the judgment-debtors. The appellants went to take possession of the property purchased by them, when they were resisted by the respondents before me who claim to be the prior purchasers of the property from the judgment-debtors. Owing to this obstruction the appellants presented a petition before the learned Munsif stating that they had been obstructed by the respondents and asking for possession to be made over to them.

It is true that the appellants did not describe their application as an application either under section 47 of the Code or an application under Order XXI, rule 97, but it is pointed out that if they were making an application under Order XXI, rule 97, the allegations would have been exactly the same. Upon the presentation of this application the respondents came before the Court and filed two petitions objecting to the deputation of the Nazir. Upon this the Court treated the appellants' petition as a petition under Order XXI, rule 97, and it proceeded to investigate the matter under Order XXI, rule 97. No objection was taken to this procedure by the appellants. The Court came to the conclusion that the decree obtained against the judgment-debtors was a money decree and that the respondents were the prior purchasers of the property. Accordingly the Court of first instance dismissed the appellants' application altogether.

The appellants appealed to the lower Appellate Court. The lower Appellate Court came to the conclusion that there was no right of appeal at all from an order passed in an application under Order XXI, rule 97. The learned Vakil appearing on behalf of the appellants in this Court contends that the application was not an application under Order XXI at all but under section 47. I am of opinion that this contention must be overruled, because, in my opinion, they never objected to the procedure adopted by the Court of first instance when the application was put in on their behalf. Therefore, it must follow that there is no appeal in this Court. The learned Vakil, however, argues that the lower Appellate Court should have decided the question whether the decree obtained by the Maharaja of Darbhanga was a rent decree or a money decree and in declining to decide that question it has declined a jurisdiction which was vested in it by law and that, therefore, this Court should interfere with that order under section 115, Civil Procedure Code. In my view the Court of first instance in an elaborate judgment came to the conclusion that the decree was a money decree and not a rent decree. It may be that that decision is erroneous, but the Court of first instance had jurisdiction to decide the question in the way it did. It follows that the learned District Judge had no power to interfere with that finding under any provision of the Code at all and, in my opinion, I have no power to interfere with the order recorded by the Court of first instance on this point. In my opinion, the second appeal fails and must be dismissed with costs and the Rule obtained by the petitioner must also be discharged with costs, which I assess at one gold *mohur*.

Appeal dismissed; Rule discharged.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 519 OF 1919.
July 7, 1919.
Present:—Mr. Justice Piggott.
DEBI SINGH—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 33—Statement in civil suit, admissibility of, in criminal case between same parties after death of deponent.

Accused, when defendant in a civil suit brought against him to recover a certain debt, produced a receipt purporting to have been signed by the plaintiff, showing that the debt had been discharged. The plaintiff was examined as a witness in the suit and he deposed that the receipt was a forgery. The prosecution of the accused was thereupon ordered, but before the trial came off the plaintiff died and his statement in the civil suit was admitted in evidence in the criminal case against the accused. The accused was convicted and the question in appeal before the High Court was, whether the statement of the deceased plaintiff was admissible in evidence and whether the Court was justified in believing that statement:

Held, that the statement had been rightly admitted; as the accused had an opportunity of cross-examining the deponent at the time the statement was made, and the proceedings were between the same parties within the meaning of the explanation to section 33 of the Evidence Act, and that if the Court was satisfied on a review of the entire evidence that the deponent had spoken the truth, his statement in the civil suit was sufficient to prove that the receipt was a forgery.

Criminal appeal against the order of the Sessions Judge, Aligarh, dated the 30th April 1919.

Messrs. *S. C. Mukerji* and *Panna Lal*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The case against the appellant, Debi Singh, was that he produced a receipt for the payment of a sum of Rs. 2,340, which receipt purports on the face of it to have been signed by one Kishen Singh. This receipt was produced before a Civil Court when Debi Singh was being sued for the recovery of a certain debt, and his case was that he had discharged that debt in its entirety by means of the payment evidenced by the receipt above mentioned. Kishen Singh was examined as a witness before the Civil Court and deposed that the receipt was a forgery. It so happened that Kishen Singh was dead before the appellant could be put on his trial on the criminal charge; but I am satisfied that the statement of Kishen Singh made before the Civil Court has been rightly admitted in evidence. The appellant had an opportunity of cross-examining Kishen Singh at that time and the proceedings were between the same parties within the meaning of the explanation to section 33 of the Indian Evidence Act. The real question, therefore, is whether the Court below was justified in believing the sworn statement of Kishen Singh, to the effect that he had never signed this receipt. In the judgment under appeal the evidence produced in the case is set forth and discussed in considerable detail. The learned Sessions Judge has pointed out that there is a suspicious mistake apparent on the face of the receipt itself and that there is a mass of circumstantial evidence tending to show that Debi Singh could not have paid a sum of Rs. 2,340 in cash to any one on the date given in the receipt. It has been contended before me in argument that Debi Singh has really been convicted because he failed to prove affirmatively the payment of the money in question, but this is not a correct view of the case. The Court had before it the testimony of Kishen Singh, admissible under the provisions of the Indian Evidence Act, as already noticed. That testimony was sufficient to prove that the receipt was a forgery, if the Court was satisfied on a review of the entire evidence that Kishen Singh had spoken the truth. The circumstances relied upon in the judgment of the learned Sessions Judge are, in my opinion, very strong reasons in favour of believing Kishen Singh to have spoken the truth. I think the appellant was rightly convicted and I dismiss his appeal.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REFERENCE NO. 27 OF 1919.

May 29, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

SHIV DUTT RAY—PETITIONER

versus

Babu SATISH CHANDRA GHOSH —RESPONDENT.

Bengal Municipal Act (III B. C. of 1884), ss. 241, 273—Building Regulations of Giridih Municipality, r. 13 (2)—Building still below plinth level—Conviction for contravention of rule, legality of.

Accused was convicted under section 273 of the Bengal Municipal Act for having infringed clauses 1 and 2 of rule 13 of the Building Regulations of the Giridih Municipality made under section 241 of the Act. The evidence for the prosecution showed that the accused had only laid the foundation a few feet below the ground level, the brickwork of which had not even reached the plinth level, and there was no evidence to show what kind of building the accused was going to construct, and whether the main building when completed would contravene the clauses of the rule for infringing which he had been convicted, nor had the Municipality taken steps to enforce the submission of a plan:

Held, that the conviction could not be maintained, because there was in fact no building in existence and it was not known whether and where the building would be erected. [p. 389, col. 1.]

Reference made under section 438, Criminal Procedure Code, by the Judicial Commissioner, Chota Nagpur, dated the 23rd April 1919, in the following terms:—

"The applicant has been convicted on a summary trial of an offence under the Bengal Municipal Act for contravening the Building Regulations in force in the Municipality of Giridih and sentenced to pay a fine of Rs. 20. He has further been directed to comply with those regulations. He is a resident of Pachamba, which is now a portion of the Giridih Municipality.

"I have heard the Pleader for the applicant and the Public Prosecutor. The conviction is valid if the Building Regulations are in force in Pachamba but not otherwise. In my opinion they are not in force therein and accordingly I recommend that the conviction and sentence be set aside.

"The facts are briefly these.

"In November 1902, Part VI of the Municipal Act was extended to the Giridih Municipality by Notification No. 2703M. At that time Pachamba was not a part of Giridih. It is conceded on both sides that the Municipality of Giridih had been in existence for many years before 1902, although the date when it was created is not in evidence.

"On 20th May 1918 the Building Regulations with which we are now concerned and which had been framed by the Commissioners under section 241 of the Municipal Act received the sanction of the Local Government by Notification No. 6754M.

"Two days later, on 22nd May 1918, Pachamba was included within the Giridih Municipality. By Notification No. 6867M. made under sub-section 2 of section 9A, the Local Government gave effect to the proposal of the Commissioners to include Pachamba within the limits of the Giridih Municipality The notification makes no mention of Part VI.

"It does not clearly appear whether before the Building Regulations were adopted section 241 had been extended to the Giridih Municipality. Section 241, although occurring in Part VI, nevertheless is required to be specially extended by sub section 4 and it would seem such special extension is necessary before the Local Government may give its sanction to the proposed regulations under the sub-section.

"2. I will assume, as the contrary does not appear, that this section was specially extended.

"At the time when the Building Regulations were adopted Pachamba was not a part of the Municipality. The contention of the learned Public Prosecutor is that these regulations automatically came into force when Pachamba was included.

"The introduction of Part VI cannot be considered as being a normal feature of a Municipality. Section 220 makes it very clear that Part VI is not to be extended to a Municipality without the fullest formalities. The Giridih Municipality managed without Part VI for many years.

"When Part VI is introduced, it is not necessarily extended to the whole of the Municipality. Even if it is in force, the Commissioners may take steps to exclude a portion of the Municipality from its operation under section 221. Part VI can

only come into force when the Commissioners have fully considered not only whether they will resolve to introduce it at all but also to what particular places within the Municipality it shall apply.

"The adoption of the argument of the learned Public Prosecutor would force us to the conclusion that the Commissioners, when they discussed the matter of the introduction of the Part VI in the year 1903, had under contemplation the extension of the Act sixteen years later to Pachamba and decided amongst themselves that it would be well if Part VI were extended also to Pachamba and that the Local Government, when they sanctioned the proposal, had the same thing in mind. Such a view is artificial.

"In my opinion Part VI is not in force in Pachamba and I consider the conviction to be illegal."

Rule 13 of the Building Regulations published in the Behar and Orissa Gazette, dated 20th May 1918, runs as follows: —

(1) Notwithstanding anything contained in these rules no building of any kind shall be erected within two feet of any public road, lane or drain, but, with the permission of the Commissioners at a meeting, platform or boundary walls may be raised under such conditions and restrictions as the Commissioners at a meeting may impose.

(2) The distance between the perpendicular from the eaves of a house to the nearest boundary of the holding on which such house has been or is about to be erected must be at least three feet and such space must be kept free from all obstructions. Provided that the Commissioners at a meeting shall have the power to exempt cases of hardship from the operation of this rule.

The case was originally heard by Das, J., on the 15th May 1919, who in view of the importance of the question involved referred it to a Divisional Bench.

Mr. *Yunus*, for the Petitioner, amplified the reasonings of the learned Judicial Commissioner stated in his order of reference, quoted above.

Mr. *Manohar Lal* (Assistant Government Advocate), on behalf of the Municipality, submitted that at the time when the Pachamba area was added to the Municipality of Giridih under section 9 (*c*), the Building Regulations were already in force and by virtue of this inclusion the added area enjoyed the privileges available in the Municipality as well as became subject to all laws, rules, regulations, restrictions and liabilities which obtained in the larger municipality.

The contention of the other side that under section 221 the Commissioners have never considered that Pachamba shall be subject to the operation of the Part VI, and, therefore, of the Building Regulations, is not sound because the section plainly contemplates, first, the extension of the parts of the Act referred to therein and then an exclusion, if considered necessary. Further there is no hardship to the petitioner because under section 9A he could have objected to the proposed annexation of Pachamba area. As he has not done so, he must submit to the laws that are in force in the Municipality of Giridih.

[Their Lordships intimated that this point need not be pursued further but desired to know what evidence there was on the record to shew that the accused had constructed a building in contravention of rule 13.]

The rest of the argument being on facts is not material for this report.

JUDGMENT.

JWALA PRASAD, J.—This is a Reference by the Judicial Commissioner of Chota Nagpur under section 438 of the Code of Criminal Procedure, recommending that the conviction of the accused under section 273 of the Bengal Municipal Act, III of 1884, by the Deputy Magistrate of Giridih by his judgment, dated the 10th February 1919, be set aside. The reference is opposed by the learned Assistant Government Advocate.

Mr. Yunus appears in support of the reference. The principal ground upon which the recommendation has been made by the learned Judicial Commissioner is that the place where the building in question is alleged to have been created by the accused is situate in a village called Pachamba adjoining the Giridih Municipality, to which the Building Regulations made by the Municipality of Giridih under section 241 of the Bengal Municipal Act, and sanctioned

by the Local Government under clause 2 the section, do not apply. This ground does not commend itself to us. The Municipality of Giridih was created some time in the year 1902 and thereupon the Bengal Municipal Act, III of 1884, applied to and had its effect in the area declared to be within the Giridih Municipality by virtue of section 8 of the Act.

Under section 220 of the Act the provisions of Part VI only apply to a Municipality when it is expressly extended thereto by the Local Government in the manner provided by the succeeding sections. In November 1902 some time after the creation of the Giridih Municipality, Part VI of the Act was extended to the Municipality by Notification No. 2703 (M). This Part VI deals amongst other matters with rules relating to the erection and re erection of buildings within a Municipality. Section 241 in that part provides for rules to be made by Commissioners at a meeting to regulate the erection of houses, not being huts, within the Municipality in respect of all or any of the matters enumerated therein. For the first time certain rules under this section were framed by the Giridih Municipality in the year 1918, which received the sanction of the Local Government under sub-section 2 of the section on the 20th May 1918. Two days later, that is, on the 22nd May 1918, Pachamba was included within the Giridih Municipality by Notification No. 6867 (M) made and published under sub-section 2 of section 9 of the Act. From the date of the aforesaid notification the area included within what is called Pachamba village became part of the Giridih Municipality, and by virtue of section 9, clause (*c*), read with section 7 the Bengal Municipal Act applied in its entirety and with full force to the added area Pachamba from the said date. No doubt the Commissioners at a meeting are empowered to recommend to Government for excluding from a Municipality any local area comprised therein or to withdraw any Municipality, from the operation of the Act; but so long as this is not done, all the provisions of the entire Act in force in a Municipality, at the time when its area is extended, apply to the newly added area. It has already been shown that Part VI as well as the Building Regulations framed by the Giridih Municipality and sanctioned by the Local Government under section 241 of the said part were in full force two days before Pachamba was included within the Giridih Municipality and hence they would apply to the added area Pachamba, within the ambit of which the site on which the accused is said to have commenced the erection of the building in question is situate. Under clause (3) of the section, the building rules and regulations acquired the force of law from the 20th May 1918, when they received the sanction of the Local Government. The accused was amenable to and would have been liable for any contravention of the said rules in erecting the building in question. Had the reference rested solely upon the ground stated by the Judicial Commissioner, that Part VI or section 241 did not apply to the added area Pachamba, we would have had no hesitation in rejecting it and upholding the conviction of the accused by the Deputy Magistrate.

It appears, however, that the accused committed no offence at all under section 241 of the Act. The Magistrate has convicted him under rule 13, clauses 1 and 2 of the Building Regulations published in the Bihar and Orissa Gazette, dated the 20th May 1918.

Under clause 1 of that rule no building is permitted to be erected within two feet of a public road, lane or drain. Under clause 2 the distance between the perpendicular from the eaves of a house to the nearest boundary of the holding on which such house has been or is about to be erected must be three feet and such place must be kept free from all obstructions.

None of the clauses 1 and 2 of rule 13 apply to the present case, as there is nothing to show that the accused in any way contravened the requirements of these clauses, inasmuch as the building has not been constructed and there is no building in existence. The evidence on behalf of the prosecution shows that the accused had only laid the foundation a few feet below the ground level, the brickwork of which had not even reached the plinth level. There is nothing to show on behalf of the prosecution what kind of building the accused was going to construct and whether the main building would be two feet from

the public road, or where the eaves of his house when complete would be situate, or whether a perpendicular from the eaves of that house would be situate within or beyond the prescribed limit of three feet from the road. There is no building at all at present in existence, nor is it known whether and where the actual building would be. It might be that the accused would only construct a *chotera* or plinth without any structure upon it. The Municipality did not take steps to enforce the submission of a plan by the accused in order to see whether the proposed building would contravene the provisions of Part VI or any of the rules and regulations framed under section 241. The prosecution was perhaps started a little too early and without any regard to the provisions of Part VI of the Act. The accused had no right to erect any building without having obtained sanction from the Municipality and without first having submitted a plan of the proposed house to the Municipality and if the Municipality had taken proper steps under the Act, there would have been a possibility of having from the accused a plan of the house and to know exactly whether the accused was going to contravene the provisions of the regulations in the construction of his house. As the matter stands at present, the accused cannot be convicted. We have no doubt declared that Pachamba, where the site of the present proposed building is situate, is within the Municipality and is governed by Part VI and the Building Regulations framed under section 241 of the Act, so that if the accused in future contravenes the provisions of the said regulations or the Act in any way by building any house on the site in question or otherwise, he will be amenable to law.

The recommendation of the Judicial Commissioner is accepted and the accused is acquitted. The fine, if already realised, must be refunded to the accused.

ATKINSON, J.—I agree.

Accused acquitted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO 158 OF 1919.

April 1, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

FONG KUN (KHUN) CHINAMAN—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Opium Act (I of 1878), s. 9, cls. (c), (e)—Possession of railway receipt by consignee with knowledge that parcel contains opium, whether amounts to possession of opium—Importation of opium, what amounts to.

A railway receipt which covered a parcel of opium was traced to the possession of the accused. There was also found in his possession a letter addressed to him advising him of the despatch of the parcel:

Held, (per *Richardson, J.*)—That as the accused knew that the parcel sent to him contained opium, the possession of the railway receipt constituted possession of the opium within the meaning of section 9 of the Opium Act. [p. 390, col. 1.]

Per *Shamsul Huda, J.*—That, although, under the circumstances of the case, it was doubtful whether the accused was guilty of the offence of possessing opium under clause *c*), he was clearly guilty of importing opium under clause (*e*) of section 9 of the Opium Act. [p. 390, cols. 1 & 2.]

Rule against the order of the Chief Presidency Magistrate, Calcutta, dated 17th February 1919.

Mr. *C. R. Das* (with him Babus *Monmatha Nath Mookerjee* and *Narayan Chandra Kar*), for the Petitioner.

The Hon'ble the Advocate-General (with him Babu *D. Sanyal*), for the Crown.

JUDGMENT.

RICHARDSON, J.—The petitioner, Fong Khun, has been convicted under section 9 of the Opium Act (I of 1878) of being in possession of contraband opium and sentenced to rigorous imprisonment for six months. A railway receipt was traced to the possession of the petitioner which covered a parcel consigned to him by a correspondent in Assam. A letter addressed to the petitioner advising him of the despatch of the parcel was recovered at the same time. In that letter the contents of the parcel were described as "five numbers." The parcel was subsequently opened and found to contain five seers of opium. The circumstances leave no room for doubt that the petitioner was trafficking in smuggled opium.

It was held in *Kashi Nath* v. *Emperor* (1) that in such a case, the consignee knowing that the parcel had been sent to him and that it contained opium, the possession of the railway receipt constituted possession of the opium within the meaning of section 9 of the Opium Act. That case was followed, though reluctantly, in *Ashruf Ali* v. *Emperor* (2) and we are bound by these decisions, unless we are able to hold, as the Court held in *Kali Charan Mukherjee* v. *Emperor* (3), that on the facts they are distinguishable.

It is suggested here that because two days before the railway receipt came into the petitioner's hands, the Police, acting on information received, had told the railway parcel clerk not to part with the parcel and had tied a piece of red tape round it and sealed it, therefore, the petitioner as holder of the receipt had no possession of the parcel. The precautions taken by the Police were intended merely to prevent delivery being given without their cognizance. At the time neither the Police nor the parcel clerk knew for certain what was in the parcel. Nothing was done which affected the legal rights of the parties or deprived the petitioner of possession or right to possession under and by virtue of the receipt. His possession continued until the parcel was opened and the opium was actually seized. That was after the receipt had been obtained from the petitioner. The facts, as it seems to me, do not justify a distinction being drawn between the present case and the cases to which I have referred.

On that ground or on the ground suggested by my learned brother that the petitioner was at any rate guilty of importing opium, in my opinion this is not a case in which we ought to interfere in revision and the Rule must be discharged.

The petitioner must surrender to his bail and undergo the unexpired portion of his imprisonment.

SHAMSUL HUDA, J.—I feel considerable doubt whether in the circumstances proved in this case the petitioner could be said to be in possession of opium within the meaning of section 9, clause (*c*), of the Opium Act. In my opinion, however, the petitioner was clearly guilty of importing opium under clause (*e*) and might have been convicted of that offence. In the view I take I do not think that this is a fit case for our interference in revision.

I accordingly agree with my learned brother in discharging the Rule.

Rule discharged.

(1) 32 C. 557; 9 C. W. N. 719; 2 Cr. L. J. 417.

(2) 4 Ind. Cas. 699; 36 C. 1016; 14 C. W. N. 233; 11 Cr. L. J. 29.

(3) 22 Ind. Cas. 148; 41 C. 537; 18 C. L. J. 514, 18 C. W. N. 309; 15 Cr. L. J. 4.

PATNA HIGH COURT.

CRIMINAL REVISION No. 15 OF 1919.

June 23, 1919.

Present:—Mr. Justice Atkinson.

BACHU BEHARI LAL—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Penal Code (Act XLV of 1860), ss. 463, 466—Order directing prosecution for forgery, whether can be made against person not party to proceedings—Offence under s. 466, Penal Code, whether included in s. 195, Criminal Procedure Code—Judicial proceeding, what is.

A plaintiff in a civil case sought to enforce a right by means of a forged deed. The Court sanctioned his prosecution for an offence under section 209 of the Penal Code. He was tried and acquitted. An appeal was then made to the Sessions Judge who, purporting to act under section 476 of the Criminal Procedure Code, sanctioned the prosecution of the petitioner in this case for an offence under section 466 of the Penal Code. An application to revise this order was made to the High Court, and it was contended that, inasmuch as the petitioner was not a party to the civil suit out of which the original prosecution arose, the order was bad in law as made without jurisdiction:

Held, that the Sessions Judge was entitled, under section 476 of the Criminal Procedure Code, to direct the prosecution of the petitioner for forgery, irrespective of the fact that he was not a party to the original proceedings. [p. 393, col. 2.]

It was further contended that the Sessions Judge had no power to order the prosecution for an offence under section 466 of the Penal Code, because that section is not specifically mentioned in section 195 of the Criminal Procedure Code:

Held, that, inasmuch as section 195 of the Criminal Procedure Code confers jurisdiction to grant sanction to prosecute under section 463 of the Penal Code, and as the latter section, in its comprehensive and general terms, covers an act of a particular kind of forgery which may constitute a separate offence under the specific enumeration of crimes provided for by the Penal Code, the Sessions Judge had power to make the order. [p. 394, col. 1.]

BACHU BEHARI LAL *v.* EMPEROR.

Lastly, it was contended that the Sessions Judge had no right to exercise the powers vested in him by section 476 of the Criminal Procedure Code, inasmuch as the matter out of which the prosecution arose did not come before him in the course of a judicial proceeding:

Held, that as there was an appeal to the Sessions Judge from the order discharging the original accused under section 209 of the Penal Code lawfully presented to a proper Court and that Court was of opinion that the petitioner should be prosecuted, the Sessions Judge did have before him a judicial proceeding in the course of which he became acquainted with the facts as to the petitioner's participation in the act of forgery, and that he did not exceed his powers in making the order in question.[p. 394, col. 1.]

Criminal revision against the order of the Sessions Judge, Saran, dated the 7th May 1919, directing the prosecution of the petitioner under section 476, Criminal Procedure Code, which was as follows:—

"Heard argument on behalf of Bachu Behari Lal.

"My order under section 476, Criminal Procedure Code, has been opposed on three grounds:—

"(1) that the proceedings in the course of which his alleged offence was brought to my notice were not judicial proceedings;

"(2) that Bachu Behari Lal not being a party to the suit in connection with which the alleged forgery is said to have been committed, no orders can be passed against him under section 476, Criminal Procedure Code;

"(3) that on the merits the case is not a strong one and conviction is doubtful.

"As regards the first point, a petition had been filed before me on behalf of the complainant Gokal Singh in a criminal case against one Bali Ram Sahai, asking me to set aside the order of discharge passed by the Deputy Magistrate in that case and to order a further enquiry. It was in connection with those proceedings that the alleged offence was brought to my notice.

"It seems to me that there can be no doubt that those proceedings before me were judicial proceedings. I cannot imagine what else they can be called.

"Reliance was placed upon the definition of judicial proceedings given in section 4, clause (*m*), Criminal Procedure Code, and it was urged that I was not entitled to take evidence in the course of those proceedings, hence they were not judicial proceedings. However, this definition on the face of it is not exhaustive and it shows that the words 'judicial proceedings' may also include proceedings in which evidence cannot be taken. Personally I see no reason to doubt that the proceedings before me were judicial proceedings within the ordinary meaning of the words. Moreover, the opinion expressed in *Sangilia Pillai* v. *District Magistrate of Trichinopoly* (1) supports my view.

"As regards the second objection, there is no force in it. Section 195, clause (*c*), Criminal Procedure Code, shows that the sanction is necessary in the case of certain offences of forgery that are committed by a party to a proceeding. In other words, persons who are not parties may be prosecuted for such offences by a private party without obtaining the sanction of the Court. This does not mean that the Court itself can take no action under section 476, Criminal Procedure Code, against persons who are not parties to a case and who commit such offences. In fact the words 'when such offence has been committed by a party to any proceeding,' which are found in section 195, Criminal Procedure Code, have been expressly and purposely omitted from section 476.

"As regards the third objection that the case is not a strong one and the conviction is unlikely, I find it hard to imagine how there could be a stronger *prima facie* case of forgery of a judicial record; Bachu Behari Lal must certainly stand his trial.

"I, therefore, make my order absolute and I direct that Bachu Behari Lal, be prosecuted for an offence under section 466, Indian Penal Code, (or for any other offence which the evidence may disclose) upon the grounds mentioned in my proceedings of 22nd April 1919.

"Let the record with a list of prosecution witnesses be sent to the District Magistrate for favour of disposal either by himself or by some other Magistrate subordinate to him.

"Let Bachu Behari Lal, who is present in Court, be released on bail of Rs. 300 for his appearance before the District Magistrate when required."

Mr. *S. P. Varma*, for the Petitioner.

The Government Advocate, for the Opposite Party.

(1) 25 M. 659; 2 Weir 593.

The arguments at the Bar are sufficiently clear from the judgment of Atkinson, J.

JUDGMENT.—The petitioner in this application seeks to have the order of the learned Sessions Judge of Saran, dated the 7th May 1919, set aside.

The learned Judge by his order directed the petitioner to be prosecuted for an offence under section 466 of the Indian Penal Code.

The facts upon which this application is founded may be briefly stated.

A suit was instituted in the year 1915 bearing No. 21. It was a title suit between one Gokal Singh as plaintiff and Balaram Sahay as defendant.

By this suit Gokal Singh sought to enforce his right to a sale of certain property under a sale-deed executed in the year 1914.

The defence filed by Balaram Sahay to resist the suit was based upon a compromise effected in a previous mortgage suit; and by the defence in Suit No. 21 of 1915 it was pleaded that the sale-deed of 1914 had been annulled by virtue of the compromise. The compromise so referred to in the proceedings is Exhibit 2, and the compromise bore date 21st November 1916. The compromise was filed in Court in the original mortgage suit and in effect operated as a decree in that suit.

When Gokal Singh ascertained the nature of the defence which had been asserted by Balaram Sahay in Suit No. 21 of 1915, he immediately observed that the compromise referred to purported to annul and cancel the sale-deed. But on examination it was obvious that the compromise had been altered so as to make it appear that the sale-deed was annulled, which was never intended between the parties in the prior mortgage suit in which the compromise had been arrived at.

Accordingly Gokal Singh applied to the Subordinate Judge in Suit No. 21 of 1915 to direct the prosecution of Balaram for forgery.

The learned Subordinate Judge granted sanction and accordingly Balaram was prosecuted.

The prosecution of Balaram Sahay came before the Deputy Magistrate on the 10th March 1919 for trial, and he directed that the accused should be acquitted of the offence with which he was charged under section 209 of the Indian Penal Code, inasmuch as there was no reliable evidence against him in respect of the charge on which he had been tried.

From the order of acquittal pronounced in favour of Balaram made by the Deputy Magistrate, Gokal Singh applied to the Sessions Judge in appeal to reverse the order passed by the Deputy Magistrate, and in the course of this appeal at the suit of Gokal Singh against the order of the Deputy Magistrate, Mr. Monahan as Sessions Judge of the district of Saran directed that the petitioner Bachu Behari Lal should be prosecuted for an offence under section 466, Indian Penal Code.

The learned Sessions Judge in directing the prosecution of the petitioner purported to exercise the powers vested in him under section 476 of the Code of Criminal Procedure.

It is contended before me that the order of the learned Sessions Judge is erroneous and made without jurisdiction.

Three contentions were put forward for the purpose of impeaching the order of the 7th May passed by the learned Sessions Judge.

First, it is contended that section 476 of the Code of Criminal Procedure incorporates within its terms all the provisions, limitations and qualifications specified in section 195 of the Code of Criminal Procedure. That is to say, that the reference by incorporation to section 195 in section 476, Criminal Procedure Code, is not merely confined to an enumeration of the sections of offences in respect of which a Court may direct a person to be prosecuted; but it also applies with regard to the qualifications as to the persons against whom proceedings may be taken. Therefore, it is contended that inasmuch as the petitioner was not a *party* to the Suit No. 21 of 1915 instituted by Gokal Singh that, therefore, the Court had no power under section 476 to direct his prosecution for an offence under section 466, Indian Penal Code.

Two authorities are cited in support of this contention, *viz.*, the rulings reported

as *Jadunandan Singh* v. *Emperor* (2) and *Kallaru Ramalingam, In re* (3). It is perfectly true that these two decisions are authorities in favour of the contention put forward on behalf of the petitioner. Mr. Justice Mukerjee in the case reported as *Jadunandan Singh* v. *Emperor* (2) gave an elaborate judgment, in which he enunciated the principle that in construing section 476 a Court in exercising the powers conferred on it by that section must have regard to all the provisions and qualifications specified in section 195 of the Code of Criminal Procedure.

If the ruling referred to was the governing authority determining the law in this Province, no doubt the petitioner would be entitled to succeed in the application which he has made before me.

However, the ruling of Mr. Justice Mukerjee reported as *Jadunandan Singh* v. *Emperor* (2) has been dissented from in this Court. My learned brother Mr. Justice Mullick, as a member of a Division Bench of this Court, has distinctly laid down in the case reported as *Abdul Sattar* v. *Emperor* (4) that section 476 merely for the sake of abbreviation incorporates section 195 of the Criminal Procedure Code within its terms *qua* the enumeration of offences only specifically mentioned in that section as offences under the Indian Penal Code in respect of which the persons authorised by section 476 of the Criminal Procedure Code may direct the prosecution of a person guilty of any such offences.

Apart from the two decisions to which I have referred reported as *Jadunandan Singh* v. *Emperor* (2) and *Kallaru Ramalingam, In re* (3), the weight of judicial authority seems to be in favour of the view of the ruling of the Division Bench of this Court. It is quite erroneous for learned Counsel on behalf of the petitioner to state or argue, as he has done before me, that Mr. Justice Mullick failed to consider the importance and value of the judgments in the two reported cases which I have mentioned. Mr. Justice Mullick was emphatically of opinion that the rulings in *Kallaru Ramalingam, In re* (3) and *Jadunandan Singh* v. *Emperor* (2) were not acceptable or binding as a correct interpretation of the law in this Province; and ample authority will be found in support of the view of my learned brothers in the following reported cases, *viz.*, *Rajkumar Singh* v. *Emperor* (5), *Akhil Chandra Sen* v. *Queen Empress* (6), *Ganga Ram* v. *Emperor* (7), *Devji, In re* (8) and *Keshav Narayan Manolkar, In re* (9).

Therefore, I hold that the first contention put forward by the petitioner is unmaintainable and that the learned Judge was entitled to direct his prosecution for forgery under section 476 irrespective of the fact that he was not a party to the proceedings in Suit No. 21 of 1915 instituted by Gokal Singh against Balaram.

The second argument addressed to me by Mr. Varma is clear. His argument was that the learned Judge had no power under section 476 to direct the petitioner's prosecution for an offence under section 466 of the Indian Penal Code, inasmuch as section 463 is not specifically mentioned in section 195 of the Criminal Procedure Code.

This point was suggested by the Court when petition of admission in this matter was made to a Division Bench of this Court, and we allowed this point to be taken as an additional ground in revision by the petitioner's petition.

I am satisfied, however, after careful consideration of the matter that there is no substance in this objection.

Section 195 confers jurisdiction upon a Court to grant sanction to prosecute for an offence under section 463 of the Indian Penal Code. Section 463 is the general section which defines what forgery is, and that section is couched in wide and comprehensive terms and is intended, in my opinion, to apply to all classes and kinds of forgeries, howsoever committed.

No doubt the offence charged under section 466 against the petitioner is an offence of forgery of a Court record, a heinous

(2) 4 Ind. Cas. 710; 37 C. 250; 14 C. W. N. 330; 10 C. L. J. 564; 11 Cr. L. J. 37.

(3) 31 Ind. Cas. 653; 40 M. 100; 18 M. L. T. 488; 2 L. W. 1135; 16 Cr. L. J. 797.

(4) 48 Ind. Cas. 894; (1918) Pat. 352; 20 Cr. L. J. 94,

(5) 37 Ind. Cas. 487; 1 P. L. J. 298; 18 Cr. L. J. 137; 3 P. L. W. 33.

(6) 22 C. 1004; 11 Ind. Dec. (N. S.) 667.

(7) 42 Ind. Cas. 927; 40 A. 24; 15 A. L. J. 817; 19 Cr. L. J. 15.

(8) 18 B. 581; 9 Ind. Dec. (N. S.) 896.

(9) 17 Ind. Cas. 720; 13 Cr. L. J. 848; 14 Bom. L. R. 968.

and grave crime. This section deals only with a particular kind of the general species of forgery specified in section 463. It would be almost absurd to hold that section 463, which embraces all forgeries, is limited and restricted in its application so as to be inapplicable to the act of forgery committed within the meaning of section 466. The point, however, is not without authority, and I express my concurrence with the view of the law stated in the case reported as *Queen-Empress* v. *Tulja* (10). The Calcutta High Court has also taken the same view in the case reported as *Teni Shah* v. *Bolahi Shah* (11), and in both these cases it has been held that section 463 in its comprehensive and general terms covers an act of a particular kind of forgery which may constitute a separate offence under the specific enumeration of crimes provided for by the Indian Penal Code.

Therefore, I hold that on the second contention submitted the argument of the petitioner must fail.

The third and last contention submitted for my consideration was that Mr. Monahan had no right to exercise the powers vested in him under section 476 of the Code of Criminal Procedure, inasmuch as the matter out of which this prosecution has arisen did not come before him in the course of a judicial proceeding.

This contention is, in my opinion, absolutely unsustainable.

Gokal Singh preferred an appeal from the order of the Deputy Magistrate discharging Balaram Sahay of the offence with which he was charged under section 209. In the course of that proceeding there was an appeal lawfully preferred to a proper Court; that Court was of opinion, in the course of that proceeding, that Balaram was not the person to be prosecuted, but that Bachu Behari Lal was. It would be impossible to hold in point of law or fact that the learned Judge did not become acquainted with the facts as to petitioner's participation in the act of forgery relied on to justify his prosecution in the course of a judicial proceeding.

Accordingly I hold that the third argument submitted on behalf of the petitioner is unsustainable in point of law, and I accordingly reject this application and direct the prosecution of the petitioner do proceed forthwith.

The learned Government Advocate asks for costs; this application is refused.

Application rejected.

(10) 12 B. 36; 6 Ind. Dec. (N. S.). 509.

(11) 5 Ind. Cas. 879; 14 C. W. N. 479; 11 Cr. L. J. 280.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 518 OF 1919.

July 7, 1919.

Present:—Mr. Justice Piggott.

KADHE MAL—APPELLANT

versus

EMPEROR—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 239—Joint trial of persons charged with attempting to use forged document and abetment of same, legality of.

Where two persons are jointly concerned in the production in evidence of a forged document, and are tried the one as the principal and the other for abetment, the trials should be separate. The Court ought not, in such a case, to assume that the evidence against the two accused is the same and that it must necessarily come to the same finding in the two cases. [p. 395, col. 1.]

Criminal appeal against the order of the Sessions Judge, Aligarh, dated the 30th April 1919.

Messrs. *S. C. Mukerji* and *Panna Lal*, for the Accused.

Mr. *L. M. Banerji* (Government Pleader), for the Crown.

JUDGMENT.—This appeal is closely connected with another* which I have just disposed of, but the two cases differ in one essential point. In a certain civil suit, in which one Debi Singh was being sued as a defendant for the recovery of a certain sum of money, Debi Singh produced in evidence a receipt purporting to have been given him by one Kishen Singh. The Civil Court decided against the genuineness of that receipt and eventually Debi Singh was put on his trial for having produced in evidence a forged document, knowing it to be forged, and Kadhe Mal was separately placed on his trial for abetment of the forgery and for having given false evidence before the Civil Court. The two accused persons were tried separately as required by the law, but in

*See *Debi Singh* v. *Emperor*, 52 Ind. Cas. 385.—*Ed.*

reality there has been no separate trial. The learned Sessions Judge commences his judgment against Kadhe Mal with the remark that the receipt in question has already been found to be a forged document in the trial of Debi Singh He does not, of course, mean to say that this fact is conclusive against Kadhe Mal, but he has assumed that the evidence against Kadhe Mal is the same as that against Debi Singh and that the same Court must necessarily come to the same finding in the two cases. Now Kishen Singh, whose signature appears on the receipt, had died before criminal proceedings were taken. The deposition which he had made at the civil trial was admissible in evidence against Debi Singh but was not admissible against Kadhe Mal. If both the cases had been tried with the aid of a Jury, and Kadhe Mal's case had come before a different Jury, it would have been the duty of the Court to exclude from evidence the statement which Kishen Singh had made at the trial in the civil suit, and the Jury would have been asked to return a verdict as against Kadhe Mal on the evidence available after the exclusion of that deposition. In my opinion no Jury could have returned a verdict of guilty without having before them the sworn testimony of Kishen Singh. As I have pointed out in my judgment on Debi Singh's appeal, this sworn testimony is the decisive feature in the case. The rest of the prosecution evidence amounts to circumstantial evidence corroborating Kishen Singh's statement and warranting the Court in believing him to have spoken the truth. It is not, in my opinion, evidence such as to justify affirmatively the finding that the receipt in question is a forged document. It may be that Kadhe Mal has been unduly fortunate in the circumstances of his trial; but the law requires him to be tried separately from Debi Singh, and I cannot overlook the fact that the evidence against the two men is by no means the same. I accept the appeal of Kadhe Mal, set aside the conviction and sentence against him and direct that he be released.

Accused released.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 747 OF 1918.

January 31, 1919.

Present:—Mr. Justice Chevis and Mr Justice Abdul Raoof.

HARNAM SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 111, 394, applicability of—Robbery committed by four persons—Abetment—Death caused by one alone, whether probable consequence—Liability of others.

A robbery was committed by 4 men; two, one of whom was the accused, went from house to house bullying and ill-treating the inmates and making them give up their valuables, while the other two kept guard on the house tops. Of the latter pair one was armed with a gun which he fired off several times, and towards the close of the affair when the villagers began to make it unpleasant for the robbers by stone throwing, he aimed at one of the villagers who took a prominent part in stone throwing, and shot and killed him. The accused, having been convicted of murder, appealed to the Chief Court:

Held, (1) that inasmuch as the fatal shot was fired by one man alone, the accused could not be convicted of murder by reason of section 34, Indian Penal Code: [p. 397, col 1.]

(2) that in order to apply section 111, Indian Penal Code, it must be found (1) that the appellant was an abettor of the robbery and (2) that the murder was a probable consequence of the abetment and was committed in pursuance of the conspiracy to commit the robbery; [p. 397, col. 2.]

(3) that the appellant was one of the principals in the robbery and not merely an abettor; [p. 397, col. 2.]

(4) that even assuming that he was an abettor, it could not be said that murder was a probable consequence of the abetment to commit robbery; [p. 397, col 2.]

(5) that the accused was guilty of an offence under section 394, Indian Penal Code.[p. 398, col. 1.]

Appeal from the order of the Sessions Judge, Hissar, dated the 21st October 1918, convicting the appellant.

Mr. *Gullu Ram*, for the Appellant.

Lala *Mul Chand*, R. S., for the Respondent.

JUDGMENT.—The appellant Harnam Singh has been convicted of the murder of Umar Hyat and sentenced to death. The case is before us on appeal, and also under section 374, Criminal Procedure Code, for orders as to confirmation of the death sentence.

The murder in question occurred in the course of a robbery which took place in the houses of Jainti, Santu and Ishari

at Badalgarh soon after sunset on the 9th November 1917. The facts of the robbery are related at length in the judgment of the learned Sessions Judge, and it is unnecessary to repeat them in full detail here. Briefly it may be said that the robbery was committed by four men; two, one of whom is alleged to be the appellant, went from house to house, bullying and ill-treating the inmates and making them give up their valuables, while the other two kept guard on the house tops. Of the latter pair one was armed with a gun, which he fired off several times, and towards the close of the affair, when the villagers began to make it unpleasant for the robbers by throwing stones he aimed at Umar Hyat, who was taking a prominent part in the stone throwing, and shot and killed him. The robbers then made off with their booty.

The manner in which the investigating Police came to the conclusion that Harnam Singh was one of the robbers and arrested him in Calcutta in April 1918 is described in the judgment of the learned Sessions Judge.

That the robbery and the murder took place as described by the witnesses is not denied, and the only question of fact arising for decision in this appeal is whether it has been proved that the appellant is one of the four robbers.

On this point the principal evidence is that of Lekhu, son of Jainti, Ganeshi, brother of Santu, *Musammat* Gangi, wife of Lekhu, and *Musammat* Rakhi, wife of Ishari, who all swear to the appellant as one of the two who committed the actual robbery while their two companions mounted guard on the house tops. There is reliable evidence as to these four witnesses having picked the appellant out of a group of men in the Hissar Jail in the presence of Rai Gopal Das, Treasury Officer. We see no reason whatever to suppose that the identification was not perfectly genuine. It is urged that the Police may have allowed the witnesses opportunity of seeing the appellant before the identification parade took place, or that the witnesses may have seen beforehand the other persons with whom the appellant was grouped. But if any tricks of this sort were to be played, how is it that Rura, Jainti and Santu were not also induced to identify the appellant? The robbers were in the houses of the witnesses for a considerable time, so we have no doubt that the witnesses had opportunity of noting their features, even though their faces were partially covered as the witnesses admit.

It might, of course, be urged that the appellant was picked out because he happens to resemble one of the robbers, but there is other incriminating evidence. After Harnam Singh was arrested, Karima was shut up with him in the lock up for the night, posing as a man arrested for cattle theft, and the next day Karima gave the Police information which led to the house of Kanshi goldsmith and of appellant's wife and sister being searched. In possession of Kanshi and the appellant's sister were found ornaments which have been satisfactorily identified as part of the loot. Kanshi Ram (P. W. No. 42), no doubt, claims the ornaments found in his possession as his own, though he admits certain dealings with appellant's father in the Diwali of 1917. But *Musammat* Ratno, sister of the appellant (P. W. No 35), admits that she got the ornaments from her brother, and in the absence of any good evidence to shew that she has been coerced into giving this evidence, we decline to suppose that she is giving false evidence against her own brother.

So we have not only identification by four of the victims of the robbery but also evidence proving his connection with part of the ornaments looted in the robbery.

It is unnecessary now to dwell on the evidence of Karima and Sharfu. We may, however, remark that Karima's story of the booty having been divided in his presence and of his being told that it was stolen property may easily be true, but points strongly to his being an associate of the culprits. Further, according to his own shewing he withheld the name of one of the real culprits when he first gave information to the Police, and he appears to us to be a man on whose uncorroborated evidence it would be dangerous to place reliance. As to Sharfu all that his evidence proves is that

about the time of the robbery he saw the appellant and two other Sikhs in Bananwali, a village a long way off from the scene of the robbery.

The evidence of the two defence witnesses is not worth comment. We hold it clearly proved that the appellant is one of the four men who committed the robbery.

Next comes the question what offence he is guilty of. He was not the man who fired the gun and killed the deceased. The learned Sessions Judge has applied section 34 of the Indian Penal Code, but we are of opinion that this section is frequently misapplied and we do not consider it applicable to the present case. The section runs thus: "When a criminal act is done *by several persons*, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." Thus if two men were jointly to beat a man to death each of the two would be liable, though he alone had not caused the death. But here there is no question of an act causing death being done by several persons. The fatal shot was fired by one man alone, and if the appellant is to be convicted of the murder it must be not by reason of section 34, Indian Penal Code, but as an abettor. We note that in many such cases the difficulty of fixing responsibility on to all the gang does not arise, because such robberies are often committed by gangs of 5 or more men, and then section 149 is applicable,—a section which goes much further than section 34, as it relates not merely to acts done in furtherance of the common object but also to such acts as the offenders knew to be likely to be committed in furtherance of that object. There is also section 396, Indian Penal Code, which lays down that if any one of 5 or more dacoits commits a murder in the course of the dacoity, every one of the dacoits may be punished with death. Here, however, there were only four culprits, so neither section 149 nor section 396 can be applied.

The question remains whether the appellant is guilty of abetment of the murder. The appellant knew, of course, that one of his comrades was armed with a gun, and it must be presumed that he knew, not merely that the gun would be fired off to frighten the villagers, but that it might be used in case of necessity to effect the escape of the robbers by causing death. But there was presumably no intention formed beforehand of killing anybody. Several shots were fired, but seeing that only one at the very end of the affair took effect, it would appear that the earlier shots were not intended to hit. And the two robbers inside the house only inflicted simple hurts. So we can scarcely hold that the appellant instigated the fatal shot, or engaged in a conspiracy for it to be fired or aided the firing of that shot. On behalf of the Crown section 111, Indian Penal Code, is quoted, and it is urged that the fatal shot was a probable consequence of the robbery. Section 111 runs as follows: "When an act is abetted and a different act is done, the abettor is liable for the act done in the same manner and to the same extent as if he had directly abetted it: provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment."

So in order to apply section 111 to the present case we shall have to find (1) that the appellant was an abettor of the robbery, and (2) that the murder was a probable consequence of the abetment and was committed in pursuance of the conspiracy to commit the robbery.

Now the appellant was one of the principals to the robbery and not merely an abettor, and the section as formed and the illustrations which accompany it seem to point merely to abettors. But illustrations are not exhaustive, and it may be argued with some force that when two or more persons jointly commit an offence each of them is not merely a principal, but is also an abettor of his companions since he is aiding them in the doing of the act We need not, however, decide this point, since we are not prepared to hold that the murder was a probable consequence of the abetment to commit robbery. When the chances are in favour of a certain event happening, then that event is probable; when the chances are against its happening, it is improbable. When the chances are even, we get the middle line

between probability and improbability. Improbability, if increased to the extreme limit, becomes impossibility; probability if increased to the limit becomes certainty. The halfway line in neither probability nor improbability. Now in a robbery of this kind, when there is no previous enmity of any sort firearms are taken with the main object of frightening the villagers, and it is not the intention of the robbers to use the firearms with deadly effect, unless it should be necessary to do so in order to effect their escape. If the appellant and his comrades had been asked by a friend shortly before the robbery what were the odds on a murder being committed during the course of that robbery, we imagine that they would have said the odds were *against* anybody being killed. And we think that such an answer would have been right. Many such robberies take place without any one being killed. We do not, however, mean to lay down any general rule as to probabilities in such cases, every case must be judged as far as possible on its own merits. We cannot, therefore, uphold the conviction of murder by reason of section 111.

But section 394 is clearly applicable; this section provides that if any person in committing robbery voluntarily causes hurt, he and any other person jointly concerned in committing the robbery shall be punished with transportation for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. We think the maximum sentence allowed by this section should be passed. Robberies by armed gangs at night require rigorous repression, as the Legislature clearly recognizes when providing special punishments for gangs of five or more persons committing such offences. Here the gang just fell short of five, and so the offender is not liable to the death sentence to which he would otherwise have been liable under section 396.

We so far accept the appeal as to alter the conviction to one under section 394, and the sentence to one of transportation for life.

Appeal partly accepted;
Sentence reduced.

PATNA HIGH COURT.

CRIMINAL REVISION No. 157 OF 1919.

June 13, 1919.

Present:—Mr. Justice Atkinson.

DAROGA CHOWDHURY AND OTHERS —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 350—Transfer of Magistrate—Trial de novo—Re-transfer of Magistrate—Trial proceeded with from where he had left it—Procedure, legality of.

The accused were charged with certain offences under various sections of the Penal Code and the Cattle Trespass Act. The case was assigned to Mr. *T*, the Joint Magistrate, who, however, was transferred from the district before he was able to complete the case. The Sub-Divisional Officer transferred the case to his own file and heard the case *de novo*, disregarding all the evidence recorded by Mr. *T*. Before the Sub-Divisional Officer had concluded the case, Mr. *T*. was re-transferred to the district, whereupon the Sub-Divisional Officer transferred the case to Mr. *T.'s* file with a direction that Mr. *T*. should take it up from where he had left it before being transferred. This was done, and resulted in the accused being convicted;

Held, that the trial was illegal and must be set aside, and the accused tried *de novo*; that the order of the Sub-Divisional Officer was *ultra vires* and without jurisdiction, because all that had taken place before Mr. *T*. had been superseded, and formed no part of the record in the proceeding then actually pending and being prosecuted against the accused, and that, as a consequence, Mr. *T*. had no authority or jurisdiction to act on the record of the proceedings which had been antecedently taken before him, the result being that the accused were gravely prejudiced in their trial. [p. 400, cols. 1 & 2.]

Criminal revision against the order of the Sessions Judge, Monghyr, dated the 14th April 1919, affirming in appeal the conviction and sentence of petitioners by the Magistrate, Monghyr, dated the 14th March 1919.

Mr. *Gour Chandra Pal*, for the Petitioners.

JUDGMENT.—The seven petitioners apply that the order of the learned Sessions Judge, dated the 14th April 1919, may be set aside, and that consequential upon setting aside of the same that the order of the Joint Magistrate Mr. Tadani, who convicted them on the 14th of March 1919, should also be set aside.

Two points were taken in support of the application on behalf of the petitioners. The petitioners were charged with having committed certain offences under various

sections of the Indian Penal Code and the Cattle Trespass Act.

The case against the accused was originally assigned to the Joint Magistrate, Mr. Tadani, for hearing and disposal. Mr. Tadani commenced the hearing of the case on the 22nd August 1918, and he continued the investigation of the charges against the accused up to 24th October 1918. Mr. Tadani was then about to be transferred from the District of Monghyr; and he applied to the Sub-Divisional Officer requesting that the trial of this prosecution might be transferred to the file of some other officer for final disposal.

Accordingly on the 24th October 1918 the Sub-Divisional Officer, Mr. Majid, transferred the case from the file of Mr. Tadani to his own file, he being the Magistrate most suitable to dispose of the prosecution instituted against the accused.

Immediately after the transfer to the file of the Sub Divisional Officer the accused in the exercise of their statutory right applied for a *de novo* or fresh trial: which application was granted by the Sub-Divisional Officer.

The Sub-Divisional Officer proceeded *de novo* to have the evidence recorded afresh; disregarding all the evidence which had been originally taken and recorded by Mr. Tadani during the period he acted as Magistrate in the trial of the prosecution case against the accused.

The Sub-Divisional Officer proceeded in the usual way and recorded the evidence on behalf of the prosecution.

On the 15th January 1919 Mr. Tadani was re-transferred back to the district of Monghyr; whereupon the Sub-Divisional Officer re transferred the trial of this prosecution to the file of Mr. Tadani, remarking that it would economise time if he would take up the case from where he, Mr. Tadani, had left it off. The Sub-Divisional Officer had not proceeded in the course of his investigation as far as Mr. Tadani had at the time that the case was originally transferred to the file of the Sub Divisional Officer in October. The wording of the Sub-Divisional Officer's order is as follows:—"This will economise time, since he, Mr. Tadani, will take up the hearing at the point where he had left."

Now it is contended before me that that order of the Sub-Divisional Officer, dated the 15th January 1919, was an improper and illegal order made without jurisdiction and consequently that the order of conviction by Mr. Tadani was illegal and void in law, and that the accused have been gravely prejudiced in this trial by reason of the illegal order of transfer made by the Sub-Divisional Officer, and that no appeal properly lay therefrom; and in addition it is contended that the judgment of the learned Sessions Judge of Monghyr in this case was a judgment not in accordance with law, and that, therefore, it should be set aside.

I may say that the argument on the second point was not seriously pressed by Mr. Pal. He devoted the entire of his argument to the first ground of the objection, and I cannot say that I was impressed by his observations with reference to the second ground asserted for impeaching the validity of the conviction of the accused.

Mr. Pal's contention is that the law requires, speaking generally, that the person who convicts an accused shall be the person who has heard the evidence and seen the witnesses at the trial; and the law, *prima facie*, does not contemplate or permit a change or transfer of Judges during the intervening stages of the trial between the commencement and the end of the prosecution. Sometimes it is inevitable that a transfer may take place of an officer pending a trial, and in such cases section 350 of the Criminal Procedure Code seems to make provision as to the procedure to be adopted in such event. Sub-clause (*b*) of section 350 provides that "Where a Magistrate is transferred and the evidence is partly recorded by one and partly by the other who acts as successor then it is competent for the successor to convict the accused on the evidence recorded by his predecessor: provided that no prejudice thereby be done to the accused."

I admit that clause (*b*) has no application to the facts of this case. Section 350 of the Criminal Procedure Code, in my opinion, applies to all cases of transfers as well as to cases in which one Magistrate succeeds another in succession and discharge of the duties of his office.

Clause (*a*) of section 350 undoubtedly confers a right upon accused persons, where a transfer takes place in the constitution

of the Tribunal which commenced to try the case, to have a fresh trial *de novo*. I take it that this means that the succeeding Magistrate must start afresh as if nothing had been done; and that all that had been done was completely blotted out and superseded and was no longer any part of the case; otherwise it would be senseless to refer to such right as giving birth to a right of fresh trial *de novo*.

I take clause (*a*) of section 350 of the Criminal Procedure Code to mean a new beginning, a new start unfettered and unrestricted by anything that antecedently had taken place.

If that is so, then in my opinion the Sub-Divisional Officer had no power, jurisdiction or right to transfer the case to Mr. Tadani, directing him to proceed with the trial at the point where he, Mr. Tadani, originally left off when he had due seisin of the hearing of the prosecution, because all that had taken place before Mr. Tadani had been superseded, and must be deemed to be considered as forming no part of the record in the proceeding then actually pending and being prosecuted against the accused. If the learned Sub-Divisional Officer had merely transferred the case to Mr. Tadani to proceed from the point where he, the Sub-Divisional Officer, had left off when he re-transferred the case to Mr. Tadani, then I think no objection could be urged against the conviction of the accused by Mr. Tadani acting upon the record of the proceedings in the *de novo* trial initiated before the Sub-Divisional Officer.

Consequently, in my opinion the order of the learned Sub Divisional Officer, dated the 15th January 1919, transferring the case to Mr. Tadani in the manner in which he did was *ultra vires* and without jurisdiction; and that consequently Mr. Tadani had no authority or jurisdiction to act on the record of the proceedings which had been antecedently taken before him. Thus in my opinion the accused have been gravely prejudiced in their trial by reason of the course the proceedings took owing to the invalid order made by the Sub-Divisional Officer on the 15th of January 1919.

There are many cases on this point argued before me. Two cases are to be found reported as *Sobh Nath Singh* v. *Emperor* (1) and *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (2) respectively; in which the Courts laid down in most emphatic terms that non-compliance with the provisions of section 350 of the Code of Criminal Procedure involves prejudice to an accused person.

I do not go so far myself as to say that *per se* non compliance with the provisions of section 350 must necessarily involve prejudice to an accused in every case, but I say it may do so under certain circumstances, and if prejudice ensues, the accused is entitled to a new and fair trial. In the particular case before me, I am satisfied that the attempt to revive the proceedings which were dead undoubtedly did prejudice the accused, having regard to the fact that in the second edition of the prosecution case oral evidence was given by the witnesses before Mr. Majid, the Sub-Divisional Officer, which was at variance with that originally recorded by Mr. Tadani and that it was impossible for the accused under the circumstances of this case to have used the proceedings recorded before Mr. Tadani, in the subsequent case before the Sub-Divisional Officer, to impeach the inaccuracy of the subsequent evidence, nor would it have been possible, on re-transfer of the case to Mr. Tadani, for the accused to have used the proceedings before the Sub-Divisional Officer to challenge the evidence originally recorded before Mr. Tadani.

I am satisfied, therefore, on the entire case that the accused have been materially prejudiced by the course the trial took owing to the defective order of the learned Sub-Divisional Officer, and I accordingly set aside the conviction of the accused before Mr. Tadani, dated the 14th March 1919, and their conviction on appeal before the Sessions Judge, dated the 14th April 1919, and I direct that all the accused be tried *de novo*.

Retrial ordered.

(1) 12 C. W. N. 138; 6 Cr. L. J. 431.
(2) 12 C. W. N. 140; 6 Cr. L. J. 434.

IMAM ALI SIKDAR *v.* KARIM BUKSH.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 40 AND 41 OF 1917.

May 22, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

IMAM ALI SIKDAR—DEFENDANT—JUDGMENT-DEBTOR—APPELLANT IN BOTH

versus

KARIM BUKSH SHEIKH—PLAINTIFF—DECREE-HOLLER—RESPONDENT IN NO. 40 OF 1917

MOYNUDDIN MONDAL AND OTHERS—RESPONDENTS IN NO. 41 OF 1917.

Civil Procedure Code (Act V of 1908), s. 47—Decree for ejectment directing payment of compensation within period fixed - Payment after date fixed—Order accepting payment—Appeal, whether lies.

The judgment in an ejectment suit made the ejectment conditional upon the payment of compensation by the plaintiff; in the decree, however, no mention was made of this condition, but it only directed payment of the compensation within the date fixed. The plaintiff deposited the money after the period had expired, and, notwithstanding the defendant's objection, the Court made an order that the money be received:

Held, that as the decree had not been put into execution, the order was not one under section 47 of the Civil Procedure Code, and was, therefore, not appealable. [p. 402, col. 1.]

Appeal against the orders of the Subordinate Judge, Assam Valley Districts, dated the 21st of November 1916, affirming those of the Munsif, Dhubri, dated the 25th of February 1916.

FACTS appear from the judgment.

Babu *Bimal Chandra Das Gupta*, for the Appellant.—The defendant is the appellant. Plaintiff obtained a decree against him in a suit for ejectment. The decree was conditional on payment by plaintiff to him of compensation. Appeal against that decree was dismissed for non-prosecution. The point is that the time for depositing the money having elapsed the suit is barred. The Courts below found that the execution of the decree was within time, as they thought that time should be extended on account of the appeal. The only mode left to the plaintiff was to make an application for review. The only decree capable of execution was the Munsif's decree. The appeal was infructuous. And that became incapable of execution as the condition was not complied with. The appeal and its withdrawal would not have the effect of extending time. See *Ramaswami Kone* v. *Sundara Kone* (1), *Ghanshiam Lal* v. *Ram Narain* (2), *Pureshnath Ghose Mundul* v. *Kristo Lall Dutt* (3). The executing Court cannot also extend time. See Dr. Ghosh's Law of Mortgages, (4th Edition), Volume I, 600. Even the remedy by way of application for review is not open to the other side. See section 47, Civil Procedure Code. Then the further question arises whether a proper case has been made out entitling the other side to an extension of time. I submit not. The order of the Court should be construed strictly in favour of the defendant and the condition precedent not having been fulfilled, the plaintiff is not entitled to execute the decree.

Babu *Jnanendra Mohan Das*, for the Respondent in Appeal No. 40.—The question is one of construction of decree. In the decree no condition precedent is attached. So far as ejectment is concerned, the order is not conditional. The decree is clearly in plaintiff's favour.

Babu *Biraj Mohan Mojumdar*, for the Respondents in Appeal No. 41.—I adopt the argument of my learned friend. My further submission is that section 148, Civil Procedure Code, authorises the Court to extend time for payment of money. The order appears to be under section 148, Civil Procedure Code, and is, therefore, I submit, not appealable, because it is not covered either by section 104 or Order XLIII, rule 1. The argument that the executing Court has no power to extend time, has no substance in it. It has, I submit, got power to decide the matter in dispute.

Babu *Bimal Chandra Das Gupta*, in reply.—The decree has got to be read along with the judgment, and the judgment is perfectly clear that the order of ejectment is conditional on payment by the plaintiff of the money within a certain time. Section 148 can have no application in a case like this. That section applies where the order is made for the payment of money required under the Civil Procedure Code only. The matter arises out of proceedings under section 47. Hence I have got a right of second appeal.

(1) 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26.
(2) 2 Ind. Cas. 364; 31 A. 379; 6 A. L. J. 493.
(3) 23 W. R. 50.

JUDGMENT.

APPEAL No. 40 OF 1917.

SHAMSUL HUDA, J.—This is an appeal against an order passed by the learned Subordinate Judge of the Assam Valley Districts, affirming an order of the Munsif of Dhubri, dated the 25th of February 1916. The facts are shortly these:—The plaintiff obtained a decree for ejectment against the defendant, who is the appellant before us. In the judgment the ejectment was made conditional upon payment of a certain sum of money by the plaintiff as compensation to the defendant and the date for such payment was fixed on or before the 17th October 1915. In the decree that was drawn up, nothing was said about the ejectment being conditional upon payment of the compensation money, but it only directed the plaintiff to make the payment within the date fixed. Against that decree, the defendant preferred an appeal which was dismissed, and shortly after the dismissal of the appeal, on the 23rd November 1915 the plaintiff made the deposit. The defendant objected to the money being received, but the learned Munsif thought that it was within his competency to receive the money on that date. He accordingly overruled the objection. This order was passed by the successor of the learned Munsif who decided the case originally. The defendant has now preferred this second appeal to this Court, and the first question that we have to consider is whether an appeal lies. It seems to me that the order passed is not an order under section 47, Code of Civil Procedure. The decree has not been put into execution yet and the order passed is not an order relating to execution, discharge or satisfaction of the decree passed by a Court executing such a decree. Upon this view the appeal fails and is dismissed without costs.

APPEAL No. 41 OF 1917.

The judgment just delivered in Miscellaneous Appeal No. 40 of 1917 will govern this appeal also. This appeal is also dismissed. The appellant will pay to the respondent in this appeal his costs, the hearing fee being assessed at two gold *mohurs*.

WALMSLEY, J.—I agree.

Appeals dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 428 OF 1918.

July 22, 1919.

Present:—Mr. Justice Das.

SHIVA NARAIN RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat PHULJHARIA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Female member, property acquired by—Presumption—Benami transaction effected in order to defeat creditor—Real owner, whether can attack benami—*Fraud.*

Where property is acquired by a lady, whose husband is a member of a joint Hindu family, for her own benefit, and for the benefit of her children, the acquisition cannot be held to be for the benefit of the entire joint family. [p. 404, col. 2.]

Where a *benami* transaction is effected in order to defeat a creditor and the creditor is defeated, the real owner cannot subsequently attack the *benami* transaction. [p. 404, col. 2.]

Appeal from a decision of the Subordinate Judge, 1st Court, Shahabad, dated the 17th December 1917, confirming that of the Munsif, Buxar, dated the 26th May 1917.

FACTS.—The plaintiffs and defendants were members of the same family. In 1875 the joint ancestral dwelling house together with a shop and 3 Khandhars was sold in execution of a decree and purchased by the decree-holder, the Maharaja of Dumraon. In 1881 the auction-purchaser transferred the dwelling house and the 3 Khandhars under a Bakshishnama on payment of a Nazrana of Rs. 700 to *Musammat* Phuljharia, wife of Sital, one of the members of the joint family of the plaintiffs and the defendants The plaintiffs were the sons of *Musammat* Phuljharia. In 1885 the entire male members of the family together sold one of the Khandhars acquired in the name of *Musammat* Phuljharia to one Sujhaon Turha. The members of the family from time to time went out to some places in Bengal and started business in those places. Whenever they came, they lived in the house acquired in the name of *Musammat* Phuljharia. In fact one of the defendants *Musammat* Barti always lived in the house both before and after the acquisition of the house in the name of *Musammat* Phuljharia. In 1912, at the Survey Settlement the house and the Khandhars were recorded in the joint names of the plaintiffs and the defendants. The

plaintiffs brought the present suit on 23rd February 1916 for ejectment of the defendants from the houses, on an allegation that the houses were the self acquired property of *Musammat* Phuljharia and that the defendants had been living in it with the permission of *Musammat* Phuljharia and the plaintiffs. The defendants pleaded that as about the year 1881 a creditor was threatening to execute his decree, the houses were acquired *benami* in the name of *Musammat* Phuljharia, who was a female member of the family, on payment of Nazrana to the auction-purchaser, the Maharaja of Dumraon; that in fact the acquisition was made for the family and the houses belonged to the entire joint family; that all the members of the family lived in the houses without any objection; that they jointly effected a transfer of one of the houses acquired in the name of *Musammat* Phuljharia in 1885 and that the suit was barred by limitation. The first Court decreed the suit, holding that the parties were not joint at the time of the acquisition and that they lived in the houses with the permission of *Musammat* Phuljharia and the plaintiffs. The defendants appealed to the District Judge, who dismissed the appeal on the grounds that though the houses originally were the joint ancestral houses of the parties, after they had been sold off in execution of the decree of the Maharaja of Dumraon they were acquired in the name of *Musammat* Phuljharia on payment of Rs. 700, that there was no evidence that the purchase was made with the nucleus of the joint fund or that *Musammat* Phuljharia was a *farzidar*, that the defendants lived in the houses with permission and, therefore, could not resist the suit. Against the above decision the defendants appealed to the High Court.

Mr. *Parmeshwar Dayal*, for the Appellants, contended that the acquisition having been made in the name of one of the female members of the joint family, there was a presumption that the acquisition was on behalf of the entire joint family, unless it was otherwise established by the plaintiffs. It was on the plaintiffs to prove that the money with which the acquisition was made came out of the private purse of *Musammat* Phuljharia and that she was not the *farzidar* for the family. He relied on *Chunder Nath Moitro* v. *Kristo Komul Singh* (1), *Nobin Chunder Chowdhury* v. *Dokhobala Dasi* (2).

In the present case as the family dwelling house was sold in execution of a decree and was re-purchased in the name of one of the female members of the house and as subsequent to the re-purchase the entire family lived in it for over 36 years, there was a strong presumption that the property was joint. When in fact one of the four houses acquired in the name of *Musammat* Phuljharia was sold jointly by all the members of the family in 1885, 4 or 5 years after the acquisition, it could not be contended that the houses were not joint family property. These facts raised a presumption that at any rate the houses were given to the joint family after the acquisition and held the status of joint acquisitions.

Almost all *benami* transactions were entered into with some ulterior motives. If in the present case the houses were purchased *benami* in the name of *Musammat* Phuljharia with a view to avoid the creditors, it did not lose the character of a *benami* transaction. It was, therefore, not open to the plaintiffs to defeat the rightful claim of the defendants. The plaintiffs as members of the family were as much guilty of avoiding the creditors as the defendants. They could not in equity lay the whole blame on the defendants and succeed in ejecting them.

The case of *Musammat* Barti, defendant No. 4, stood on stronger grounds. She or her husband was no party to the decree which the other members of the family wanted to avoid. She had lived in the house permanently. It was not within the right of the plaintiffs to eject her under colour of the deed of gift in the name of *Musammat* Phuljharia, which had been effected *benami* to avoid the creditors.

The Court below has overlooked that the Survey Khatian was in favour of the defendants. There is no finding that the presumption arising out of the Survey Khatian has been rebutted.

Mr. *L. N. Singh*, for the Respondents, was not called upon.

(1) 15 W. R. 357.
(2) 10 C. 686; 5 Ind. Dec. (N. S.) 461.

JUDGMENT.—In my opinion this appeal is concluded by the findings of facts.

The suit is for possession of certain houses which, it is alleged by the defendants, belonged to the entire joint family of which they are members. The root of title to these houses is a deed of gift executed by the Maharaja of Dumraon in favour of *Musammat* Phuljharia. The plaintiffs claim through this lady. The case of the defendants is that all these houses were joint family properties. They were purchased by the Maharaja of Dumraon in execution of a mortgage decree obtained by him against the joint family, and subsequently he executed a deed of gift in favour of *Musammat* Phuljharia but intending to confer the benefit on the entire joint family. In other words, the assertion of the defendants is an assertion of *benami*. The reason for *benami* is given in the 8th paragraph of the written statement. I shall have something to say as to that presently. But it seems to me that upon the finding of the lower Appellate Court it must be held that the plaintiffs are entitled to succeed in the action. First of all, the deed recites that owing to the application of the grantee, that is to say, *Musammat* Phuljharia, the gift is made to her and her heirs. As the lower Appellate Court points out, the document does not recite that it was made for the benefit of the whole family of which the grantee was a member. The lower Appellate Court finds that there is no evidence on the record that Rs. 700, which was paid as Nazrana to the Maharaja, was paid out of the joint family funds. The lower Appellate Court has found that the houses in suit have been repaired at the cost of the plaintiffs and that there are account papers to prove the fact of such payment towards costs. The learned Vakil on behalf of the appellant argues on the authority of a case reported as *Nabin Chunder Chowdhry* v. *Dokhobala Dasi* (2) that where property is acquired in the name of a wife whose husband is a member of a joint family, it must be presumed that the acquisition in her name is for the benefit of the entire joint family. That may be so, but here the Court has found as a fact that the property was acquired by *Musammat* Phuljharia for her own benefit and for the benefit of her children. Therefore, this finding of fact is binding on me.

Next, it seems to me that in any case the appellants, or some of them are estopped from putting forward their title to these houses in view of their own written statement as contained in paragraph 8 thereof. There they give a reason for the *benami*. They say that there was a decree against the joint family and in order to safeguard the property against the creditors who had a decree against them, it was decided that the property should be put in the name of *Musummat* Phuljharia. The judgment obtained by the creditors is on the record and it shows that the judgment-debtors were one Debi Ram who is not a party in this litigation and Deni Ram who is the father of defendants Nos. 1, 2 and 3. The lower Appellate Court says, and the judgment which has been put in supports that statement, that Debi Ram and Deni Ram successfully saved this property from sale at the instance of the decree holder. The question arises that having entered into a fraudulent transaction of this nature and having succeeded in the fraud, are they entitled to plead their own fraud and claim to prove the *benami* nature of the transaction? The question has been debated in more cases than one. It is unnecessary to deal with them, but the authorities certainly establish that no man can allege his own fraud to invalidate a transaction entered into by him. The case made by the defendants is: "We entered into this *benami* transaction in order to save the property from creditors. We have succeeded in saving the property from the creditors and now there is no longer any necessity for the *benami* character to continue, and, therefore, we ask the Court to declare the *benami* nature of the transaction." In my opinion they cannot be heard to take up a position like that.

In my opinion this appeal fails and must be dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION PETITION No. 101 OF 1917-18.

April 7, 1919.

Present:—Mr. Ferard, S. M., and Mr. Hopkins, J. M.

MUHAMMAD ABU BAKER KHAN—APPLICANT

versus

BALA—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 43, 44—Landlord and tenant—Enhancement of rent—Assessment, mode of.

Under the law, rents can only be enhanced in accordance with prevailing rates: an assessment of fair rates is unknown to the law. [p. 405, col. 1.]

The method of deducing the prevailing rate of rent of land is to take the average rate, or the medium rate, the average rate being calculated with reference to the *area* held at each rate, and not a mere arithmetical average of the various rates. [p. 405, col. 2.]

Per *Ferard, S. M.*—It is open to the Court to count from its calculation of medium rates "fancy" rates on the one hand and nominal or obviously favourable rents on the other.

Application for revision of the order of the Commissioner, Agra Division, dated the 27th May 1918, in the case of enhancement of rent.

JUDGMENT.

HOPKINS, J. M.—There were suits for enhancement of rent in which the Assistant Collector was required by law to ascertain the prevailing rates of the various classes of soil in accordance with the provisions of sections 43 and 44 of the Tenancy Act. The Assistant Collector examined the occupancy holdings of the villages in suit as well as of three other villages, but found a marked difference in the rates in various villages and professed himself unable to discover any prevailing rate. He, therefore, took the rates in a single village Kasimpur Khusipur, in which certain clearly marked prevailing rates were ascertainable, and making a deduction of 1/6th from these rates applied them to the other villages. The Commissioner on appeal has upheld these rates on the ground that they are fair rates and the landholder now applies to the Board in revision.

The law lays down clearly that rents must be enhanced in accordance with prevailing rates and makes no provision for the assessment of fair rates. The decision of the lower Courts was clearly contrary to law, and in my opinion they have acted illegally in the exercise of their jurisdiction and these orders should be set aside.

As regards the Assistant Collector's difficulty that he could find no prevailing rates I would make the following remarks :—

If he had found in respect of any class of soil that the rates paid varied between Rs. 4 and 6, I do not think he would have had any difficulty in accepting Rs. 5 as the prevailing rate. The rates he actually found were as follows :—

	Rs. a. p.			Rs. a. p.		
Matyar wet from	4	4	0 to	6	10	0
Matyar dry ,,	2	13	0 to	4	4	0
Pilia wet ,,	3	3	0 to	4	14	0
Pilia dry ,,	2	0	0 to	3	14	0
Bhur I wet ,,	2	0	0 to	3	4	0
Bhur I dry ,,	1	5	0 to	3	4	0
Bhur II dry ,,	1	5	0 to	1	4	0

The variations are considerable, but they do not in any case amount to 100 per cent. Presuming that the quality of the soil was the same in each, the prevailing rate ought to have been deduced by taking the average rate, or the 'medium' rate. The average rate should be calculated with reference to the *area* held at each rate and should not, of course, be a mere arithmetical average of the various rates. The 'medium' rate is the highest rate at which or at rates higher than which more than half of the exemplar land is held (*cf.* section 31, Bengal Tenancy Act, 1885). There is ample material on the record for the deduction of a prevailing rate without the local inspection.

I would set aside the orders of the Court below and would remand the suits for a finding as to the prevailing rates to be deduced in the manner indicated above and as to the enhancement, if any, to be made in accordance with these rates. It must be understood that the landholder applicant takes his chance of getting less than the amounts now decreed. Return to be made within six weeks, ten days for objections.

FERARD, S. M.—I agree. It is, of course, open to the Court to count from his calculation of medium rates 'fancy' rents on the one hand and nominal or obviously favoured rents

on the other, if there be such among the exemplars to an extent that would vitiate the result.

Order set aside.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3183, 3328 TO 3342 OF 915.

April 2, 1919.

Present:—Justice Sir Asutosh Chowdhury, KT.

UPENDRA NATH GHOSE AND ON HIS DEATH THE EXECUTRIX AND EXECUTORS—PLAINTIFFS—APPELLANTS

versus

ANATH BANDHU CHAKRAVARTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 102, cl. (j), 105, 105 A (a), (b), (c)—Application under s 105, for settlement of fair rent—Settlement Court, questions which can be decided by.

In an application for settlement of fair rent made under section 105 of the Bengal Tenancy Act, the Revenue Court has, by virtue of the provisions of section 105 A, clauses (*a*), (*b*) and (*c*), read with section 102, clause (*j*) of the Act, jurisdiction to go into the questions whether the land is not liable to pay rent and whether a person who is the occupant of the land, stands in the relation of a tenant towards the applicant. [p. 407, col. 1.]

Appeals against the decrees of the Special Judge, Faridpur, dated the 10th of September 1915, affirming those of the Assistant Settlement Officer, Camp Baliakandi, dated respectively the 26th June, 20th, 22nd and 24th October and 22nd December 1914, and 30th January, 11th March, 7th, 10th and 14th April 1915.

FACTS appear from the judgment.

Babu *Mohendra Nath Roy* (with him Babu *Amarendra Nath Bose*), for the Appellants.—This appeal arises out of a suit for settlement of fair and equitable rent. The Court of Appeal below, affirming the decree of the First Court, has dismissed the appeal. This matter arises out of an application under section 105 of the Bengal Tenancy Act. Revenue Officers in dealing with such applications are bound by the wording of the section and the defence raised by the defendants that the lands are not liable to assessment cannot be tried by the Revenue Officers, because both sections 105 and 105A of the Bengal Tenancy Act contemplate a case between landlord and tenant. Refers to the definition of landlord, tenant and rent. Therefore, the judgment of the Revenue Court was wholly without jurisdiction and should be set aside.

Babu *Mohini Mohan Chakravarty*, (with him Babus *Rajendra Chandra Guha*, *Fanindra Lal Mitra*, *Tarakeswar Roy*, *Nalukeswar Mukherjee*, *Arabendra Bhusan Sinha* and *Samarendra Kumar Dutt*, for the Respondents.—The main question is whether this is a case under section 105A of the Bengal Tenancy Act. There are two classes of cases before your Lordships. In one class there are documents (*taidads*) showing that the land is rent-free. In the other class the landlord's right to have an assessment of rent is barred by limitation, because the finding is that for 150 years the tenants have been holding the land without paying any rent therefor. As regards the question of jurisdiction, my submission is that the case is governed by section 105A of the Bengal Tenancy Act, the wording of which is wide enough to cover cases of this nature between landlord and tenant. The Revenue Officer has got jurisdiction under section 105A of the Bengal Tenancy Act to hold as to whether the land is liable to assessment or not. That was the very object of the introduction of section 105A. Refers to Rampini's Bengal Tenancy Act, 6th Edition, page 380; also *Upendra Nath Ghose* v. *Jamini Mohun Pal* (1).

Babu *Upendra Nath Roy* replied briefly.

Babu *Biraj Mohon Mojumdar*, for the Deputy Registrar.

JUDGMENT.—The only point raised by the appellants in this case is as to whether section 105 of the Bengal Tenancy Act is limited to questions between landlords and tenants.

It is argued that the Revenue Court and the first Appellate Court had no jurisdiction to go into the question of disputed title between the landlords and the occupants of the holding, which the landlords wanted to be assessed and which is within the ambit of their estate. So far as section 102 of the Act is concerned, clause (j) clearly provides an entry to be made in respect of land if claimed to be held rent-free, whether or not the "occupant" is entitled to hold the land without payment of rent. Section 105 (2) gives a right to the Zemindar to apply within the time

(1) 21 Ind. Cas. 37; 18 C. W. N. 268.

thereby limited for settlement of rent. In that very section reference is made under section 102 (j) including the case of the occupants of any land. Section 105A (*a*) and (*b*) refer to questions whether the land is or is not liable to pay rent. Sub-clause (*c*) deals with the issue as to whether a person who is the occupant is in the relation of a tenant. I think it is clear that the sections above referred to contemplate a case of the character now before the Court and that the Court had clear jurisdiction to go into the question raised. This is also to a certain extent supported by the decision in *Upendra Nath Ghose* v. *Jamini Mohan Pal* (1). I hold that the only point which has been raised in these appeals before me fails, and, therefore, they are dismissed with costs so far as the appearing respondents are concerned.

Appeals dismissed.

PATNA HIGH COURT.

Re PRIVY COUNCIL APPEAL No. 13 OF 1919.

June 2, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

Raja WAZIR NARAIN SINGH—PETITIONER

versus

Rani JAGADAMBA KUERI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLV, r. 13 (d)—Appeal to His Majesty in Council—Proceedings stayed by High Court—Direction by Privy Council to proceed—Receiver, appointment of—High Court, power of.

Owing to a default in complying with certain orders of the High Court, proceedings taken upon permission granted to appeal to His Majesty in Council were stayed. Thereupon the appellant obtained an order from the Privy Council directing that the appeal should proceed, and, while the necessary papers were under preparation, the High Court appointed a Receiver of the property in suit. On the application of the appellant it was objected that the High Court had no jurisdiction to make such appointment as special leave had been obtained from the Privy Council for the appeal to proceed:

Held, that the High Court had jurisdiction under Order XLV, rule 13 (*d*), of the Civil Procedure Code to appoint a Receiver. [p. 408, col. 2.]

Application to review the order of 8th April 1919.

Messrs. *Haribhusan Mukherji* and *Ambika Prasad Upadhaya*, for the Petitioner.

Mr. *Sushil Madhab Mullick*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—This is an application for review of an order made by us on the 8th of April last, appointing Raja Wazir Narain Singh Receiver of the estate which is the subject-matter of an appeal now pending before their Lordships of the Privy Council.

The history of the case is as follows:—

The Raja sued Rani Jagadamba Kueri for possession not only of the estate, but of certain Government promissory notes which were in deposit in the Bank of Bengal to her credit. The Rani succeeded as regards the promissory notes, but with regard to the *corpus* of the property the Raja obtained a decree declaring his title and for possession. In accordance therewith he has taken possession of the estate.

The Rani then applied for leave to appeal against that decree to His Majesty in Council. Permission was granted in accordance with Order XLV of the Civil Procedure Code, but as the Rani failed to comply with certain orders of the Court, it was directed that the proceedings should be stayed. The Rani subsequently moved their Lordships of the Privy Council and obtained an order directing that the appeal should proceed. The appeal has been entered as No. 13 of 1919 and the necessary papers are under preparation.

On the 28th of March last the Rani applied to this Court for the appointment of a Receiver, on the allegation that the Raja had been guilty of waste and that irreparable injury would be caused if some measures for the protection of the property were not taken. Notice of this application was served by Mr. Sushil Madhab Mullick upon Mr. Bankim Chandra De, the Vakil of the Raja. On the 8th April the matter came up for hearing, and, although the Raja was not himself present, Mr. Naresh Chandra Sinha was heard in his behalf and an order was made appointing the Raja Receiver of the estate upon his furnishing security to the extent of Rs. 1,00,000, time for that purpose being allowed till the 8th of May.

On the 15th April the present application was made by the Raja for a review of the order appointing him Receiver. His principal ground is that he was entirely ignorant of the application of the 28th March, and that the order of the 8th April was made without any opportunity being given to him to furnish counter-affidavits traversing the allegations made by the Rani.

Now we have had the advantage of hearing a statement by Mr. Bankim Chandra De upon the allegations contained in the affidavits now filed by the Raja and by his agent Trebani Lal and dated the 14th April 1919, and we find the facts to be these.

About the 25th of March the Raja and Trebani Lal were both at Bankipore in connection with some other business, and when Mr. Sushil Madhab Mullick intimated to Mr. Bankim Chandra De his intention of making an application for the appointment of a Receiver that fact was communicated by the latter to Trebani Lal. Upon instructions received from Trebani Lal Mr. Bankim Chandra De accepted service of notice of the application, and on the 28th March he received a *vakalatnama* from the Raja to act in the matter in his behalf. On the 28th of March Trebani Lal was present in Court from the opening of the Court till about half past one awaiting the hearing of the application. The application was, however, not made till abont 2 P. M. It is not clear whether at that time Trebani Lal was actually present in Court, but there can be no doubt that he was fully aware, and had been aware, of the intention of the Rani's advisers to make the application in Court on that day. Mr. Bankim Chandra De further states that the same evening after the Court had ordered notice of the application to issue he saw the Raja at about 7 P. M. and informed him that the application had been made and that it would be necessary to file counter affidavits in reply; so that there can be no possible doubt that on the 28th March the Raja was fully aware that an application had been made for the appointment of a Receiver. The Raja took no further steps, and on the 8th April Mr. Naresh Chandra Sinha, who had acted in the appeal at an early stage, was heard by us under instructions from Mr. Bankim Chandra De. In these circumstances it is idle to say that the Raja had no opportunity of making himself heard in the matter of the application. The omission to appear was wilful, and we cannot admit that any ground has been shown for our reviewing our judgment of the 8th April appointing him Receiver.

A point of law has been raised by Mr. Haribhusan Mukherji, who now appears for the Raja, to the effect that as it was necessary to obtain a special order from their Lordships of the Privy Council for the appeal to proceed, the appointment of a Receiver cannot be made by this Court. Reliance is placed upon the case of *Tega Singh* v. *Bichitru Singh* (1) which, following the earlier case of *Moheshchandra Dhal* v. *Satrughan Dhal* (2), decided that under section 608 of the Code of 1882 as well as under Order XLV, rule 13, of the Code of 1908, it was not open to the High Court to appoint a Receiver in a case in which the certificate was not granted by the Court The case of *Nityamani Dasi* v. *Madhu Sudan Sen* (3), however, is direct authority to the contrary Their Lordships of the Privy Council have there laid down that it is open to the High Court to stay execution notwithstanding that the appeal has been admitted by special leave by His Majesty in Council. The argument in the High Court in *Nityamani's case* (3) was that the provisions of Order XLV, rule 13, of the Code of 1908 are wider than section 608 of the previous Code, and it would seem that their Lordships of the Privy Council accepted this view.

If, therefore, it is open to the High Court to stay execution under Order XLV, rule 13, in a case in which special leave has been given, I fail to see why there is no jurisdiction to give the relief which is set out in the very next clause of rule 13 (*d*). On principle the argument that applied to the stay of execution must apply to this case also. The preliminary point, therefore, that we have no jurisdiction to appoint a Receiver in my opinion fails. The result is that the application for review will be rejected,

(1) 4 Ind. Cas. 452; 10 C. L. J. 326.
(2) 26 I. A. 281: 27 C. 1; 4 C. W. N. 34; 7 Sar. P. C. J. 567; 14 Ind. Dec. (N. s.) 1 (P. C.).
(3) 11 Ind. Cas. 384; 38 C. 335; 13 C. L. J. 529; 8 A. L. J. 449; 13 Bom. L. R. 419; 10 M. L. T. 25. (1911) 2 M. W. N. 124; 4 Bur. L. T. 123; 38 I. A. 74 (P. C.).

and the order appointing the Raja as Receiver upon his furnishing security to the extent of Rs. 1,00,000 will be affirmed. The opposite party, the Rani, will be allowed her costs. The time for furnishing the security will be extended till the 16th instant. In default the legal advisers of the Rani will be at liberty to make an application for the appointment of some other person.

We cannot leave the case here, and it will be necessary to issue notice upon the Raja and upon Trebani Lal to show cause why proceedings should not be taken against them under section 476 of the Code of Criminal Procedure in the matter of allegations made by them in their affidavits of the 14th April 1919. The 16th instant will be fixed for the hearing of this matter.

JWALA PRASAD, J.—I agree.

Application rejected.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 24 OF 1918-19.

April 5, 1919.

Present:—Mr. Ferard, S. M., and Mr. Hopkins, J. M.

JAI DAYAL—APPELLANT

versus

Maharaja KESHO PRASAD SINGH—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 4 (3), 67—Rent, whether includes nazrana—*Ejectment on failure to agree to amount of* nazrana *fixed, whether permissible.*

Rent in section 4 (3) of the Agra Tenancy Act includes *nazrana*, or whatever is paid on account of land, and does not mean merely annual rent.

Where a suit is brought for ejectment because the tenant will not pay as much *nazrana* as is demanded, the tenant can take the plea authorised by section 67 (1) of the Agra Tenancy Act.

Second appeal from the order of the Commissioner, Benares Division, dated the 1st November 1918, in the case of ejectment.

JUDGMENT.

HOPKINS, J. M.—I am unable to agree with the Commissioner in this case. The question is whether the appellant is being ejected because he refused to agree to an enhancement of rent. The respondent's manager admits that he took Rs. 2,000 from the appellant as *nazrana* and asked him for Rs. 2,000 more. It is true that the actual payment was after the suit was instituted but the negotiations had been going on for some months before.

It is argued that the payment of Rs. 2,000 or Rs. 4,000 was to be in consideration of the bestowal of occupancy rights. Whether occupancy rights were to be given or not it is clear that there was to be an enhancement of rent, and this brings the case within the provisions of section 67 of the Tenancy Act. Rent, it may be noted, does not mean merely annual rent but includes whatever is paid on account of land, and, therefore, includes "*nazrana*."

The appellant holds some 25 *bighas* of land at a rent of Rs. 123. The *nazrana* which he paid was more than 16 years' rent and that which he was asked to pay was more than 32 years' rent. To say under such circumstances that the appellant was not asked to agree to enhancement of rent, and that he is not now being ejected because he did not agree to pay what was demanded of him, is to be blind to patent facts.

The circumstance that the enhancement of rent was to be accompanied by the grant of occupancy rights does not alter the fact that there was to be an enhancement of rent.

I would accept the appeal and setting aside the order of the Commissioner would restore that of the Assistant Collector and give the appellant his costs in all Courts.

FERARD, S. M.—I agree. "*Nazrana*" comes within the definition of "rent" in section 4 (3), Tenancy Act, and a tenant whose ejectment is sought because he will not pay as much "*nazrana*" as is demanded can plead section 67 (1). It is immaterial that if he had met the demand the landlord was ready to let him acquire occupancy rights, he could not, of course, as held in Selected Decisions of 1918, *give* them to him at once.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 21 OF 1918.

November 6, 1918.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

KONIMAREDDI SUBBAREDDI AND ANOTHER—SURETIES—COUNTER-PETITIONERS—APPELLANTS

versus

KOLLIPARA VEERAYYA TATA —PLAINTIFF—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 145, O. XXI, r. 43—Attachment of moveables—Delivery to surety for safe custody - Execution proceedings against surety, maintainability of.

Per *Sadasiva Aiyar, J.* (*Spencer, J., contra*).—Section 145 (*b*), Civil Procedure Code, refers to restitution of property "taken in execution," that is, taken possession of by a party in execution in accordance with the terms of the decree or order in his favour, and not to properties taken possession of by the Court through attachment in execution of a decree. A decree-holder cannot execute his decree against a person who has become surety under Order XXI, rule 43, in respect of properties taken possession of by the Court Amin. It is only a surety who comes under section 145 of the Code that can be proceeded against in execution as if he were a party to the decree. [p. 410, col. 2.]

Per *Spencer, J.*—The Court has inherent power to assign a bond executed in its favour for the purpose of a suit being brought to enforce its terms. [p. 411, col. 1.]

The word 'restitution' in section 145 (*b*) of the Civil Procedure Code must be read in the wide and general sense of restoration or making good that which is deficient, and a Court can, under that section, proceed in execution against a surety who has failed to perform his conditional undertaking to produce the judgment-debtor's property when called upon to do so. [p. 411, col. 1.]

Appeal against the Appellate Order of the District Court, Guntur, in Appeal Suit No. 204 of 1917, preferred against the order of the Court of the Principal District Munsif, Guntur, in Miscellaneous Petition No. 1731 of 1916, in Original Suit No. 1266 of 1915.

FACTS.—Certain standing and harvested crops were attached by Court in execution of a decree, and the Court Amin left it in the appellants' custody on their executing a bond 'to give possession of it to Court according to its order.' The execution application was afterwards dismissed and the appellants handed over the properties to some persons named by the judgment-debtors. The decree-holders applied for execution against the sureties-appellants. The lower Courts gave permission, holding that the case was covered by section 145, Civil Procedure Code. The sureties appealed to the High Court.

Mr. *K. G. Babu Row*, for the Appellants.—The sureties cannot be proceeded against in execution. Section 145, Civil Procedure Code, does not apply, as it refers to restitution of properties taken by a party in execution. Here the bond was given under Order XXI, rule 43, Civil Procedure Code, and the properties were taken possession of by the Court through its Amin.

Mr. *V. Lakshminarayana*, for the Respondent.—Section 145, Civil Procedure Code, is wide enough to cover a case like the present. The Court has power to proceed in execution against a person who fails in his conditional undertaking to produce the property when called on to do so.

JUDGMENT.

SADASIVA AIYAR, J.—The security bond given by the appellants does not fall under any of the clauses (*a*), (*b*) or (*c*) of section 145, Civil Procedure Code. It is a special kind of surety bond taken by the Court in accordance with Order XXI, rule 43, Civil Procedure Code, as materially altered by this High Court under its rule-making powers and is concerned with the safe custody of "articles which cannot be conveniently removed" from the place of their attachment in execution. It has nothing to do with section 145, Civil Procedure Code. Clause (*b*) of section 145 refers to restitution of property "taken in execution," that is, taken possession of by a party in execution in accordance with the terms of the decree or order in his favour, and not to properties taken possession of by the Court through attachment in execution of a decree.

The decree-holder cannot execute his decree against a surety who becomes one under Order XXI, rule 43, in respect of properties taken possession of by the Court Amin. It is only a surety who comes under section 145 that could be proceeded against in execution as if he was a party to the decree. The Court should, in a case like the present, assign the bond in favour of the decree-holder in whose interests (though not for whose direct benefit) the bond was taken. The lower Courts' orders permit-

ting the decree-holder to execute his decree against the appellants to the extent of the amount mentioned in the surety bond cannot, therefore, be upheld and are set aside. In substitution thereof, I would direct that the District Munsif's Court do assign the bond in favour of the decree holder. As the bond is nearly three years old, it is desirable that the assignment should be made soon. The parties will bear their respective costs throughout.

SPENCER, J.—As the words "where and in so far as a decree is varied or reversed" occurring in section 144, Civil Procedure Code, are not repeated in section 145, I am inclined to read the word "restitution" in section 145 *b*) as not confined to the narrow sense in which it is used in section 144, namely, adjustment of the rights of parties *inter se* arising out of the variation of a decree in appeal or otherwise but in the wide and general sense of "restoration" or making good that which is deficient. If that is so, the Court can proceed in execution against the surety who has failed to perform his conditional undertaking to produce the judgment-debtor's property before the Court when called upon to do so. In the Code of Civil Procedure there is no provision similar to that in section 45 of the Guardians and Wards Act for the assignment of a security-bond for the purpose of a suit being brought to enforce its terms.

That course is, however, one which it must be within the inherent power of the Court in whose favour the bond is written to adopt, and I think it would be convenient to adopt it in the circumstances of the present case. The words "may be executed" in section 145 seem to indicate that a proceeding in execution is only an alternative remedy and that the other remedy of assignment of the security bond is not excluded.

I, therefore, agree with the order proposed by my learned brother.

M. C. P.

Decree set aside.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 58 OF 1918.

April 4, 1919.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

Lala KEDAR NATH AND ANOTHER—DEFENDANTS—PETITIONERS

versus

Lala SHEO PRATAP—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Interlocutory order—Remedy, alternative, open—High Court, power of interference of.

Where an alternative remedy is provided, the High Court will not entertain an application for the exercise of its powers of revision under section 115 of the Civil Procedure Code. [p. 412, col. 1.]

A trial Court refused the request of the defendant's Pleader to frame a particular issue and the defendant moved the High Court in revision. At the hearing a preliminary objection was taken that no revision lay from an interlocutory order:

Held, that the application was not maintainable, inasmuch as another remedy was open to the defendant, *viz.*, that if he was adversely affected by the omission of the proposed issue, he could appeal to the High Court and urge the objection that his defence was not considered in its entirety. [p 412, col. 1.]

Civil revision against the order of the Subordinate Judge, Agra, dated the 21st February 1918.

The Hon'ble Mr. *N. P. Asthana* and Mr. *G. Agarwala*, for the Applicant.

The Hon'ble Mr. *Tej Bahadur Sapru* and Mr *S. K. Dar*, for the Opposite Party.

JUDGMENT.—This is an application in revision under section 115 of the Code of Civil Procedure by the defendants to a suit pending in the Court of the Subordinate Judge of Agra The plaintiff sued to recover money alleged to be due on a contract. The defendants urged two pleas, namely, that no such contract as was stated in the plaint had taken place between the parties and, secondly, that if any contract did take place between the parties, it was of a wagering nature and could not be enforced. The learned Subordinate Judge examined the defendants before proceeding any further in the case. He recorded their statements in a *rubkar*, dated the 21st of February 1918. After writing the depositions of the two defendants the Court framed three issues. The Pleader for the defence asked the learned Subordinate Judge to add a fourth issue to the effect that the contract, if any,

between the parties was a wagering contract. The learned Subordinate Judge disallowed the prayer of defendants' Pleader.

The defendants have presented the present application in revision from the order of the learned Subordinate Judge rejecting the request of their Pleader to add a fourth issue in the case about the character of the contract. A preliminary objection is taken on behalf of the plaintiff to the effect that no revision lies from an interlocutory order. A number of cases have been cited on behalf of the plaintiff-respondent in support of the preliminary objection, while the learned Counsel for the appellants relies upon certain cases of this Court as also upon some cases of other High Courts. We think it unnecessary to express an opinion upon the pure and net question of law whether a revision from an interlocutory order lies to this Court or not, as in the present case the applicants have another remedy open to them also when the case goes to trial and is disposed of. If they are by the omission of the proposed issue affected adversely and lose the case in the first Court, they can always in appeal to this Court urge the objection that the defence was not considered in its entirety. Under these circumstances the present application is not maintainable We would, however, like to remark that it would have been advisable, and it is still open to the Subordinate Judge to do so, if an issue were framed or is framed in accordance with the suggestion of the defendants-appellants, it would, in our opinion, save further trouble in the case.

We dismiss the application but make no order as to the costs.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1695 OF 1909.

June 6, 1918.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Smither.

BIPRADAS PAL CHOWDHRY—PLAINTIFF—APPELLANT

versus

AZAM OSTAGAR—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 4, 105—Scope of Act—'Landlord', 'tenant', meanings of—S. 105, applicability of, to non-agricultural lands in Mufassil municipality.

In its general scope, the Bengal Tenancy Act is a law for agricultural landlords and tenants. [p. 413, col. 1.]

'Tenant' and 'landlord' in section 105 of the Bengal Tenancy Act mean, respectively, a tenant and a landlord as defined in section 4 of the Act. [p. 413, col 1]

Section 105 of the Bengal Tenancy Act does not apply to non-agricultural lands situated in a Mufassil municipality and occupied by tenants engaged in trade or other non-agricultural employment. [p. 413, col. 1.]

Appeal against the decree of the District Judge, Nadia, dated the 13th May 1909, affirming that of the Settlement Officer, Nadia, dated the 13th November 1908.

Babu *Pravash Chandra Mitter* (with him Babu *Amarendra Nath Bose*), for the Appellant.

Babu *Mahendra Nath Roy* (with him Maulvi *Abdul Jauwad*), for the Respondent.

JUDGMENT.

WOODROFFE, J.—This appeal and connected Rule 473 raise the question whether section 105 of the Bengal Tenancy Act applies to non-agricultural lands situated in a Mufassil municipality. The lands have been found to be homestead lands occupied by tenants engaged in trade or other non-agricultural employment.

It has been argued that the local extent of operation of the Act extends to all municipalities except Calcutta or other excepted area, which this is not. That may be, but the question before us is whether section 105 applies to the class of tenants which these have been found to be.

The Legislature contemplated, I think, that only three classes of tenants should be regarded as holding lands within the meaning of the Bengal Tenancy Act, *viz.*, a tenure-holder who has been held to mean a person collecting rents from

raiyats, *raiyats* holding lands for the purpose of cultivation and under-*raiyats* holding under them. The question is whether the tenants here come within the classes mentioned in section 4.

An argument has been sought to be drawn from the fact that *putnis* have been treated as falling within the Act, and yet some *putnis* may exist in respect of non-agricultural property such as *hats* It has, however, been stated without controversy that it has not been held that *putnis* of this class fall within the Act, whatever may be the case as regards *putnis* the nature of which brings their holders within the definition of tenure-holder in the Bengal Tenancy Act. There seems to me no doubt that in its general scope the Bengal Tenancy Act is a law for agricultural landlords and tenants.

It is found, as a matter of fact, that the tenants are not of the classes mentioned in section 4. "Tenant" in section 105 means a tenant as defined in section 4. In section 105 "landlord" means the landlord of a tenant defined in section 4 and "land" means land held by a tenant as so defined.

There are two Rules 4783 and 4784. The first has been asked for in case there was no appeal from the Settlement Officer to this Court, and the second in case there was no appeal from the Settlement Officer to the Special Judge. The concurrent conclusion of the learned Judge is correct and this appeal is dismissed with costs and the rules are discharged without costs.

SMITHER, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 283 OF 1918.

May 5, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

KALI CHARAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHHAB NATH AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Mortgage—Covenants in favour of mortgagee in case of default—Waiver—Mortgagee, rights of.

Where a mortgage-deed contains a specific covenant that the money due thereunder shall be payable within a certain period and that if it is not paid within that period the mortgagor shall pay the amount at the time of the redemption of an earlier possessory mortgage, which will not be capable of redemption until the money due under the subsequent deed is first paid, it is open to the mortgagee to waive one of the covenants and enforce the other. [p. 414, col. 1.]

Appeal against the decree of the Subordinate Judge, Unao, dated the 30th April 1918, modifying that of the Munsif, Purwa, dated the 22nd December 1917.

Mr. *A. P. Sen*, for the Appellants.

Mr. *Tara Shankar*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption. The mortgaged property comprised a fractional share in a certain village. The mortgagors held two groves therein which stood on plots Nos. 208 and 249 Khasra, but they were expressly excluded from the mortgage. The allegation of the plaintiffs was that the mortgage-money was satisfied from the usufruct of the property mortgaged and of the two groves over which the mortgagees were given possession subsequent to the mortgage. The defence was that the mortgagees held three deeds of further charge, the amount due on which was recoverable from the mortgagors at the time of redemption of the first mortgage. There was a further plea that the mortgagees had been in adverse possession of the groves in question from about 27 years.

The Court of first instance decreed the claim for redemption subject to the payment of Rs. 1,009 6 0 with proportionate costs and future interest at 12 per cent. per annum on the principal moneys secured by the deeds of further charge. It excluded the two groves from the decree, holding that the said plots had not been entrusted to the mortgagees in the manner alleged. Both the parties appealed. The lower Appellate Court disallowed the amount claimed on the strength of the deeds of further charge. It held that the claim for the recovery of that amount was barred by time. It further held that the groves in question formed an accretion to the mortgaged property and that the plaintiffs, who are the legal representatives of the deceased mortgagor, were entitled to recover possession thereof along

with the mortgaged property at the time of redemption.

The decision of the lower Appellate Court cannot, however, be sustained. The deed of mortgage contained a specified covenant that the money due thereon shall be payable within a certain period and that if it was not paid within that period the mortgagors shall pay the same at the time of the redemption of the earlier possessory mortgage, which will not be capable of redemption till the money due on those deeds was first paid. Out of the two alternative covenants the mortgagees waived the first and chose to enforce the second and as laid down in *Narna* v. *Ammani Amma* (1) there was nothing in law to prevent them from doing so.

The effect of the second covenant was that the money due on the deeds of further charge was consolidated with that due on the deed of possessory mortgage and the latter could not be redeemed without the payment of the money due on the former. No question of limitation arises, because the defendants who represent the interest of the mortgagees have a right to retain possession till the entire money due on the deed of possessory mortgage and the deed of further charge is liquidated. The decision in *Kesar Kunwar* v. *Kashi Ram* (2), to which the learned Counsel for the respondents has referred, cannot be followed in view of the decision of this Court in *Meharban Singh* v. *Raghunath Singh* (3). The amount due on the deeds of further charge is, therefore, still recoverable.

The next question is whether the defendants are entitled to claim interest on the deeds of further charge at a rate higher than what was allowed by the Court of first instance. Two of the deeds provide for payment of interest at 2 per cent. per mensem compoundable periodically. The third deed provided for payment of interest at 2-8 0 per cent. per mensem compoundable in a similar manner. The amount of loan taken by each of these deeds is not very large. The mortgagors were indebted to the mortgagees from before and, considering the rate of interest exacted, it is not unreasonable to presume that the mortgagees took advantage of their position in getting such terms as they liked to impose. The interest allowed by the Court of first instance is not unreasonable.

It is also contended that the deeds of further charge were executed without any legal necessity, but on that point the decision of the Court below is unassailable. The earlier deeds of further charge were executed by Manna, the original mortgagor. The last deed of further charge was executed by Dwarka, son of Manna. Therein Dwarka referred to the earlier deeds of further charge and thereby ratified those deeds. It is not open to him or to his legal representatives to question their propriety now.

The only other point involved in the appeal is that relating to the groves standing on plots Nos. 208 and 249 old Khasra. They were not included in the mortgage and the profits which the defendants received from either of those groves cannot be credited in the mortgage account. The capacity in which the defendants realized their profits need not also be considered.

The appeal is, therefore, allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with proportionate costs here and in the lower Appellate Court. The plaintiffs will bear their own costs throughout.

Appeal allowed.

(1) 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 176; (1916) 2 M. W. N. 125; 31 M. L. J. 865.
(2) 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J. 889.
(3) 49 Ind. Cas. 115; 5 O. L. J. 768.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 260 OF 1918.

December 11, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

Sri Rajah KANDANA VENKATA VARADARAJA SOBANADHRI ROW BAHADUR ZEMINDAR AND ANOTHER—DEFENDANTS Nos. 1 AND 3—APPELLANTS

versus

ACHANTA VENKATA SUBBARAYUDU—PLAINTIFF—RESPONDENT.

Limitation Act (*IX of* 1908) *Sch. I, Art.* 61—*Princi-*

KANDANA VENKATA VARADARAJA SOBANADHRI ROW v. ACHANTA VENKATA SUBBARAYUDU.

pal and agent—Agent borrowing money unauthorisedly and paying to principal's creditors—Suit by agent for recovery of amount paid—Limitation—Repudiation, absence of, whether amounts to ratification.

A suit by an agent to recover from his principal money borrowed by the former without the latter's authority or ratification but which he paid to the latter's creditors is governed by Article 61 of Schedule I to the Limitation Act, the cause of action arising when payment is made to the principal's creditors.

Aghore Nath Mukhopadhya v. *Grish Chunder Mukhopadhya*, 20 C. 18; 10 Ind. Dec. (N. S) 13; *Kandaswami Pillai* v. *Avayambal* alias *Thangachi Ammal*, 7 Ind. Cas. 399; 34 M. 167; 20 M. L J. 989; 8 M. L. T. 194, (1910) M. W. N. 316, followed.

Girraj Singh v. *Mul Chand*, 29 A. 627; 4 A L. J. 501; A. W. N. (1907) 214, distinguished.

A mere failure to repudiate in terms an unauthorised transaction does not amount to ratification.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam, in Appeal Suit No. 76 of 1917 (Appeal Suit No. 142 of 1916, Sub-Court, Ellore, and Appeal Suit No. 204 of 1915, Sub-Court, Bezwada), preferred against the decree of the Court of the District Munsif, Ellore, in Original Suit No. 944 of 1914.

FACTS.—Plaintiff, who was the agent of the defendants' father, borrowed money without the latter's authority from third parties and paid it to the defendants' father's creditors. He then wrote to his principal intimating the fact of his having borrowed unauthorisedly and asking pardon for the same. To this letter the defendants' father sent no reply. The plaintiff brought the present suit for recovery of the said sum more than 3 years after the said payment. The Subordinate Judge found that though the plaintiff was not expressly authorised by his principal to borrow, the latter subsequently ratified the transaction. He held that the suit was not barred. Defendants appealed to the High Court.

Mr. *V. Ramadoss*, for the Appellants.—The borrowing by the plaintiff was neither authorised nor ratified by his principal, the defendants' father. To the letter, Exhibit I, apologising for his conduct, plaintiff received no reply. Silence will not amount to ratification.

The cause of action for the suit arose on the date of plaintiff's payment to the defendants' father's creditors. The suit is barred under Article 61 of the Limitation Act. See *Aghore Nath Mukhopadhy* v. *Grish Chunder Mukhopadhya* (1), *Kandaswami Pillai* v. *Avayambal* alias *Thangachi Ammal* (2).

Mr. *T. Prakasam*, for the Respondent.—The principal did not in terms repudiate the plaintiff's action. The suit is not barred. See *Girraj Singh* v. *Mul Chand* (3).

JUDGMENT.—The question of authorisation is *res judicata* against plaintiff by reason of the decision in Appeal Suit No. 22 of 1910. The Subordinate Judge holds that there was subsequent ratification, but there is nothing in the facts found by him to justify such a conclusion. All that is shown is that plaintiff in Exhibit I reported to defendants' father the fact that he had borrowed the money and asked pardon for having done so without authority, and wanted orders to pay it back. No reply appears to have been sent to this, and there is no evidence of defendants' father having done or said anything in ratification of plaintiff's action. It cannot be said that he ratified it simply by failing to repudiate it in terms.

In the absence of authority or ratification it must be held that plaintiff's cause of action arose when he paid to the creditors of defendants' father the money which he (plaintiff) had borrowed. The Article applicable is Article 61, Indian Limitation Act, and the suit is clearly time barred. This view is in accord with the decisions in *Aghore Nath Mukhopadhya* v. *Grish Chunder Mukhopadhya* (1) and in *Kandaswami Pillai* v. *Avayambal* alias *Thangachi Ammal* (2). On the respondent's side *Girraj Singh* v. *Mul Chand* (3) was relied on: but that case is easily distinguishable. It is not a case of principal and agent at all, but of one person borrowing money for the benefit of another to whom it was directly paid, and who contracted to repay it himself or indemnify the nominal borrower.

We must set aside the decrees of the lower Courts and dismiss the suit with costs throughout.

M. C. P.

Appeal allowed.

(1) 20 C. 18; 10 Ind. Dec. (N. S.) 13.
(2) 7 Ind. Cas. 399; 34 M. 167; 20 M. L. J. 989; 8 M. L. T. 194; (1910) M. W. N. 316.
(3) 29 A. 627; 4 A. L. J. 501; A. W. N. (1907) 214.

JUGUL KISHORE *v.* BACHINDER MOHAN.

PATNA HIGH COURT.

CIVIL REVISIONS NOS. 108 AND 109 OF 1919.

July 8, 1919.

Present:—Mr. Justice Das.

Babu JUGUL KISHORE—PETITIONER

versus

BACHINDER MOHAN AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (*Act V of* 1908), *O. IX, rr.* 4, 9, *O. XXI, rr.* 90, 100, 101—*Execution of decree*—*Application to set aside sale*—*Dismissal for default*—*Application for restoration, maintainability of.*

Order IX, rule 9, of the Civil Procedure Code does not apply to an order dismissing for default an application to set aside under Order XXI, rule 90, of the Code a sale held in execution of a decree.

Rule 4 of Order IX expressly applies to suits, and a case under Order XXI, rules 100 and 101, is not a suit within the meaning of that rule.

Civil revisions from orders of the Munsif, Purneah.

Mr. *Akbari Husnain*, for the Petitioner.

Mr. *Nirsu Narain Singh*, for the Opposite Party.

JUDGMENT.—These two revision petitions come before me under the following circumstances. The petitioner purchased and got possession of a *jote* belonging to the judgment-debtor on the 24th of March 1913. On the 23rd of April the opposite party preferred an objection under Order XXI, rules 100 and 101. At the time of the hearing of the application the opposite party failed to put in an appearance, with the result that its petition under Order XXI, rules 100 and 101, was dismissed for default on the 15th September 1918. On the 21st of October 1918 they put in a petition under Order IX, rule 4, of the Code of Civil Procedure for re-hearing of the petition which was dismissed for default. This petition for re hearing was rejected on the 29th November 1918 as no step was taken by the applicant. On the 30th November 1918 there was another application under Order IX, rule 4, by the opposite party for restoring to file the execution case which was dismissed for non-prosecution. On 20th January 1919 the petition of the 30th November 1918 was allowed and the re-hearing of the case was restored to its original number, that is to say, the re-hearing case which was rejected on the 29th November 1918 was restored to its original number. Against this order of the 20th January 1919 there is one petition being Revision Case No. 109 of 1919. Subsequently by a further order, dated 3rd February 1919, the re hearing petition was allowed and the objection case was restored to its original number. As against this order of 3rd February 1919 there is another application which is Revision Case No. 108 of 1919.

The point which has been taken before me by the learned Counsel appearing on behalf of the petitioner is very short, and it is this: that the Court had no power under Order IX rule 4, to restore a case under Order XXI, rules 100 and 101. The Special Bench of this Court has decided in the case of *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (1) that Order IX, rule 9, of the Code of Civil Procedure, 1908, does not apply to an order dismissing for default an application to set aside under Order XXI, rule 90, a sale held in execution of a decree. In my opinion that decision is applicable to the facts of this case. It seems to me that Order IX, rule 4, expressly applies to a suit and it cannot be urged at all that a case under Order XXI, rules 100 and 101, is a suit within the meaning of Order IX, rule 4.

I hold that I am bound by the decision of the Special Bench of this Court and I would, therefore, allow these applications and set aside the orders passed by the learned Munsif on the 20th January 1919 and 3rd February 1919. The petitioner is entitled to his costs which I assess at two gold *mohurs* in each case.

Petitions allowed.

(1) 49 Ind. Cas. 617; (1919) Pat. 75; 4 P. L. J. 135.

PRAYAG SINGH *v.* EMPEROR.

PATNA HIGH COURT.
CRIMINAL REVISION NO. 178 OF 1919.
July 15, 1919.
Present:—Mr. Justice Das.
PRAYAG SINGH AND OTHERS—ACCUSED —PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *s.* 193—*Fabricating false evidence--Witnessing service of summons on wrong person—Offence.*

In a rent suit summonses were issued to, amongst others, one S. Accused No. 1 identified a person as S. and the summons was served on him; accused Nos. 2 and · were witnesses to the service. It appeared, however, that S had died some years before the suit was instituted. The three accused were accordingly convicted of an offence under section 193 of the Penal Code:

Held, that the conviction of accused Nos. 2 and 3 could not be maintained, as it was not proved that they were aware that service was to be effected upon S.

Criminal revision against the order of the Sessions Judge, Monghyr, dated the 29th April 1919, affirming in appeal the order, dated the 27th March 1919, of the Deputy Magistrate, Monghyr.

Mr. *Sami*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—I am clearly of opinion that the conviction of petitioners Nos. 2 and 3 cannot be upheld. The facts are shortly these: There was a rent suit by one Hakim Mohammad Reza and others against Dabu, Sukar and others. It appears that Sukar had died long before this rent suit was instituted. Summons, however, on the defendants was served on the 21st January 1918. The petitioner No. 1 was the identifier on whose identification summons was served on Sukar. Petitioners Nos. 2 and 3 were witnesses to the service of summons. They have all been convicted under section 193, Indian Penal Code. This Court refused to interfere so far as petitioner No. 1 is concerned. The only question which I have to consider is whether the conviction of petitioners Nos. 2 and 3 can be upheld.

I have already mentioned that petitioners Nos. 2 and 3 were merely witnesses to the service of summons. That does not imply that they were aware on whom service was to be effected. Section 192, Indian Penal Code, provides as follows:—

"Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said 'to fabricate false evidence.'"

Did the petitioners Nos. 2 and 3 cause any circumstance to exist or make any false entry in any book or record, or make any document containing a false statement, intending that such circumstance, false entry or false statement might appear in evidence in a proceeding taken by law before a public servant as such? I am clearly of opinion that the answer cannot be in the affirmative. If indeed it had been proved that they were aware on whom service was to be effected, the matter would have stood on a different footing altogether. But that is not the finding of the Courts below and so far as I have read the evidence and I have certainly examined some of the evidence in the case—oral and documentary—I do not find that it has been proved that they were at all aware of the fact that service was to be effected on Sukar. It may well be that the identifier told them that service was to be effected on some other person. Before these petitioners can be convicted of an offence under section 193, it must, in my opinion, appear that they were aware that service was to be effected on Sukar. In my opinion their conviction under section 193, Indian Penal Code, cannot be sustained.

I, therefore, set aside the conviction and the sentence passed on the petitioners Nos. 2 and 3.

Conviction set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 293 OF 1919.
June 24, 1919.
Present:— Mr. Justice Piggott.
BABU RAM—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 234, 235, 476, 537 (b)—Order directing prosecution in respect of one offence—Joinder of charges—Jurisdiction of Magistrate—Objection not taken during trial—Sanction, want of, in respect of second charge—Irregularity.

Accused instituted two suits against two different persons in two different Courts, one in the Court of the City Munsif and the other in the Court of the Subordinate Judge. Both suits were tried on the Small Cause side and dismissed. The Sub-Judge directed under section 476, Criminal Procedure Code, the prosecution of the accused under section 209 of the Penal Code and of three other persons under section 193 of the same Code The Magistrate taking cognizance of the case framed charges against the accused in respect of both the suits, and the accused entered upon his defence. Evidence was recorded for both prosecution and defence without any objection to the jurisdiction of the Magistrate to take cognizance of the offences, or as to the validity of the procedure adopted in trying both charges at one and the same trial. After he was convicted, the accused appealed to the Sessions Judge protesting against the joinder of the two charges, and also against the action of the Magistrate in taking cognizance of the offence alleged to have been committed in respect of the suit filed in the Court of the City Munsif, urging that he had been taken by surprise at the course adopted by the Magistrate, as he believed he was on his trial for the offence in respect of the suit in the Court of the Sub-Judge, and was greatly prejudiced in his defence by this belief. The Sessions Judge declined to interfere and the accused moved the High Court in revision:

Held, that the case was covered by section 537 (*b*) of the Criminal Procedure Code, as the accused, who had every opportunity of doing so and who had full warning from the date on which the charge was framed of the fact that he was being put upon his trial in respect of both offences, had acquiesced in the view taken by the Magistrate and had never at any stage of the trial in that Court raised the question of the Court's jurisdiction in respect of the offence alleged to have been committed in the City Munsif's Court; that at most the Magistrate had committed an error, but the error had not in any way prejudiced the accused by the procedure adopted. [p. 420, col. 1.]

Criminal revision against the order of the Sessions Judge, Bareilly, dated the 15th April 1919.

Mr. *J. N. Misra*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This application in revision arises out of the following facts. On the 6th of April 1918 the applicant Babu Ram instituted two civil suits in two different Courts against two different persons. In one case he claimed a sum of Rs. 33 10 0 from one Badri Prasad. This suit was instituted in the Court of the City Munsif of Bareilly, was tried on the Small Cause Court side, and was dismissed on the 23rd of April 1918. In the other suit Babu Ram claimed a sum of Rs. 140 from one *Musammat* Ganga Dei in the Court of the Subordinate Judge of Bareilly. This suit also was tried on the Small Cause Court side and was also dismissed. The learned Subordinate Judge then took proceedings under section 476 of the Criminal Procedure Code against Babu Ram and against certain persons who had appeared as witnesses before his Court in support of Babu Ram's claim against *Musammat* Ganga Dei. In the course of those proceedings he sent for and examined the file of the suit against Badri Prasad in the City Munsif's Court. On the 1st of June 1918, he recorded an order directing the prosecution of Babu Ram under section 209 of the Indian Penal Code and of three other persons under section 193 of the same Code. The Magistrate who took cognizance of the matter enquired into the conduct of Babu Ram in respect of both the suits filed by him. He framed charges alleging against Babu Ram that he had fraudulently or dishonestly, or with intent to injure Badri Prasad and *Musammat* Ganga Dei, made against each of them, on one and the same day, a claim in two different Courts of Justice which he knew to be false. After the charges had been framed Babu Ram entered on his defence. The prosecution witnesses were re called and cross examined and witnesses for the defence were heard on three subsequent dates, the last of which was one month and eleven days after the framing of the charges. It is quite clear that in the Magistrate's Court no objection was taken as to the jurisdiction of the Court to take cognizance of both offences, or as to the validity of the procedure adopted in trying both these charges at one and the same trial. It was an essential part of the case for the prosecution that these two false claims had been preferred by Babu

Ram out of enmity against Badri Prasad, his reason for proceeding against *Musammat* Ganga Dei being that that lady is related to Badri Prasad and lives in one and the same house with him. So far, therefore, as concerns the trial of these two charges together, the procedure adopted is not merely warranted by section 234 of the Criminal Procedure Code, but the case actually falls within the purview of section 235 (1) of the same Code, the case for the prosecution being that the bringing of two false claims against Badri Prasad and *Musammat* Ganga Dei respectively formed part of the same transaction. The trying Magistrate, and also the Sessions Judge on appeal, have found that the case for the prosecution was fully made out on the facts, that the two claims preferred by Babu Ram were false to his knowledge, and were preferred dishonestly and with intent to injure Badri Prasad and *Musammat* Ganga Dei. In his memorandum of appeal to the Sessions Court Babu Ram protested against the joinder of the two charges, and also against the action of the Magistrate in taking cognizance of the offence alleged to have been committed by the filing of the false claim against Badri Prasad in the Court of the City Munsif. He has stated in the said petition of appeal that he was taken by surprise by the course adopted by the Magistrate, that he believed himself to be on his trial only in respect of the claim brought against *Musammat* Ganga Dei and that he was greatly prejudiced in his defence by this belief An examination of the record shows that these assertions are absolutely false. Babu Ram had fair warning that he was charged in respect of both offences. He did in fact defend himself in respect of both charges. He had abundant opportunity of doing so, and he never in the Magistrate's Court challenged the legality or propriety of the procedure adopted. The learned Sessions Judge, concurring with the view taken of the fact by the Magistrate, has declined to interfere on any legal ground, holding that the joinder of charges was justified, that, if any error was committed in respect of the Magistrate's taking cognizance of the offence alleged to have been committed in respect of the filing of the suit in the City Munsif's Court, the accused had not been prejudiced thereby and that the provisions of section 537 (*b*) of the Criminal Procedure Code, more particularly when considered in connection with the explanation appended to the aforesaid section, forbid interference on appeal or revision on the mere ground of want of sanction in respect of this particular offence, or of irregularity in the proceedings taken under section 476 by the learned Subordinate Judge.

In the petition of revision to this Court these points are again raised. I have to consider, first of all, whether the learned Subordinate Judge had jurisdiction to take proceedings in respect of the false claim alleged to have been preferred in the City Munsif's Court. My answer on this point is that on the materials at present available I am unable to answer this question positively either in the affirmative or in the negative. If it was made a part of *Musammat* Ganga Dei's defence in the suit before the learned Subordinate Judge that the preferring of this false claim against her was part of a conspiracy, another step in which had been the filing of a false claim against Badri Prasad in the City Munsif's Court, and if in consequence the learned Subordinate Judge sent for and examined the record of the trial in the City Munsif's Court, and if, in fact, the question of the false claim preferred against Badri Prasad was brought to his notice in the course of a judicial proceeding, that is to say, in the course of his trial of the claim brought against *Musammat* Ganga Dei, then he had jurisdiction to direct the prosecution of Babu Ram for having preferred the false claim against Badri Prasad in the City Munsif's Court, as well as for having preferred a false claim against *Musammat* Ganga Dei in his own Court. If I thought it essential in the interests of justice to do so, I should adjourn the present proceedings in order to call for the record of the Suit No. 320 of 1918, on the Small Cause Court side, in the Court of the Subordinate Judge of Bareilly, in order to enquire further into these matters. For reasons which will become sufficiently obvious in the course of this order, I do not think this necessary. If this were the only point to be determined on this application, I should be

perfectly justified in holding that the order passed by the learned Subordinate Judge under section 476 of the Criminal Procedure Code must be presumed to be a good and valid order, unless and until the applicant can satisfy this Court to the contrary. A more serious difficulty has, however, been raised in respect of the same order. It is undoubtedly ambiguous in its terms and lays itself open to the contention that the learned Subordinate Judge, although he had examined the file of the suit in the City Munsif's Court in order to form a sound opinion regarding the transaction as a whole, did not, as a matter of fact, intend to direct the prosecution of Babu Ram in respect of the claim preferred in the City Munsif's Court, but only in respect of the claim preferred against *Musammat* Ganga Dei in his own Court. I am not prepared to go further than to say that the order of the learned Subordinate Judge of June the 1st, 1918, is ambiguous, and does not make it as clear as it should do whether he intended to direct the prosecution of Babu Ram in respect of two offences under section 209 of the Indian Penal Code, or of one only. Now I am content to deal with the matter upon this basis. I take it that the Magistrate who tried Babu Ram on these two charges had before him an ambiguously worded order, as to which it can fairly be contended that it does not make it clear whether the prosecution of Babu Ram in respect of the claim preferred in the City Munsif's Court is or is not ordered. I take it that the Magistrate in all good faith believed that the order of June the 1st, 1918, directed Babu Ram's prosecution in respect of both offences. He acted upon that belief, and the accused, who had every opportunity of doing so, and who had full warning from the date on which the charge was framed of the fact that he was being put upon his trial in respect of both offences, acquiesced in the view taken by the Magistrate and never at any stage of the trial in that Court raised the question of the Court's want of jurisdiction in respect of the offence alleged to have been committed in the City Munsif's Court. On this state of facts I am prepared to hold that the case is covered by the provisions of section 537 (*b*) of the Criminal Procedure Code. When all is said and done, the words which occur in that sub-section, "the want of any sanction required by section 195 or any irregularity in proceedings taken under section 476", must have some meaning; it is contrary to the canons of sound interpretation to press the words, "passed by a Court of competent jurisdiction", in the first part of the said section so as to make it impossible for the words quoted from sub-section (*b*) to have any meaning at all, that is to say, to be applicable in any possible case. I have before me a ruling of this Court on which I desire to found myself. It is the case of *Emperor* v. *Zahir Singh* (1) decided by Mr. Justice Tudball. With regard to section 537 of the Criminal Procedure Code, the learned Judge remarks: "The section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped all parties at the beginning of the proceeding." The present seems to me precisely such a case. The error, if it was an error, committed by the Magistrate in the present case, was in interpreting the Subordinate Judge's order of June the 1st, 1918, as covering both the offences under section 209 of the Indian Penal Code to which reference is made in the course of the said order. The error, if it was one, certainly escaped observation, not merely at the beginning of the proceeding in the Magistrate's Court, but throughout the entire trial in that Court. I am satisfied that in no event could it be said that Babu Ram was prejudiced by the procedure adopted. It was an essential part of the case for the prosecution that two false claims had been brought by Babu Ram, on one and the same date, in two different Courts, in pursuance of the same vengeful purpose; and that the bringing of those two false claims constituted two acts so connected together as to form part of one and the same transaction. Even if Babu Ram had been on his trial only in respect of the false claim preferred against *Musammat* Ganga Dei, the evidence given by Badri Prasad would

(1) 28 Ind. Cas. 646; 37 A. 283; 13 A. L. J. 345; 16 Cr. L. J. 310.

have been relevant under more than one section of the Indian Evidence Act.

The sentences passed in this case are rigorous imprisonment for one year and a fine of Rs. 100 on each charge. The sentences of imprisonment have been ordered to run concurrently, so that when all is said and done, the only practical effect of the trial of the two offences together is that Babu Ram is condemned to a fine of Rs. 200 instead of a fine of Rs. 100 only. While, therefore, I entertain no doubt in my own mind as to the correctness of the principles of law on the strength of which I have decided to dismiss this application, I am prepared in view of the somewhat complex nature of the questions of law raised to take into consideration the question of sentence. There is no clear evidence on the record as to the means of Babu Ram; but I am disposed to infer that his position in life is such as to make the payment of a fine of Rs. 200 a somewhat serious matter for him. Moreover, if it is permissible to look at the matter from a somewhat technical point of view, it may be said that the false claim against *Musammat* Ganga Dai was for a considerably larger amount and constituted a more serious offence than the bringing of the false claim against Badri Prasad, so that some distinction might be made between the two in the matter of the sentence. My order, therefore, is this that as a question of law I affirm the conviction of Babu Ram in respect of both the offences of which he has been tried and convicted; but for the reasons given, I reduce the sentence passed upon him in the matter of the second offence charged, that is to say, the false claim brought against Badri Prasad in the Court of the City Munsif, and I do so by setting aside the sentence of fine passed in respect of the conviction on that charge. The net result is that Babu Ram remains liable to two concurrent sentences of rigorous imprisonment amounting to one (1) year in all, and to a single fine of rupees one hundred (Rs. 100), with an alternative period of rigorous imprisonment. I understand that Babu Ram has been released on bail, if so, he must surrender to his bail; to undergo the unexpired portion of his sentence. If the full fine of Rs. 200 has been paid then one-half of it, that is to say Rs. 100 will be refunded.

Sentence reduced.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 162 OF 1919.

June 19, 1919.

Present:—Mr. Justice Atkinson.

DAROGI CHAMAR AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 367, 427—Criminal appeal—Judgment of Appellate Court, contents of.

The law requires an Appellate Court to write a reasoned and considered judgment, setting out the facts and points arising for determination and stating the reasons and grounds for its decision. A judgment which omits to do this, the Judge in appeal contenting himself with saying that he adopts the reasons given by the trial Court to support the grounds of his decision for maintaining the conviction of an accused person, is erroneous in form, as such a judgment cannot be read as supplementary or additional to, or to be explained and deciphered by the aid of, the judgment of the trial Court.[p. 423, col. 1.]

Criminal revision against the order of the Sub Divisional Officer, Bhagalpur, dated the 31st April 1 19, affirming in appeal the conviction of the petitioner by a Magistrate of the 2nd Class, dated the 24th March 1919.

FACTS—The judgment of the Appellate Court was as follows:—

"I have carefully gone through the judgment. The appellants appear to have been rightly convicted under section 411, Indian Penal Code. Apparently three bags containing paddy were stolen from the complainant's verandah. Two of them were recovered from the house of accused Darbeshi. The contents of one were emptied and divided into six shares. The third bag could not be discovered. The reasons given in the lower Court's judgment for his finding commend themselves to me also and I accept it and uphold the conviction of the appellants but regard being had to the nature of the offence, the sentence appears to me to be too severe and I according-

ly reduce it to one of three months' rigorous imprisonment in each case."

Mr. *A. P. Upadhaya*.

JUDGMENT.—The five petitioners herein were charged with an offence under section 411 of the Indian Penal Code, *viz.*, dishonestly receiving stolen property.

It appears that three sacks of paddy belonging to the complainant were taken from his verandah by night and that on the following day two of the sacks were discovered in the house of accused No. 2, the paddy having been taken out from the sacks and divided into portions.

The learned Magistrate of the 2nd Class, who tried this case, sets forth in his judgment very cogent reasons for showing that all the accused are guilty of an offence within the meaning of section 411 of the Indian Penal Code. The learned trial Magistrate considered the case and the evidence as against each accused, and he found that the taking of the sacks of paddy from the complainant's verandah by the petitioners was with the dishonest intention of appropriating complainant's property to the petitioners' use.

On appeal the case came before Mr. Sircar, the Sub-Divisional Magistrate of Bhagalpore, and I confess that his judgment is, in my opinion, perfunctory in the extreme. Section 424 of the Criminal Procedure Code read with section 367 provides what a judgment of an Appellate Court should contain to be a judgment such as the law requires. Section 367 provides that it shall contain the point or points for determination, the decision thereon and *the reasons for* arriving at the decision.

Now the judgment of the Sub-Divisional Magistrate does not state the point or points arising for determination and the reasons for the decision at which the Appellate Court has arrived.

The learned Sub-Divisional Magistrate on appeal has not considered whether upon the evidence the taking of the bags by the accused was a taking by them dishonestly knowing that the same was stolen property, nor has the learned Sub-Divisional Magistrate on appeal considered the weight of the evidence adduced at the trial as against each of the accused individually, and as to how far such evidence would warrant a conviction of each of the five persons charged in the appeal which he was called upon to determine.

The ruling reported as *Ram Lal Singh* v. *Hari Charan Ahir* (1), in my opinion, applies in its reasoning with direct precision to the facts of the particular case now before me; and with the authority of that decision I venture to express my entire concurrence. Sir Lawrence Jenkins says:—

"It is continually overlooked by Courts of Appeal that section 424 of the Criminal Procedure Code prescribes that the rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court, other than a High Court, and one of the sections in Chapter XXVI is section 367, which prescribes that a judgment shall, among other things, contain the point or points for determination, the decision thereon and the reasons for the decision. Now, the conviction in this case by the Court of first instance was both under sections 379 and 143. For the purpose of an offence under section 379, it is necessary that it should be proved that there was an intention to take dishonestly any moveable property out of the possession of the person aggrieved without that person's consent; and one of the points for determination, therefore, is whether there was that intention. Admittedly there is no finding on that point in the judgment of the lower Appellate Court. This is not a mere technical objection, because one of the points urged on the part of the defence is that, though there may have been the moving of property, there was not the intention to take that property dishonestly out of the possession of any other person, inasmuch as, it is contended, there was a *bona fide* claim of right; so that it is apparent that it was absolutely essential that that point should be contained in the judgment and that it should be decided."

The reasoning of that decision, in my opinion, applies with striking force to the facts of this case.

The learned Sub-Divisional Magistrate in appeal contents himself with saying that he adopts the reasons given by the trial Court to support the grounds of his deci-

(1) 5 Ind. Cas. 999; 37 C. 194; 11 C. L. J. 410; 11 Cr. L. J. 348.

sion for maintaining the conviction of all the accused on appeal.

In my opinion such a judgment is quite erroneous in form. The judgment of the Appellate Court must stand by itself and cannot be read as supplementary or additional or to be explained and deciphered by aid of the judgment of the trial Court. Authority for this proposition is to be found in *Jamait Mullick* v. *Emperor* (2). And in this Court also I think the reasoning of a decision reported as *Gurubari Behera* v. *Emperor* (3) would apply, *viz.*, that the law requires an Appellate Court to write a reasoned and considered judgment setting out the facts and points arising for determination and stating the reasons and grounds for its decision.

In my opinion the learned Sub-Divisional Magistrate has failed to discharge the duty which the law cast upon him. The case must be remanded to him so that he may write a proper judgment upon the facts and evidence, and I should like him to state also his reasons for reducing the sentence of six months passed by the trial Court to a period of three months' rigorous imprisonment against each of the accused. If the learned Sub Divisional Magistrate was honestly satisfied that the reasoning of the trial Court was satisfactory and convincing, it is hard to understand how he came to reduce the sentence in the manner in which he did.

However, I shall remand the case to the learned Sub-Divisional Magistrate to enable him to write a proper judgment in accordance with law.

As the accused are on bail, let them remain on bail pending a proper judgment being prepared by the Sub-Divisional Magistrate.

Case remanded.

(2) 35 C. 138; 12 C. W. N. 134; 6 Cr. L. J. 427.
(3) 43 Ind. Cas. 439; 2 P. L. J. 695; 4 P. L. W. 153; 19 Cr. L. J. 151.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 75 OF 1917.
June 27, 1917.

Present:—Mr. Prideaux, A. J. C.

LOCAL GOVERNMENT—PETITIONER

versus

PYARELAL—ACCUSED.

Penal Code (Act XLV of 1860), s. 376—Rape—Punishment, measure of, how to be determined.

The measure of punishment for an offence of rape, under section 376 of the Penal Code, should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal and to the defenceless and unprotected state of the injured female. The fact that the family of the injured girl have condoned the offence on being paid a sum of money should not be taken into consideration in determining the heinousness of the offence, or of the punishment to be inflicted. [p. 424, col. 1.]

Queen v. *Jhantah Noshyo*, 6 W. R. Cr. 59, followed.

Criminal revision for enhancement of sentence against the order of the Sessions Judge, Nerbudda Division, dated the 2nd April 1917, confirming the order of the District Magistrate, Betul, dated the 5th March 1917.

Mr. *G. P. Dick*, for the Crown.

ORDER.—Pyarelal, son of Mukandlal, a Bania boy eighteen years of age, has been convicted by the District Magistrate, Betul, of raping one Rasi, a Rajput girl aged thirteen or fourteen years of age, and sentenced under section 376 of the Indian Penal Code to six months' rigorous imprisonment. The conviction and the sentence have been confirmed in appeal. The Local Government applies in revision for enhancement of the sentence on the ground that the sentence awarded is grossly inadequate. The accused, though noticed, is not represented in this Court. The District Magistrate, replying to the Rule calling upon him to show cause why the sentence should not be enhanced, states that in view of the accused's youth and position he is of opinion that the sentence awarded is sufficient and that to protract this sentence to a term of years is merely to habituate the prisoner at an impressionable age to the companionship of criminals without enhancing the deterrent effects of the punishment. The offence of which Pyarelal has been found guilty, and there is no question as to his guilt, is one of a particularly

atrocious kind. The offence was pre-meditated and the medical evidence shows that considerable injury was done to the girl. That her family may have condoned the offence on being paid Rs. 20 is not a fact that should be taken into account in determining the heinousness of the offence or the punisnment to be inflicted. It has been held that in these cases the measure of punishment should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal and to the defenceless and unprotected state of the injured female; see *Queen* v. *Jhantah Noshyo* (1). The accused is a young man, but he is old enough to know the seriousness and consequences of the offence he has committed. The sentence is clearly inadequate. I enhance it to three years' rigorous imprisonment.

Sentence enhanced.

(1) 6 W. R. Cr. 59.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS REVISION No. 26 OF 1919.

July 14, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

JAMUNA KANTH JHA—PETITIONER

versus

RUDRA KUMAR JHA AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Complainant, whether competent to apply for transfer.

Ordinarily, the only persons who are recognised by the Criminal Procedure Code as parties to a criminal case are the persons who have the right to control the proceedings; these are, the Crown, the accused and parties engaged in conducting certain proceedings within the meaning of the Code. The Code does not recognise a private prosecutor, who is a complainant, as a party to the case, and he, consequently, is not competent to apply for a transfer as a party interested. [p. 425, col. 2; p. 426, col. 1.]

Criminal application made to the High Court in its criminal revisional jurisdiction on behalf of the petitioners for the transfer of a case pending in the Court of the Sub-Divisional Officer, Madhipura, District Bhagalpur.

FACTS are fully set forth in the judgment of Jwala Prasad, J.

Mr. *Monohar Lall* (Assistant Government Advocate), for the Crown, raised a preliminary objection to the entertainment of this application inasmuch as the petitioner had no *locus standi* to move this Court. The petitioner lodged an information at the Thana and the case is now proceeding as a Police case and is being conducted by the Public Prosecutor. The petitioner is only a prosecution witness. He is neither the complainant nor the accused nor the Public Prosecutor, and only these three persons are contemplated by clause (8) of section 526 and these only can move the High Court. The Code draws a distinction between a complainant and an informant. Complaint is defined in section 4 (*h*)—therefore by necessary implication complainant must mean a person who lodges the complaint as defined in the Code. See section 154 where an informant is clearly mentioned and not a complainant.

The petitioner, if dissatisfied with the Police inquiry could have impugned the Police report by an application before the Magistrate. He then becomes a complainant and is then only entitled to move the High Court. The petitioner is neither a 'party interested' as contemplated by clause (3) of section 526. The only parties in a criminal trial are the Crown and the accused in Police or Crown cases and the complainant and the accused in private cases. The test is who is responsible for the conduct of the case, although nominally the Crown is the Prosecutor in all criminal trials. If this petitioner be held to be a party interested, then every prosecution witness who has received the slightest injury will be a party interested and there will be no end of petitions for transfer before the High Court and the work of the Courts below will be paralysed. Of course my submission on this point is independent of the powers of your Lordships to inquire in this matter yourself, which your Lordships can always do. The only case of this High Court that comes nearest to this is the case of *Hari Prasad Panday* v. *Jagannath Singh* (1).

Lastly on merits the petitioner has no grievance. A Court is justified to take action against a witness under section 228, Indian Penal Code. The Courts have wide powers to exercise a discretion under that section and if every time a Court takes action under that section with a view to

(1) Misc. Case No. 96 of 1916.

prevent miscarriage of justice it is to be presumed that the Court is biassed, the effect would practically be to deprive Magistrates of this very salutary power. In fact if anybody should complain against this, it is the Crown, but the Crown are satisfied that the case should go on in the Court of the Magistrate.

Mr. *S. Sinha*, for the Petitioner.—If this case ends in an acquittal, I shall be liable for maliciously prosecuting the case and also can be mulcted in damages in the Civil Court. It is, therefore, to say the least unfair that I should not be allowed to move the High Court. I quote *Gaya Prasad* v. *Bhagat Singh* (2).

A narrow construction ought not to be put on the word complainant. It is not defined in the Code and I submit it must include the informant to the Police. It seems anomalous that the same man when he sets the criminal law in motion by going to the Police loses his rights which are taken to be vested in him when he moves the Magistrate.

My witnesses have been terrified and they are afraid of giving evidence before this Magistrate.

JUDGMENT.

MULLICK, J.—In consequence of information given to the Police by the petitioner who was one of the persons injured, a number of persons are now under trial before the District Magistrate of Bhagalpur for the offence of rioting. The petitionor has moved for a transfer of the case under section 526, Criminal Procedure Code, on the ground that the Court has shown bias against the prosecution

Although every private person, under the law in England, has a right to set the criminal law in motion, his control over the prosecution is not unlimited. The Crown is in theory the prosecutor for all offences and the individual wronged can only assist the Crown for the purpose of collecting evidence and making the investigation necessary to bring the offender to justice. In continental countries the stricter view prevails that prosecutions, having punishment for their object, can only be instituted by public authority, though a person injured by a crime may join in the prosecution as a *partie civile*, under certain rules. But even English Law, though it permits *A* to prosecute *B* for libel upon *C* or for an assault upon *D*, although *A* may have no interest in the matter and although *C* and *D* may be averse to a prosecution, declines to regard a criminal prosecution as a private action and a private complainant who sets the law in motion as a party to the proceedings.

Nor do the provisions of the Criminal Procedure Code, dealing with the trial of summons, warrant and Sessions cases, lead to the conclusion that the law is different in India.

In *Queen-Empress* v. *Murarji Gokuldas* (3) it was held that the complainant in a trial for ordinary assault was not a party to a judicial proceeding within the meaning of section 8 of the Indian Oaths Act, and in arriving at this result their Lordships would seem to some extent to have been influenced by the consideration that the Criminal Procedure Code gives the power of compounding offences not to the complainant but to the person injured.

In my opinion, strictly speaking, the Code does not recognise a private prosecutor who is a complainant as a party to the case. This seems to be clear from the following provisions of the Code of Criminal Procedure:—

(1) Section 340, which enacts that every accused person may, as of right, be defended by a Pleader.

(2) Section 417, which enacts that only the Local Government may appeal against an order of acquittal.

(3) Section 423, which enacts that no order to the prejudice of the accused can be made in revision without giving him an opportunity of being heard.

(4) Section 440, which enacts that no party has a right to be heard in revision either personally or through a Pleader subject always to the provisions of section 439.

(5) Section 556, which enacts that no Judge or Magistrate shall try a case in which he is a party or personally interested.

It seems to be clear that ordinarily the only persons who are recognised by the

(2) 30 A. 525; 10 Bom. L. R. 1080: 4 M. L. T. 204; 18 M. L. J. 394; 5 A. L. J. 665; 14 Bur. L. R. 318; 11 C. C. 371; 8 C. L. J. 337; 12 C. W. N. 1017; 35 I. A. 189 (P. C.).

(3) 13 B. 389; 7 Ind. Dec. (N. S.) 258.

Code as parties to a criminal case are the persons who have the right to be heard, that is to say, persons who have the right to control the proceedings. These are the Crown, the accused and parties engaged in conducting certain proceedings of a *quasi* civil nature which, accepting the reasonings in *Arumuga Tegundan's case* (4), I assume to be criminal cases within the meaning of the Code.

Section 526, however, appears to introduce an exception to the general rule, and clause 8 of that section seems to contemplate that a complainant is a party interested for the purposes of clause 3.

But the petitioner before us is not a complainant within the definition in section 4 of the Code and, therefore, he cannot obtain the relief which he seeks. It is contended that complainant in clause 8 should be construed to include the person who gives information to the Police. I cannot accept this view.

If, therefore, the petitioner is not a complainant can he, as a person who has set the Police in motion or who has suffered injuries in the riot, intervene under section 526 as a party interested? The answer, in my opinion, is in the negative because under the general scheme of the Code he is not a party at all. Clause 3 is intended for the persons named in clause 8 and such other persons as have a right to be heard.

In my opinion there is no necessary connection between the obligation to give information for the preservation of law and order and the right to control the proceedings instituted thereon and, therefore, the provisions of section 44 and connected sections do not affect the case.

There does not seem to be any reported case in this Court bearing directly upon the question before us, but the judgment of Chamier, C. J., and Sharfuddin, J., in the unreported Miscellaneous Case No. 96 of 1916 [*Hari Prasad Panday* v. *Jagannath Singh* (1)] seems to some extent to support the view which I have taken. In the High Court of Bombay their Lordships have held in *Gannon, In re* (5) that a person merely by his relationship with the accused did not become competent to apply for a transfer as a person interested.

For the reasons given above I would dismiss the petitioner's application and direct the trial to proceed.

JWALA PRASAD, J.—The petitioner lodged an information with the Police Inspector of Sonbarsa Thana on 18th November 1918 complaining against the opposite party of having committed riot in connection with a dispute over a private ferry of Barasome Ghat, armed with deadly weapons, in the course of which the petitioner and other persons were wounded.

The Police after investigation submitted a charge-sheet, whereupon the opposite party were put upon their trial before the Sub-Divisional Magistrate of Madhipura. After the examination-in-chief of most of the prosecution witnesses the Magistrate framed charge against the opposite party under section 147, Indian Penal Code, and one of them, Rudra Kumar Jha, was further charged under section 148 of the Code. Some of the prosecution witnesses were cross-examined on the 29th April and the case was adjourned for further cross-examination to 12th May. During the cross-examination of prosecution witness No. 2, Babu Lal Khirar, the Magistrate drew up proceedings against him under section 228 of the Indian Penal Code for having refused to give answer to a question put to him by the defence Mukhtar, Bishwanath Jha, and convicted him under that section and sentenced him to pay a fine of Rs. 50. After that the said witness was further cross-examined.

The petitioner then on the 20th May filed a petition before the Magistrate for postponing further hearing of the case in order to enable him to obtain a transfer of the case to some other Court for trial, on the ground that the remaining prosecution witnesses were frightened owing to the attitude of the Magistrate against the said prosecution witness No. 2. The adjournment was, however, not granted and the further cross-examination of the witnesses continued. On 21st May the petitioner made another application before the Magistrate for postponing the hearing. This also was rejected.

On 27th May the petitioner moved the District Magistrate for the transfer of the

(4) 26 M. 188; 12 M. L. J. 391; 2 Weir 678.
(5) 5 Bom. L. R. 869.

case from the file of the Sub-Divisional Magistrate. This was also rejected.

On the 2nd June the petitioner moved us for transferring the case from the file of the Sub-Divisional Magistrate to some other Magistrate under section 526 of the Code of Criminal Procedure. We refused to stay the further hearing of the case in the Court below but ordered the postponement of the passing of the final order by the Sub-Divisional Magistrate until the disposal of the application in this Court. In the meantime we directed notice of the application to be given to the Government Advocate in order to obtain instruction as to whether or not the Crown intended to oppose this application. The Assistant Government Advocate appears and strongly opposes the application on behalf of the Crown both upon the point of law and upon the merits. This is in itself sufficient to refuse the application of the petitioner, as was pointed out in the unreported Miscellaneous Case No. 96 of 1916 [*Hari Prasad Panday* v. *Jagannath Singh* (1)] of this Court. Whatever the rights of a private prosecutor be under section 526 to apply for a transfer, it is certain that his rights are subordinate to that of the Crown "standing forward as prosecutor on behalf of the subject on public grounds", namely, to maintain order, peace and well-being of the society. A subject may have a right to institute civil proceedings to recover money or other property on account of any wrong caused to him by a crime committed by any person, but as regards criminal prosecution by him it has been observed in *Burdett* v. *Abbot* (6), per Bayley, *vide* Halsbury's Laws of England, Volume IX, page 233, that "Any private person, in the absence of a statutory provision to the contrary, can commence a criminal prosecution, but the prosecution is always at the suit of the Crown. Hence it is that criminal proceedings were called pleas of the Crown. The Crown only can stay criminal process or remit a punishment awarded by any Court."

Under the Code of Criminal Procedure, Chapter XVIII, the conduct of the case in Crown prosecutions is vested in the Public Prosecutor and a Pleader appointed by a private person is subordinated to him and may instruct and assist him in the prosecution of the case and is required to act under his directions. The Public Prosecutor has a right to withdraw from the prosecution and to enter *nolle prosequi* (*vide* sections 493 and 494) This right of withdrawal from prosecution may be exercised by a private person conducting a case with the permission of the Magistrate enquiring into or trying the case under section 495.

The application to transfer a case is a proceeding in the course of the conduct of the case and when there is a conflict between the private prosecutor and the Public Prosecutor in the matter of transfer of the case, the right of the former as representing the Crown would naturally prevail. In the present case the prosecution was in the hands of the Public Prosecutor on a charge sheet having been submitted by the Police. Whatever right the petitioner may have by virtue of having commenced the prosecution, his right is subordinated to that of the Crown and when the Crown is opposing the application and does not apprehend any unfairness in the trial of the case by the Magistrate, I am of opinion that the application of the petitioner cannot be entertained.

Coming now to Chapter XLIV of the Code of Criminal Procedure dealing with the transfer of criminal cases, section 588 empowers a Chief Presidency Magistrate, a District Magistrate or a Sub Divisional Magistrate to withdraw any case from any Magistrate subordinate to him and to enquire into or try himself or refer it for enquiry or trial to any competent Magistrate subordinate to him. This section does not provide as to how and by whom the Magistrate referred to therein may be moved. The Magistrate may act under this section *suo motu* or on the information supplied by any person.

We are, however, concerned with section 526 of the Code, under which a High Court is empowered to transfer a case from a Criminal Court subordinate to its authority to any such Court of equal or superior jurisdiction or to itself. Section 526 of the previous Code of Criminal Procedure of 1882 gave much larger powers than those conferred by section 147 of the High Courts Criminal

(6) (1811) 14 East 1 at pp. 154, 162; 104 E. R. 501; 12 R. R. 450.

Procedure Act (X of 1875). The present Code of 1898 has made a new provision in clause (3), which did not exist in the Code of 1882. By this clause "the High Court may either act on the report of the lower Court or on the application of a party interested or on its own initiative." Thus under the present Code "a party interested" has a right to make an application under section 526 for the transfer of a criminal case pending in a subordinate Court.

The question, therefore, for determination is whether the petitioner, being one of the persons injured in the riot and having commenced the criminal prosecution by lodging information with the Police Sub-Inspector, is a party interested within the meaning of the said clause. Section 526 (*a*) was added by Act III of 1884, section 12 of the Code of 1884. This section is exactly in the same terms as clause 8 of section 526 of the present Code, and empowers the "prosecutor, the complainant or the accused person" to notify to the Court before which the case or appeal is pending *his* intention to make an application to the High Court under section 526 for the transfer of the case or the appeal, and upon such application the Court is required to exercise the powers of postponement or adjournment in order to afford the applicant reasonable time for making an application for transfer and for obtaining an order thereon. It is, therefore, obvious that both under the old Code as well as under the present Code the right to make an application for transfer under section 526 has been conferred upon the complainant in the criminal cases. This is conceded by the learned Assistant Government Advocate appearing on behalf of the Crown.

He, however, contends that the word "complainant" used there must be limited to a person who makes a "complaint" under section 4, clause (*h*), of the Code of Criminal Procedure, "orally or in writing, to a Magistrate with a view to his taking action under the Code" (section 190 (*a*), and cannot be extended to a person who lodges a first information before a Police Officer and the prosecution is started on the Police report made upon such information. The word "complainant" has not been defined in the Code. If it means only a person who makes a "complaint" within the technical meaning of the term to a Magistrate, the petitioner being then an informant before the Police would not come under it. If, on the other hand, it includes a person who lodges an information of an offence having been committed before the police, the petitioner would come under it and then his right to make an application under section 526 is obvious. If he is not a complainant as used in clause 8 of the section, he will still be entitled to apply for a transfer of the case if he is a 'party interested' within the meaning of clause 3 of the section unless the said words in the clause are synonymous with the words "the Public Prosecutor, the complainant or the accused" used in clause 8. If the Legislature intended that the words "party interested" in clause 3 should mean only "the Public Prosecutor, the complainant or the accused," there was nothing to prevent those very words being used for the words "party interested" in clause 3. The object of the two clauses is quite different. Clause 8 is enacted for the purpose of enabling a Court to postpone or adjourn the hearing of a case where an intention is expressed of making an application for the transfer of the case, whereas the object of clause 3 is to confer a right of making an application for transfer. An informant of the offence to the Police may not be conducting the case and may not, therefore, be entitled to ask for an adjournment but is nonetheless interested in the result of the case and consequently in a fair and impartial trial of the same. He has to bear the consequences of the result of the case, such as his liability to be prosecuted if the case were held on account of an unfair trial to be false and malicious. If, on the other hand, the case succeeds, he and he only is entitled to compensation in the Civil Court for the wrongs done to his person or property.

There does not appear to be any reason why the right of obtaining a transfer should be conferred upon a person who directly goes to the Magistrate with a complaint, and not upon a person who

goes to the Police. It is optional with an injured person to go direct to a Magistrate with the complaint, or to the Police with an information of the offence having been committed. In either case he is the person who has commenced the criminal prosecution, and in either case under the legal fiction, prosecution is said to be at the "suit of the Crown." If this fiction bars his right of making an application for transfer when he goes to the Police in the first instance, it equally does so when he lodges a complaint before the Magistrate. *A fortiori* if the fiction is no bar in the latter case, it is not so in the former. Besides, an informant before the Police can, at any time during the Police investigation or after the close of the Police investigation, come to the Magistrate with a grievance against the proceedings adopted by the Police and can require the Magistrate to summon the accused or to call for a charge sheet, and his petition, if any, is to be treated as a complaint and is required to be disposed of under the provisions of sections 200 to 204 relating to complaints, whether the Police submits a charge-sheet or not. The Magistrate is also entitled to direct the Police to submit a charge sheet even when the latter holds that the case is false: *vide* Chapter XIV, sections 154 to 159. Unless the first informant were a party and also a party interested, he would not have been entitled to move the Magistrate for directing the Police to submit a charge-sheet. Under sections 44 and 45 of the Code there is an obligation upon every private person to give, either to a Magistrate or to a Police Officer, an information of the commission of certain offences mentioned therein, among which offences of unlawful assembly and of riot are included. The person lodging the information is responsible for it and it is his interest to see that a fair and impartial enquiry or trial takes place in respect of the offence of which he has given information, and obviously he is entitled to apply for a transfer under section 526 when there be a reasonable ground for his apprehension that the enquiry or trial would not be fair or impartial unless there were a statutory bar to his making an application. The distinction between an informant and a complainant appears to be very thin for the purpose of making an application under section 526 and far from imposing a legal bar upon him to make such an application, clause 3, newly added, appears to me to amplify the right which would have seemed not to have been conferred by clause 8 in which the words "the Public Prosecutor, the complainant or the accused" occur. In respect of many cognizable offences [in which a Police Officer may arrest without warrant and which are punishable for a term exceeding six months within clauses (*f*) and (*w*) of section 4], such as the case of misappropriation or criminal breach of trust of private money or of cheating of a private person or mischief to private irrigation works, and also in cases where the Police Officer takes a strong view against the case and the Magistrate sends for the charge-sheet, the conduct of the case is often in the hands of a private prosecutor. In such cases there is no reason why a private person should not be entitled to apply under section 526.

But when the conduct of a case is in the hands of a Public Prosecutor and a Pleader appointed by a private person is subordinate to the Public Prosecutor, I should think that the latter alone has a right to make an application and the former is to move the latter or the Crown for an action to be taken under section 526 through the Crown Prosecutor. This is the case here, and, therefore, in this case I hold that the right of the petitioner is subordinated to that of the Public Prosecutor and inasmuch as the latter opposes it, the petition of the former to this Court should be rejected.

Now coming to the merits of the case, there does not appear to be any substance in the application. The only complaint against the Magistrate is that he punished one of the prosecution witnesses under section 228 of the Indian Penal Code for refusing to give answer to a question in cross-examination. This was within the right of the Magistrate and does not necessarily impute any unfairness in the trial of the case.

The next ground is that the remaining witnesses for the prosecution were frightened by the aforesaid act. This is rather

a frivolous and unsubstantial ground. On the other hand, even after the said event the witnesses for the prosecution were examined and yet nothing has been suggested to show that the Magistrate has exhibited any unfairness in the conduct of the case.

The last ground that Babu Viswanath Jha, the Mukhtar for the defence, is a relation of the principal accused Rudra Kumar Jha and is in contact with the trying Magistrate in connection with the Local Bar, the High English School and the Co operative Central Bank, is also unsubstantial and affords no sufficient ground for taking away the case from the file of the trying Magistrate.

I would, therefore, reject this application. The record may now be sent down for disposal by the trying Magistrate.

Application rejected.

PATNA HIGH COURT.

CRIMINAL REVISION No. 185 OF 1919.

July 2, 1919.

Present:—Mr. Justice Atkinson.

RAM KHELAWAN THAKUR—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 403, 406—Criminal breach of trust—Agent receiving money on behalf of principal and subsequently refusing to return it—Offence.

Where an agent receives money on behalf of his principal, the money so received is the property of, and is owned by, the principal, and if such agent refuses, at the request of the person paying the money to refund it, he is not criminally liable, and, consequently, cannot be prosecuted for the offence of criminal breach of trust, as the gist of that offence is the dishonest misappropriation or the conversion by one to his own use of the property of another which has been entrusted to him. [p. 431, col. 2.]

Nga Po Ywet v. *Emperor*, 24 Ind. Cas. 332; 7 Bur. L. T. 209; 15 Cr. L. J. 452; 7 L. B. R. 278, relied upon.

Criminal revision against the order of the Sessions Judge, Muzaffarpur, dated the 28th May 1919, affirming on appeal the conviction and sentence passed by the Sub-Divisional Officer, Sitamarhi, dated the 5th May 1919.

Messrs. *P. C. Manuk* and *Hasan Jan*, for the Petitioner.

JUDGMENT.—The petitioner, Ram Khelawan Thakur, seeks by this application to have his conviction set aside as originally pronounced by the Sub-Divisional Officer, Mr. Owen, pursuant to his order dated the 5th May 1919, which was affirmed on appeal by the learned Sessions Judge of Muzaffarpur on the 28th May 1919. The accused was charged under section 406 of the Indian Penal Code with the offence of criminal breach of trust. The trial Court found the accused guilty; and on appeal the Sessions Judge affirmed the conviction of the accused, and he awarded him four months' rigorous imprisonment coupled with payment of a fine of Rs. 120.

Mr. Manuk, who appears on behalf of the petitioner, contends that upon the evidence adduced by the prosecution the charge of criminal breach of trust cannot be in law sustained.

It would appear that one Bhageloo brought a criminal charge against four persons by the name of Misser for an alleged offence under section 325 of the Indian Penal Code. While the proceedings were pending against these four persons at the instance of Bhageloo a Panchait was called, and the Panchait agreed to get the assent of Bhageloo to a compromise upon the condition that accused should pay to Bhageloo the sum of Rs. 50 as compensation in respect of the injuries which he had sustained, arising out of the assault which had been committed upon him by such accused persons. Bhageloo at the time that the compromise was arrived at by the Panch was in Sitamarhi Hospital, but it was taken for granted by all the members of the Panchait that Bhageloo would accept whatever terms the Panchait agreed upon. Accordingly on the following day the parties came to Sitamarhi and brought with them the money with a view of getting Bhageloo's assent to the terms of the compromise arrived at by the Panch. The accused in the proceedings under section 325 accompanied by a person called Raghu Nath Misser also went to Sitamarhi, interviewed Bhageloo and Bhageloo verbally assented to the terms of the compromise which had been proposed and agreed to by the other parties at the instance of the Panch; and it was suggested at the time that it would be desirable that there

should be a petition in writing stating the terms of the compromise and that such petition should be signed by Bhageloo. It is stated by various witnesses on behalf of the prosecution that Bhageloo requested Raghu Nath Misser, who was to pay the money by way of compensation for the injuries which Bhageloo sustained, that the same should be paid to the petitioner as agent on behalf of Bhageloo who was then in bad in hospital.

After Bhageloo had been interviewed, and while the petition of compromise was being prepared in a written form, Raghu Nath paid to the petitioner Rs. 50, being the amount of compensation assessed by the Panch to be paid to Bhageloo. When the compromise was embodied in the form of a petition and taken to Bhageloo for signature, Bhageloo refused to sign it; although his agent Ram Khelawan Thakur, the petitioner, had at the time already received Rs. 50 which at the request of Bhageloo had been paid and entrusted to him.

It is upon these facts that the petitioner has been prosecuted for criminal breach of trust. The criminal breach of trust relied upon is that the petitioner failed and omitted to return to Raghu Nath Misser the money which he had paid and entrusted to the petitioner as agent on behalf of Bhageloo, his principal. There is no suggestion of any breach of trust between the petitioner and Bhageloo, his principal.

The Crown case is based upon an alleged entrustment or entrusting of the sum of Rs. 50 by Raghu Nath Misser to the petitioner. I fail to see myself on the evidence, which I have read very carefully, anything to suggest any entrustment by Raghu Nath Misser to the petitioner as trustee or in trust for Raghu Nath Misser. There was no doubt the giving of a sum of money by Raghu Nath Misser to the petitioner as agent for a disclosed principal, which constituted no more than a payment of a debt alleged to be due to the principal. It was clearly intended by the terms of the compromise that Raghu Nath Misser should pay the sum of Rs. 50 to the petitioner; and that the petitioner was to receive the same on behalf of his known principal; and that upon receipt by the petitioner of the money so received the same became the property in law of Bhageloo who was the owner thereof. But there was no express entrustment to the petitioner of any moneys in trust for Raghu Nath Misser or any of the accused persons charged under section 325 proceedings at the instance of Bhageloo.

When the compromise failed or fell through by reason of the fact that Bhageloo declined to sign the written petition of compromise, it may be that according to Civil Law a constructive trust would be created or arise by implication of law, whereby the petitioner might be deemed to hold the money he received in trust for the person who paid it to him upon a failure of consideration to support the original contract. By Civil Law I apprehend under such circumstances that the form of action which could be instituted would be for money had and received to the use of and on behalf of the person from whom the money was received. Therefore, though one might contend that the law created a constructive trust as against the petitioner at the suit of Raghu Nath Misser in respect of which he might be made answerable civilly in an ordinary civil suit, yet the petitioner is not amenable for any offence against the criminal law.

The question which I have to consider is whether upon the evidence there has been an offence committed within the meaning of section 406 read with section 403 of the Indian Penal Code. Section 406 is general in form and simply avers that "whoever commits a criminal breach of trust shall be punished with imprisonment." The important section, however, is section 403, which defines criminal misappropriation of property. Section 403 says "Whoever *dishonestly misappropriates or converts to his own use* any moveable property shall be punished with imprisonment."

Therefore the gist of the criminal offence of breach of trust is dishonest misappropriation or the conversion by one to his own use of the property of another which has been entrusted to him.

Now I have perused the evidence in this case, and I fail to detect, so far as the prosecution case is concerned, any evi-

dence from which the inference could be fairly or legitimately drawn that the petitioner here dishonestly misappropriated the sum of Rs. 50 which he received or that he converted the same to his own use.

The evidence of P. W. No. 2 and of P. W. No. 5 leaves me under no doubt as to what happened. It may be desirable to refer to one or two paragraphs of their evidence.

P. W. No. 2 says:—"After I had fair copied the petition Kandu Babu said that Bhageloo's thumb impression should be taken on it. Bhageloo was in hospital. Accused was looking after the case for him. So we went to hospital," and a little further on he says "Raghu Nath asked the accused to give back the money. The accused said he would not give it back. He went off next towards the Bazar, and we went to Kandu Babu."

Now P. W. No. 2 also says in cross-examination that "Bhageloo had said that the money should be paid to Ram Khelawan and upon that basis, he, Raghu Nath, had given the money to the petitioner."

P. W. No. 5 deposes to the fact that he was present at the Panchait, the terms were settled at the Panchait, and the following day Raghu Nath and others came to Sitamarhi. Then he states: "They met the accused in the Kachhari. The compromise petition was written after Rs. 50 had been paid to this accused by Raghu Nath in his presence. He, Raghu Nath, and the accused and two Moharrirs went to the hospital"; after the parties went into the hospital apparently this witness came out and remained outside. When the others came out of the hospital it was ascertained "that Bhageloo refused to put his thumb impression. Raghu Nath asked accused to pay back the Rs. 50. But the accused did not do so, and went off."

Further on this witness says: "The money was paid to Ram Khelawan *because he was acting on behalf of Bhageloo.*" "We gave the money to Ram Khelawan as we had asked Bhageloo, and *he had said that the money should* be paid to Ram Khelawan, and we did not suspect any dishonesty."

Therefore, the moment that the petitioner received Rs. 50 he received it on behalf of Bhageloo, and he must, as principal, be answerable for the acts of his agent acting within the scope of his authority. Mr. Manuk very fairly suggests that it would not be possible in this case to sustain a prosecution as against Bhageloo for criminal breach of trust. Clearly it would not.

There may be in law an implied trust as between the petitioner and Raghu Nath that will be sufficient to enable Raghu Nath to maintain a civil suit against the petitioner to recover the money he claims. Such an obligation or trust would not, in my opinion, create an offence punishable by the criminal law as a criminal breach of trust, or amount to criminal misappropriation or conversion of the property of another.

In the absence of clear and precise proof of the offence charged the accused ought not to be convicted.

It appears to me, the reasoning of the decision reported as *Nga Po Ywet* v. *Emperor* (1) applies in principle to the facts of this case.

In my opinion the learned Judge in appeal has failed to bear in mind the proper legal consideration which should have been present in weighing and considering the evidence.

I do not think on the evidence adduced by the prosecution that it can be fairly said that the petitioner was guilty of criminal misappropriation or of criminal conversion of the money he received to his own use.

Mr. Manuk admits that although the petitioner may be liable civilly he is not liable criminally.

In my view he is not liable criminally, but he properly would be liable civilly.

Thus to avoid any future and unnecessarily litigation between the parties, Mr. Manuk confesses that this client is willing to pay to Raghu Nath Misser within ten days from this date the sum of Rs. 50, which he admits having received from him under the circumstances aforesaid.

Accordingly I set aside the conviction of the accused pronounced by the learned Sub-Divisional Officer, dated the 5th of May 1919, and also the conviction in appeal affirmed by Mr. Boyce, dated the 28th May 1919.

The fine, if paid by the accused, shall be refunded.

Conviction set aside.

(1) 24 Ind. Cas. 332; 7 Bur. L. T. 200; 15 Cr. L. J. 452; 7 L. B. R. 278 (F. B.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2455 OF 19 6.

June 6, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

SITA NATH GHOSE—DEFENDANT No. 10 —APPELLANT

versus

THAKURDAS CHAKRAVARTY—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 67, 68, 72 —Mortgage—Covenant to put mortgagee in possession, breach of—Mortgagee, whether entitled to interest—Payment made by mortgagee to save property from being sold, whether charge—Mortgage money, whether includes interest.

Certain tenure-holders mortgaged their interest in the tenure, and it was stipulated in the mortgage-bond, *inter alia*, that the mortgagee should be put in possession of the mortgaged property in lieu of interest and that the mortgagors should pay off the principal at the end of a specified year and, in default of payment, the mortgagee should be at liberty to foreclose according to law. The mortgagee, however, was wrongfully kept out of possession by the mortgagors and was unable to get possession except for one year. During the currency of the mortgage and while he was out of possession, the mortgagee discharged a decree for arrears of rent obtained against the mortgagors, to prevent the property being sold in execution. He instituted the present suit to recover the principal debt with interest at 12 per cent and futher claimed, under section 72 of the Transfer of Property Act, to add to the amount secured the amount of the decree paid by him with interest thereon at 9 per cent. per annum. It was contended in appeal to the High Court (1) that the plaintiff was not entitled to interest, but (2) if he was entitled to interest at all, he could only claim interest by way of damages under the Interest Act:

Held, (1) that inasmuch as the plaintiff had been wrongfully kept out of possession, he was entitled to interest on the principal; [p. 434, col. 1.]

(2) that the plaintiff was entitled to interest as a charge on the property and that the amount claimed was not excessive. [p. 434, col. 1.]

The term "mortgage-money" includes interest. [p. 434, col. 2.]

Appeal against the decree of the Additional District Judge, 24-Parganas, dated the 25th May 1916, confirming that of the Subordinate Judge, Alipore, dated the 30th May 1914.

Babu *Tarakeswar Pal Chowdhry*, for the Appellant.

Dr. *Dwarka Nath Mitter* (with him Babus *Debendra Nath Mondal* and *Hiron Chandra Mitter*), for the Respondent.

JUDGMENT.

RICHARDSON, J.—The mortgage in this case was a mortgage which combined the incidents of a mortgage by way of conditional sale with the incidents or one of the incidents of a usufructuary mortgage. It was expressly provided that the mortgagee, the plaintiff in this suit, should have possession of the mortgaged properties in lieu of interest. The mortgage-debt was payable at the end of 1307 and it was further expressly provided that in default of payment the mortgagee should be at liberty to foreclose according to law.

The plaintiff, it is found, was wrongfully kept out of possession by the mortgagors or their then representatives and only secured possession during one year, 1311.

While he was out of possession, he paid a sum of Rs. 562-13-6 to prevent the mortgaged property from being sold in execution of a decree for arrears of rent obtained by the superior landlord.

He instituted the suit on the 14th April 1913 (1st Baisak 1320), which, unless anything had occurred to give a fresh starting point, was the last day of the period of twelve years allowed by Article 132 of the Limitation Act. By his plaint he sought to recover the principal debt Rs. 800 with interest at 12 per cent. per annum, crediting against interest the rent which he had realised during 1311. He further claimed under section 72 of the Transfer of Property Act to add to the amount secured the sum of Rs. 562 with interest at 9 per cent. per annum. The total amount claimed was Rs. 2,000, in respect of which the Courts below have concurred in giving the plaintiff a decree for foreclosure in the usual form.

The mortgagors have not appealed. The appellant before us is the defendant No. 10 in the suit, who purchased the mortgaged properties by two conveyances subsequent to the mortgage.

The decrees of the Courts below are not seriously contested so far as the principal debt and the sum of Rs. 562 with interest on that sum are concerned. It is contended, however, on the authority of the decision of the Bombay High Court in *Mahadaji* v. *Joti* (1), that the plaintiff is not entitled to interest on the principal. The facts are not fully stated in the report,

(1) 17 B. 425; 9 Ind. Dec. (N. S.) 277.

but if the learned Judges intended to lay down any general principle the case may be distinguished on the ground on which the learned District Judge has distinguished it. It is said in the judgment that the plaintiff "never took the trouble to obtain possession." In the present case, as I have said, the finding is that the plaintiff was wrongfully kept out of possession. In spite of his efforts he was only able to secure possession for one year. There was no waiver or acquiescence as there was in *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (2).

Then it was said that if the plaintiff is entitled to interest at all, he can only claim interest by way of damages under the Interest Act, and the Full Bench decision of this Court in *Moti Singh* v. *Ramohari Singh* (3) is cited as authority for the proposition that such interest is payable only for the six years before suit. But in that case it was held, on the construction of the contract, that it disclosed no intention to provide for interest after the due date. That was the ground of the decision and Maclean, C. J., was careful to point out that "if *post diem* interest be provided for, it is just as much a charge on the property as the principal" and that "in such a case Article 132 of the Limitation Act would apply."

Here the contract clearly contemplated the payment of interest after the due date by the perception of profits. The plaintiff was to retain possession till the capital was repaid. The plaintiff is clearly entitled to some interest as a charge on the property and the interest allowed does not seem excessive. This seems to me to be in accordance with principle. In *Raja Oodit Purkash Sing* v. *Martindell* (4) there was a similar mortgage with a covenant for possession. Possession having been withheld, interest at 12 per cent. per annum was allowed without any question being raised. There is nothing in the Transfer of Property Act to suggest or compel a contrary view. The case of *Porgan Pandey* v. *Mahatam Mahto* (5) may be cited, though in that case it was expressly agreed that in case of dispossession interest should run at the rate of 15 per cent. per annum.

It is true that the plaintiff might have instituted a suit for the possession of the mortgaged property, or he might have sued for the mortgage money at once under section 68 of the Transfer of Property Act. He was not obliged to take the former course, nor was he obliged under section 68 to sue at once. It was open to him to bring the present suit within the period allowed by the law of limitation. The suit is in effect a suit under section 68 read with section 67. In the circumstances section 68 makes the "mortgage money" payable. By definition "mortgage money" includes interest and after the mortgage money becomes payable a suit may be brought under section 67.

In my opinion the appeal should be dismissed with costs.

TEUNON, J. —I agree.

Appeal dismissed.

(2) 24 A. 521: 29 I A. 148; 7 C. W. N. 97; 4 Bom. L. R. 845; 8 Sar. P. C. J. 310 (P. C)

(3) 24 C. 699 (F. B.); 1 C. W. N. 437; 12 Ind. Dec. (N. S.) 1135.

(4) 4 M. I. A. 444; 1 Sar. P. C. J. 384; 18 E. R. 769.

(5) 6 C. L. J. 143.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2122 AND 2123 OF 1915.

August 29, 1917.

Present :—Mr. Justice Spencer and Mr. Justice Krishnan.

AIYANAR RAJA *alias* SHOLA RAJA AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS IN BOTH

versus

K. V. ALAGAR RAJA AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 3 TO 13—RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit for declaration of title and for injunction restraining disturbance of possession—Dismissal of suit for failure to prove possession—Subsequent suit for declaration and possession, whether barred.

A suit for declaration of title to and possession of property will not be barred under Order II, rule 2, Civil Procedure Code by reason of the dismissal of a previous suit for declaration and injunction restraining defendant from disturbing plaintiff's possession, on account of the failure of the plaintiff to prove possession. [p. 435, col. 1.]

Jibunti Nath Khan v. *Shib Nath Chuckerbutty*, 8 C. 819; 10 C. L. R. 537; 4 Ind. Dec. (N. S.) 529, *Siliman Sahib* v. *Buntala Haman*, 20 Ind. Cas. 418; 38 M. 247; 25 M. L. J. 125; (1913) M. W. N. 554, followed.

Naganada Iyer v. *Krishnamurti Aiyar*, 6 Ind. Cas. 233; 34 M. 97; (1910) M. W. N. 213; 8 M. L. T. 60; 20 M. L. J. 535, distinguished.

JATRA MOHAN SEN *v.* SECRETARY OF STATE.

Second appeals against the decrees of the District Court, Ramnad at Madura, in Appeal Suits Nos. 491 and 490 of 1912, preferred against the decrees of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suits Nos. 249 and 183 of 1911 respectively.

Messrs. *A. Krishnaswamy Ayyar* and *A. S. Visvanatha Aiyar*, for the Appellants.

Mr. *C. Narasimhachariar*, for the Respondents.

JUDGMENT.—On the authority of the decisions in *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1), *Barkey Ali* v. *Gokul Misir* (2) and *Siliman Sahib* v. *Buntala Haman* (3) we have no hesitation in holding that the lower Courts were right in thinking that the present suit for a declaration of the plaintiff's title coupled with a prayer for possession is not barred under Order II, rule 2, by reason of the plaintiff's previous suit, which was for a declaration of title and for an injunction against disturbance, having been dismissed through his failure to prove possession.

The case in *Naganada Iyer* v. *Krishnamurti Aiyar* (4) is distinguishable on the ground that there the previous suit was dismissed for default which involved a finding of all the issues against the plaintiff. The question of *res judicata* upon which that case was decided does not arise for decision against the plaintiff in this case, as in both suits here the plaintiff succeeded on the issue as to the character of the sale-deeds.

The Second Appeal No. 2123 of 1915 fails and is dismissed with costs. A further question has been raised in Second Appeal No. 2122 of 1915, namely, whether Original Suit No. 249 of 1911 was properly instituted on a cause of action which was in the previous litigation combined with that which formed the basis of Original Suit No. 183 of 1911. This point was not raised at the trial in the Courts below and we cannot allow it to be argued at this stage. This second appeal is also dismissed with costs.

M. C. P.

Appeals dismissed.

(1) 8 C. 819; 10 C. L. R. 537; 4 Ind. Dec. (N. S.) 529.

(2) 13 Ind. Cas. 151; 34 A. 172; 9 A. L. J. 111.

(3) 20 Ind. Cas. 418; 38 M. 247; 25 M. L. J. 125; (1913) M. W. N. 554.

(4) 6 Ind. Cas. 233; 34 M. 97; (1910) M. W. N. 213; 8 M. L. T. 160; 20 M. L. J. 535.

CALCUTTA HIGH COURT.

CIVIL RULE No. 218 OF 1918.

July 9, 1918.

Present:—Justice Sir John Woodroffe, KT., and Justice Sir Charles Chitty, KT.

JATRA MOHAN SEN—PETITIONER

versus

SECRETARY OF STATE FOR INDIA—OPPOSITE PARTY.

Court-fee, deficit, whether can be directed to be paid after disposal of suit—Order directing recovery of deficit by attachment of moveables, legality of—Jurisdiction.

A Court, after disposing of a suit, held that the suit had been undervalued, and that on a proper valuation there was a deficiency in the amount of the Court-fees paid by the plaintiff. It accordingly directed the plaintiff to make good the deficiency and on his failure to do so, made an order, of its own motion, for realisation of the deficit by attachment of his moveable property:

Held, that the Court had no jurisdiction to make the order in question.

Civil rule against the order of the District Judge, Chittagong, dated the 16th July 1917.

FACTS.—The plaintiff instituted a suit to establish his title to certain property. The trial Court disposed of the suit and after disposal recorded an order setting out that the suit had been undervalued and that on a proper valuation the Court fee on the plaint was insufficient; he accordingly directed the plaintiff to pay the requisite additional Court-fees, and on the plaintiff failing to comply with this order, the Court directed the amount to be realised by attachment of the plaintiff's moveable property. The plaintiff appealed to the District Judge, but his appeal was dismissed on the ground that it was not maintainable. He then moved the High Court under section 115 of the Civil Procedure Code and obtained a Rule calling upon the Secretary of State for India to show cause why the orders for payment of Court-fees, and of attachment should not be set aside on the ground that they were illegal, the trial Court not having any jurisdiction to make them.

Babus *Dhirendra Lal Kastgir* and *Prabodh Kumar Das*, for the Petitioner.

JUDGMENT.—No one appearing to show cause, we make the Rule absolute. No costs. If the sum of Rs. 20 4-0 has been paid, it will be returned.

Rule made absolute.

CHANDRA KANTA *v.* BEHARI LAL.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 301 OF 1917.

May 8, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

CHANDRA KANTA BHATTACHARJEE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BEHARI LAL BHATTACHARJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Hindu Law—Joint family—Karta, *payment made by, whether binds other members of family—"Agent duly authorised," meaning of.*

The defendant No. 1, as *karta* of a joint Hindu family, purporting to act for himself as well as for his minor brother, the defendant No. 2, made part payment of interest due on a debt contracted by himself and the father of the defendant No. 2 for joint family purposes:

Held, that in making the payment the defendant No. 2, who as *karta* acted both for himself and for his minor brother, was an agent of the latter duly authorized to make the payment, and that the payment, therefore, had the effect of saving limitation in respect of the claim as against the defendant No. 2. [p. 437, col. 2.]

Chinnaya Nayudu v. *Gurunatham Chetti*, 5 M. 169 (F. B.); 2 Ind. Dec. (N. S.) 118, *Saroda Charan Chuckerbutty* v. *Durga Ram De Sinha*, 5 Ind. Cas. 484; 14 C. W. N. 741; 11 C. L. J. 484; 37 C. 461, *Bhasker Tatya Shet* v. *Vijalal Nathu*, 17 B. 512; 9 Ind. Dec. (N. S.) 333, *Har Prosad Dass* v. *Bakshi Bindeswari Prosad Singh*, 31 Ind. Cas. 30; 19 C. W. N. 860, *Ram Charan Das* v. *Gaya Prasad*, 30 A. 422 (F. B.); 4 M. L. T. 49; A. W. N. (1908) 175; 5 A. L. J. 375, relied on.

Baikunta Gui v. *Lal Chand Samanta*, 26 Ind. Cas. 511, distinguished.

The words "agent duly authorized" in section 20 of the Limitation Act include authority given by law as well as authority given by act of parties. [p. 438, col. 1.]

Appeal against the decree of the Additional District Judge, Backergunge, dated the 30th October 1916, reversing that of the Subordinate Judge, 2nd Court of that District, dated the 2nd June 1915.

FACTS appear from the judgment.

Babu *Brojendra Nath Chatterjee*, (with him Babu *Suresh Chandra Taluqdar*), for the Appellants.—This appeal is on behalf of the appellants and it arises out of a suit on a mortgage bond. The question for determination is whether certain payments of interest made by the defendant No. 1, who was at the time the *karta* of the joint family, had the effect of saving limitation in respect of the claim against the defendant No. 1. The facts found are that the debt was incurred for joint family purposes, that the mortgage-bond was executed by the defendant No. 1 and the father of the minor defendant No. 2, that the payment of interest was made out of joint family fund, and that the defendant No. 1 was at the time of making the part payment of interest the managing member of the family. From the facts proved it appears that the defendant No. 1, in making the payment, was acting *bona fide* not only for himself but also for the defendant No. 2. The defendant No. 1 must, therefore, be taken to be an agent of the defendant No. 2 who had authority to make the payment in question. Refers to *Saroda Charan Chuckerbutty* v. *Durga Ram De Sinha* (1), *Har Prosad Dass* v. *Bakshi Bindeswari Prosad Singh* (2), *Chinnaya Nayudu* v. *Gurunatham Chetti* (3), *Bhasker Tatya Shet* v. *Vijalal Nathu* (4), *Ram Charan Das* v. *Gaya Prasad* (5). There is no finding that in making the payment the defendant No. 1 as *karta* did commit any act of fraud or did not act *bona fide*. There is no doubt that in making the payment the *karta* was acting both in his individual capacity and also as representing the minor defendant No. 2. The lower Appellate Court has, therefore, erred in law in holding that limitation as against the defendant No. 2 was not saved by the payment made by the defendant No. 1 as *karta* of the joint family.

Babu *Dwarka Nath Chakraberty*, (with him Babu *Sitaram Banerjee*), for the Respondents.—Payment by the defendant No. 1 cannot save limitation in respect of the claim against the minor defendant No. 2, and so the Court of Appeal below has rightly held that the personal remedy against the defendant No. 2 was barred by limitation. *Baikunta Gui* v. *Lal Chand Samanta* (6) and *Narayana Ayyar* v. *Venkata-*

(1) 5 Ind. Cas. 484; 14 C. W. N. 741; 11 C. L. J. 484; 37 C. 461.
(2) 31 Ind. Cas. 30; 19 C. W. N. 860.
(3) 5 M. 169 (F. B.); 2 Ind. Dec. (N. S.) 118.
(4) 17 B. 512; 9 Ind. Dec. (N. S.) 333.
(5) 30 A. 422 (F. B.); 4 M. L. T. 49; A. W. N. (1908) 175; 5 A. L. J. 375.
(6) 26 Ind. Cas. 511.

ramana Ayyar (7) relied upon. The defendant No. 1 had no right or authority to do any act which would stop the running of limitation in respect of the claim against the defendant No. 2 or give a fresh start to the plaintiff under section 20 of the Limitation Act. The defendant No. 1 was not an "agent duly authorized" within the meaning of section 20, and, therefore, payment made by him could not save limitation.

Babu *Brojendra Nath Chatterjee* briefly replied.

JUDGMENT.

SHAMSUL HUDA, J.—The suit out of which the present appeal arises was instituted on the 4th of April 1912 against defendants Nos 1 and 2, sons of one Uma Kanta, for enforcement of a mortgage-bond, dated the 5th *Bhadra* 1307 B. S. (21st August 1900), executed by Uma Kanta and defendant No. 1. A mortgage-decree was passed in favour of the plaintiff and the mortgaged properties were sold in execution of such decree. The sale-proceeds having proved insufficient, an application was made for a personal decree in respect of the balance. The suit was instituted on the 4th of April 1912 and on that date the personal remedy was barred by limitation unless payment of a part of the interest made on the 29th of *Chaitra* 1312 (12th April 1906) gave a fresh start to the plaintiff under section 20 of the Limitation Act. That payment was made by the defendant No. 1 who was at the time the *karta* of the joint family, the father having died in the meantime. The defendant No. 2 is a minor. It is found that the amount borrowed was for family purposes, *viz.*, for defraying the marriage expenses of defendant No. 1. The endorsement made on the back of the bond clearly shows that in making the payment the defendant No. 1 purported to act for himself and for his minor brother, which would indicate that he was acting for the minor as *karta* of the joint family. The learned Munsif found that the payment was made from the funds belonging to both the defendants by defendant No. 1 who was the managing member of the family and passed a personal decree against both the defendants. On appeal by the defendant No. 2 the learned Additional District Judge of Backerganj absolved him from personal liability. Against this decree of the lower Court the plaintiff has appealed to this Court, and the only substantial question of law that arises for our consideration is whether the payment made by the defendant No. 1 under the circumstances stated above had the effect of saving limitation in respect of the claim as against defendant No. 2. The decision turns upon the question whether the defendant No. 1 was an agent of defendant No. 2 duly authorised to make such payment. I think the answer must be in the affirmative. For authority, if any is needed, I may refer to *Chinnaya Nayudu* v. *Gurunatham Chetti* (3), *Saroda Charan Chuckerbutty* v. *Durga Ram De Sinha* (1), *Bhasker Tatya Shet* v. *Vijalal Nathu* (4), *Har Prosad Dass* v. *Bakshi Bindeswari Prosad Singh* (2) and *Ram Charan Das* v. *Gaya Prasad* (5). The decision of the Madras High Court in *Narayana Ayyar* v. *Venkataramana Ayyar* (7) has, however, been relied upon as making those decisions inapplicable to cases in which a creditor deals not with the *karta* as such but with the individual members of the joint family. This decision seems to have been followed by a Division Bench of this Court in the case of *Baikunta Gui* v. *Lal Chand Samanta* (6). The decision of the Madras High Court on this particular point is not, I may state, a decision of a Full Bench. I find it difficult to understand how, where no question of estoppel arises, a creditor's course of dealing with the members of a joint family including the *karta* can possibly affect the relation *inter se* between the *karta* and the other members of the family, nor does the case, when carefully examined, lend any support to such a proposition. Apart from the fact that that was a case of acknowledgment under section 19 of the Limitation Act, which stands on a somewhat different footing from the case of a payment under section 20 of the Act, the decision rests on the peculiar facts of that case from which the inference was drawn that in making the acknowledgment the *karta* was acting in his individual capacity and not as representing the other co-parceners. As a mater of fact the question regarding the authority of the *karta* to bind the other members of his family by his

(7) 25 M. 220 (F. B.).

own acknowledgment did not arise, the learned Judges having come to the conclusion that the *karta* in making the acknowledgment had acted in collusion with the creditor and, therefore, in contravention of the duty which he owed to the other co parceners. All that the learned Judges laid down in that case was that when a creditor deals, not with the managing member only of a family, but with all the members of the undivided family as co-obligors and on that footing enters into a transaction—thereby avoiding any question as to whether the transaction was really for the benefit of the family—he cannot rely upon an acknowledgment of the liability, made by one of them, as an acknowledgment duly made on behalf of the co-obligors, by reason only that the person acknowledging is in fact the managing member of the family consisting of the co obligors. The words 'agent duly authorised' would include authority given by law as well as authority given by the act of parties. This point was fully discussed by Banerjee, J., in the case of *Ram Charan Das* v. *Gaya Prasad* (5) already referred to. In the present case there is the further fact that in so far at least as the liability of the father extended, the debt was binding on both the sons. As *karta* the defendant No. 1 had not only authority to pay the debt of his minor coparcener but had the authority even to sell, if necessary, the joint family property to satisfy such debt. In taking this view of the case I do not feel pressed by the decision of this Court in the case of *Baikanta Gui* v. *Lal Chand Somanta* (6), as the facts of that case are materially different from the facts of this case. In that case it was found that the existence of joint family was not proved, that it was not proved that the payment was made as *karta* of the joint family, it was not shown that the money had come from the joint family fund, and it was not found that the borrowing had been made in respect of the joint family estate. Upon these findings the question of law did not really arise. The case of *Saroda Charan Chuckerbutty* v. *Durga Ram De Sinha* (1) and the later decision in *Har Prosad Dass* v. *Bakshi Bindeswari Prosad Singh* (2) seem to me exactly in point.

I would, therefore, reverse the decision of the Court below and restore that of the Munsif.

The appellant is entitled to his costs in this Court and in the lower Courts.

WALMSLEY, J.—I agree.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

THIRD APPEAL PETITION No. 9 OF 1918 19.

April 3, 1919.

Present:—Mr. Ferard, S. M., and Mr. Hopkins, J. M.

MAHABIR LAL AND OTHERS—APPELLANTS

versus

GIRJA PRASAD AND OTHERS—RESPONDENTS.

U. P. Rent Act (XII of 1881), s. 9—Occupancy right—Hindu widow, rights of, extent of—Revision—Lower Court following wrong authority, effect of—Illegality.

Inasmuch as under section 9 of the U. P. Rent Act of 1881 an occupancy right devolved as if it were land, the interest of a Hindu widow who succeeded to an occupancy holding while that Act was in force was a mere life interest. [p. 439, col. .]

Where a Court relies for its decision upon the judgment of a superior Court, which is no authority for the proposition set up by its decision, it acts illegally in the exercise of its jurisdiction, affording a ground for interference in revision. [p. 439, col. 1.]

Third appeal from the order of the Commissioner, Benares Division, dated 31st October 1918, in the case of correction of *jamabandi*.

JUDGMENT.

HOPKINS, J. M.—A preliminary objection is taken in this case that the appellants are not the legal representatives of Parsidh, who died after the Commissioner's decision. This objection is based on a statement made by Parsidh in one of the lower Courts to the effect that he was alone in his family and no one was joint with him. It is contended that Parsidh having died without heirs, his right abated.

In these proceedings we are not concerned with the succession to Parsidh. The only question which arises at present is whether the applicants are entitled to maintain this application as representatives of Parsidh. In view of the affidavit filed I must hold that they are so entitled. The question as to who is entitled to succeed to Parsidh's rights in the land in dispute must be decided in separate pro-

ceedings. The question for decision now is whether the Commissioner was right in holding that Parsidh did not succeed to the occupancy right of the holding just recorded in the name of Sundra Kuar; there were concurrent findings of the Courts below that Parsidh shared in the cultivation with Rameshar, the husband of *Musammat* Sundra Kuar, at the time of his death. The Commissioner, in my opinion, was clearly wrong in holding that a Hindu widow, who succeeded to an occupancy holding when Act XII of 1881 was in force, inherited a right which would descend to her heirs and not to those of her husband. Under section 9, Act XII of 1881, the right devolved as if it were land and land would be held by the widow with only a life-interest Board's Selected Decision No. 3 of 1907 [*Babu Banshidhar* v. *Rajwantia* (1)] on which the Commissioner relies is not an authority for this proposition of law which he sets up. Possibly the Commissioner had in mind Selected Decision No. 2 of 1905 [*Ikram ud din* v. *Arshad Ali* (2)] but that was the case of a Muhammadan widow. The Selected Decision covering the present circumstances is No. 1 of 1907 [*Laik Singh* v. *Sukhwa* (3)].

The Commissioner's error of law is a serious one and if not corrected might have the effect of seriously upsetting the course of decisions in the subordinate Courts of the division. On the ground that the Commissioner has acted illegally in the exercise of his jurisdiction I would set aside his order and restore that of the Collector.

FERARD, S. M.—I agree.

Appeal allowed.

(1) S. D. No. 3 of 1907.
(2) S. D. No. 2 of 1905.
(3) S. D. No. 1 of 1907.

PATNA HIGH COURT.
CIVIL REVISION No. 243 OF 1918.
February 11, 1919.
Present:—Mr. Justice Atkinson and
Mr. Justice Manuk.
Musammat DUKHNO—PETITIONER
versus
MUNSHI SAHU—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 148, O. IX, rr. 8, 9—Limitation Act (IX of 1908), ss. 5, 18, Sch. I, Art. 163—Dismissal of suit for default—Application for restoration—Limitation—Extension of time—Discretion of Court, proper exercise of—Laches, effect of—Arbitrary order—Revision—High Court, power of interference of.

The discretion granted by section 148 of the Civil Procedure Code of enlarging the time for doing an act ought not to be arbitrarily exercised in matters to which the rules of limitation apply, and in which by those rules the Court can only extend the time after a proper judicial consideration of the cause shown under section 5, or the fraud established under section 18 of the Limitation Act. [p. 440, col. 2.]

Where a Court fails to apply its mind to the question of limitation and arbitrarily grants an application for the restoration of a suit long after the period of limitation has expired, it acts without jurisdiction and its order is liable to be set aside by the High Court acting under section 115 of the Civil Procedure Code. [p. 441, col. 1.]

Litigants who are guilty of gross laches and who refuse to comply with the orders of a Court ought to be shown no indulgence under section 148 of the Civil Procedure Code. [p. 441, col. 2.]

Revision against the orders of the Munsif, Monghyr, dated the 25th July and 24th August 1918.

Mr. *Jagarnath Prasad*, for the Petitioner.

Mr. *Atul Krishna Ray*, for the Opposite Party.

JUDGMENT.

MANUK, J.—The facts upon which this application is made to us in our revisional jurisdiction are as follows:—

The respondent before us instituted a suit on the 17th May 1917 against numerous defendants; the suit was dismissed under Order IX, rule 8, of the Civil Procedure Code on the 24th April 1918. On the 8th May 1918 the plaintiff (now respondent) applied under Order IX, rule 9, to set aside the dismissal and restore the suit. On this application the learned Munsif before whom it was filed recorded the following order:—

"Class of suit, copy of judgment, *vakalatnama*, written process and *talbana* are not filed. Returned to be re filed after removal of defects by 20th May 1918."

On the 17th May, for some reason not apparent, we find another order by the Munsif to the effect that the previous order had not been complied with, and the application was again returned to be re filed by the 8th June after removal of the defects. The next order is on the 11th June 1918, and this is to the effect that, as the previous orders are still uncomplied with, the application is once more returned to be re-filed

by the 5th of June 1918. On the 15th of June it transpired that the application related to a suit valued above Rs. 1,000, and it was accordingly "returned for presentation before the proper Court."

The matter next came up on the 22nd June, when the order (this time passed apparently by a Subordinate Judge) runs:—

"Nature of the suit and date of disposal of the same are not given. Returned for compliance, and re-file within a week."

It was then re filed after amendment on the 29th June, when the record was sent for, and it was ordered that the application should be put up with the record on the 16th July. On the 18th July, however, a note was submitted to the learned Subordinate Judge by his office asking for directions as to whether the application should be registered in his Court or be sent to the first Munsif, who was "vested with power to try suits of special jurisdiction." On the 9th July the learned Subordinate Judge directed that the application should be returned to be filed before the first Munsif, who is vested with special jurisdiction. The matter next came up on the 18th July, presumably before the first Munsif. On that date the office submitted a note to the learned Munsif, pointing out that the application was originally filed as under Order IX, rule 13, and hence a copy of the judgment was demanded together with process fees and a *vakalatnama*, and it was not clear why the application was made under Order IX, rule 13, and not under Order IX, rule 9. The serious laches of the petitioner in repeatedly failing to comply with the orders of the Court and the present defects were also set out. Amongst other defects still present were (*i*) the process fee filed was still inadequate, and (*ii*) the orders of the 9th May had not yet been complied with. It was also pointed out by the office that no cause had been shown for the delay in filing the petition within the time limit of 30 days from the dismissal as required by Statute. In the face of this report all that the learned Munsif did was to record a peremptory order in a single word, "admit." This was a week later, on the 25th July, and without any notice to the defendants. On that date an order was also entered in the order-sheet in the following terms:—

"Application under Order IX of the Code of Civil Procedure admitted. Register. Petitioner to file deficit *talbana* Re. 1 by 3rd August 1918."

Finally, on the 24th of August 1918 the Pleaders on behalf of the parties were heard, and the learned Munsif, without applying his mind in the least to the serious question before him as to whether the application was filed within time or not, proceeded to pass a formal order restoring the case on the applicant paying Rs. 5 to the respondent It is noticeable that not a single argument adduced on behalf of the present petitioner before us finds a place in the learned Munsif's order; the Munsif seems to have endeavoured to justify his previous ill-advised order "admit" by accepting various extenuating circumstances urged on behalf of the present respondents for their *original* default. Now under these circumstances we are asked by Mr. Jagarnath Prasad, on behalf of some of the defendants to the suit, to hold that the learned Munsif has acted without jurisdiction, inasmuch as on the 25th of July, when he admitted the application, and on the 24th August, when he set aside the dismissal, the application was long since barred by time. On the other hand, Mr. Roy, the learned Vakil for the plaintiff, has strenuously argued that the application having been filed within time on the 9th May, it was open to the Court under section 148 of the Civil Procedure Code to extend the period from time to time within its discretion and that having done so, there was no reason why on the 25th July the Court should not have admitted the application.

I am of opinion that the discretion granted by section 148 cannot be arbitrarily exercised in matters to which the rules of limitation apply, and in which by those rules the Court can only extend the time after a proper judicial consideration of the cause shown under section 5 or the fraud established under section 18 of the Limitation Act. Now in the case before us we hold that the application filed on the 9th May was no application at all within the provisions of Order IX, rule 9. The nature of the suit, the date of disposal of the same, the correct provisions of the Code under which the application was made, and various other matters necessary for the Court to con-

sider the application at all and entertain it were lacking; these defects were pointed out by the Munsif and his office to the petitioners, but no attempt was made to remedy these defects within time; and, therefore, all arbitrary extensions of time to re-file the application after the thirty days had elapsed were beyond the jurisdiction of the Munsif to grant.

Mr. Roy has also referred us to the decision in *Jhotu Lal Ghose* v. *Ganouri Sahu* (1), and he contends that the Munsif, having rightly or wrongly admitted the application and restored the suit, has acted within his jurisdiction, and that, therefore, we should not interfere under section 115 of the Civil Procedure Code. Now the case of *Jhotu Lal Ghose* v. *Ganouri Sahu* (1) is distinguishable from the case before us in one very important respect. In that case the Munsif had considered the question of limitation, had applied his mind to the objection that the application was barred by limitation and had decided in fact that it was not so barred. It was argued on behalf of the petitioner there that the Munsif had fallen into an error in holding that the application was not barred by limitation. Under those circumstances the learned Judges held that even if it were conceded that the Munsif had fallen into an error either of law or of fact that was not an error in the exercise of jurisdiction which could be interfered with by this Court under section 115 of the Civil Procedure Code. Now in the case before us there is not a single indication throughout the numerous orders that any of the Courts dealing with the petition applied its mind in any manner whatsoever to the question of limitation; nor indeed can we see how the learned Munsif, who eventually admitted the application on 25th July 1918, could have done so, having regard to the fact that it was brought prominently to his notice that no reason for the neglect to file the petition within time had been stated in any of the numerous petitions to the Court, or upon any of the numerous occasions on which the Court was approached. There having been, therefore, no application of the learned Munsif's mind to the question of limitation at all, and he having arbitrarily admitted the petition and restored the suit long after the period of limitation had expired, the impeached orders were, in our opinion, made without any jurisdiction whatsoever. It would, we think, be disastrous to give effect to Mr. Roy's contention that a Court may keep alive a cause of action for an indefinite period of time by granting, without cause shown and without consideration, indulgence after indulgence under section 148 of the Civil Procedure Code to litigants who are guilty of the grossest laches, and who refuse to comply with the orders of the Court. The Privy Council have more than once animadverted on the law's delays in this country; and to allow the subordinate Courts to proceed as the learned Munsif has in this particular case, without correction or interference by this Court under section 115, Civil Procedure Code, would simply be to encourage the evil which their Lordships of the Privy Council have so often condemned.

For all these reasons we set aside the orders of the Munsif, dated the 25th July 1918, and the 24th August 1918, with costs.

ATKINSON, J.—I just desire to say that in my opinion there was no application before the Court to restore the suit that was originally dismissed under Order IX, rule 9, on the 25th July 1918 and that on that date limitation had expired, and the application presented was barred, and, in my opinion, the Court of the first Munsif of Monghyr had no jurisdiction to entertain the application which was then Statute-barred. Any other application of the law would render the law of limitation nugatory and senseless, and I am not aware of any authority that can be cited in support of the argument that has been addressed to us.

Order set aside.

(1) 46 Ind. Cas. 176; 3 P. L. J. 376.

MADRAS HIGH COURT.

APPEAL SUIT No. 82 OF 1918.

February 12, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Justice Sir William Ayling, KT.

T. K. VASUDEVA KAMATH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NATTOJI LAKSHMINARAYANA RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 16—Transfer of Property Act (IV of 1882), s. 53—Adjudication, order of—Suit by creditor to set aside transfer by insolvent without leave of Court, maintainability of.

After an order of adjudication has been passed under section 16 of the Provincial Insolvency Act, a creditor of the insolvent is debarred by sub-section (2) (*b*) of that section from suing under section 53 of the Transfer of Property Act to set aside a transfer by the insolvent without first obtaining the leave of the Insolvency Court. [p. 443, col. 1.]

Appeal against the decree of the District Court, South Kanara, in Original Suit No. 4 of 1917.

FACTS appear from the judgment.

Mr. *K. P. Lakshmana Row*, for the Appellant.—The sanction of Court is not necessary, for this is not a "suit," "legal proceeding" or "remedy" in respect of the debt within the meaninig of section 16, sub-section (2) (*b*) of the Provincial Insolvency Act. The Act makes no provision with regard to alienations made more than 2 years prior to the adjudication. We have, therefore, to fall back on the general law under section 53 of the Transfer of Property Act, whereby a creditor can sue on his own account. See *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamad* (1) and Second Appeal No. 1800 of 1917.

The present is not a case of an alienation void as against the Official Receiver. The property has already fully vested in the alienee and it is only if the alienation is declared illegal that it can be made available for the creditors.

The restriction under the English Law that only the trustee in bankruptcy can sue applies only to alienations beyond two or ten years prior to adjudications. Under English Law, there are two periods. Here, there is only one. The creditor's right of suit under the general law is not expressly taken away by the Insolvency Act. And if the suit had been commenced before the adjudication, no leave would have been necessary.

The only case in point is *Ramalinga Chetty* v. *Anantha Chariar* (2). There is no other.

Mr *K. Sundara Row*, for the Respondents.—Under the English Law, the trustee in bankruptcy alone can sue. See *Butters, Ex parte, Harrison, In re* (3). See also Halsburys Law's of England, Volume XV, pages 88, 89, relying on the case of *Russell, Ex parte; Butterworth, In re* (4).

Under the Presidency Towns Insolvency Act, leave is necessary. Such leave was obtained in the case reported as *Official Assignee of Madras* v. *Ramasamy Iyengar* (5).

[WALLIS, C. J.—There is no provision in the Act. What is your answer to the right under the general law?]

The general law has been superseded by the special law.

JUDGMENT.—The question in this appeal is whether, after the making of an order of adjudication under section 16 of the Provincial Insolvency Act, 1907, a creditor of the insolvent is prevented by the provisions of sub-section (2) (*b*) of that section from suing under section 53 of the Transfer of Property Act to set aside a transfer made by the insolvent without first obtaining the leave of the Court. There appears to be a curious absence of authority as to the effect of the corresponding provision in the English Bankruptcy Acts with respect to actions by creditors under the Statute of Elizabeth, which corresponds with section 53 of the Transfer of Property Act. The nature of the suit under the English and Indian Acts has recently been discussed in this Court in *Palaniandi Chetti* v. *Appavu Chettiar* (6), *Subramania Ayyar* v. *Muthia*

(1) 51 Ind. Cas. 714; 25 M. L. T. 47; (1919) M. W. N. 39; 9 L. W. 138; 42 M. 143; 36 M. L. J. 231.

(2) 18 Ind. Cas. 722; 24 M. L. J. 350; 13 M. L. T. 303; (1913) M. W. N. 287.

(3) (1880) 14 Ch. D. 265; 43 L. T. 2; 28 W. R. 876.

(4) (1882) 51 L. J. Ch. 521; 19 Ch. D. 588; 46 L. T. 113; 30 W. R. 584.

(5) 17 Ind. Cas. 342; 23 M. L. J. 726; 12 M. L. T. 229; (1912) M. W. N. 974.

(6) 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 390.

Chettiar (7) and *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamad* (1). It appears that in England, while such a suit should ordinarily be on behalf of all the creditors and the decree should declare the transfer void against all of them, a judgment-creditor may sue in respect of his own debt alone and obtain satisfaction for it. The sub section of this Act provides that "except as provided by the Act no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose." A suit by a judgment creditor, such as I have mentioned, without the leave of the Court would, I think, be in contravention of this section, and would enable the judgment creditor to obtain satisfaction of his decree out of the property declared in the suit to be the property of the insolvent. Even as regards a suit by a creditor who was not a judgment-creditor to declare a transfer void against creditors generally, I think the words of the sub-section "or commence any suit or other legal proceeding" are sufficiently wide to cover a suit to make property available as the property of the judgment debtor and to forbid the institution of such a suit as this without the leave of the Court. The policy of the law as disclosed in the section is to place the administration of the estate including the realization of assets under the control of the Court, and it would be opposed to this policy to allow a creditor to proceed with a suit of this kind except with the leave of the Court and on such terms as it might impose. We agree with the Subordinate Judge and dismiss the appeal with costs.

M. C. P.

Appeal dismissed.

(7) 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 750; 33 M. L. J. 705.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1999 OF 1917.

March 20, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

DINABANDHU NANDI CHOUDHURY—PLAINTIFF—APPELLANT

versus

MANNULAL PARIK—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), ss. 23, 92 proviso (6)—Admission, whether can be explained—Construction of document—Ambiguity—Oral evidence, admissibility of.

Where a deed of transfer raises an ambiguity as to the nature of the interest in the property it purports to convey, extrinsic evidence (including evidence as to the course of dealing with the property) may be taken into consideration in construing the deed. [p. 445, col 1]

Where in a petition there is an inadvertent admission as to the nature of certain property, it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement. [p. 445, col. 2.]

Appeal against the decree of the District Judge, 24-Pargannahs, dated the 23rd of July 1917, affirming that of the Munsif, 1st Court at Sealdah, dated the 31st of July 1916.

FACTS appear from the judgment.

Sir *Rash Behari Ghosh* (with him Babu *D. N. Bagchi*), for the Appellant.—Plaintiff is the appellant. He sued for rent. The only question is whether or not the defendant is the tenant of the plaintiff. It depends wholly on the construction of certain documents. The plaintiff is the owner of a 6-annas share of a certain Zemindari. The other co-sharers are the *pro forma* defendants. The defendant admitted that he held partly under the plaintiff and partly under the *pro forma* defendants. The learned Judge held that the admission must have been made inadvertently. He has further held that the defendant is rather my co-sharer than my tenant. The facts are these:—Lachmipat purchased the 6 annas, which are now held by the plaintiff, in 1875. He was at that time in possession of the disputed land as a tenant. He could not get possession of the 6-annas purchased by him. A suit for possession was decreed in 1880. Before Lachmipat took possession under the decree, he made a gift of it to Mirza Ahmed Ali Beg

in 1880, reserving his right to retain possession of the land as tenant. The District Judge says that that was not the lease-hold but the Zemindari interest in the lands. The heirs of the donee then sold the 6 annas to *M.* and mentioned in this deed of the above reservation by Laxbmipat in his deed of gift. The heirs of the vendor sold the Zemindari interest without any reservation to plaintiff in 1898. Lachmipat was dead at the time. He was succeeded by Chattrapat Singh. The next document is the sale certificate, dated 1903, under which the present defendant claims title. He was the execution creditor and purchased it himself. The sale certificate described the lands as Mourasi Mokarari tenure and that no rent was payable in respect of the 6-annas share. Section 3 (3) of the Bengal Tenancy Act would make him a tenant, although he was absolved from paying rent. The last document is the petition of the defendant. My client's name has been recorded in the Collectorate as the owner of the 6-annas Zemindari. The mere fact that no rent was realised from the defendant would not be sufficient to establish that there was no relationship of landlord and tenant. I would now deal with the construction of the deed of gift. Where an instrument is ambiguous, the construction should be very strong against the donor. The deed is entitled "a deed of gift of the Zemindari rights." The donor merely wanted to keep to himself the lease-hold interest in the small parcels of land. The Zemindari right over them passed to the donee. The implied covenant not to pay rent on the part of Lachmipat ceased to exist the moment the lands passed into the hands of strangers.

Babu *Dwarkanath Chakravatty* (with him Babu *Hemendra Nath Sen*), for the Respondent.—The short question is whether the tenant was liable to pay rent to plaintiff. The question as to whether there is any relationship of landlord and tenant is concluded by the finding of the Judge. As regards his finding that the defendant's admission was made inadvertently it was based on evidence. The deed of gift itself shows that there was no relationship of landlord and tenant. When Lachmipat acquired the Zemindari, he himself was a tenant. So far as the donee was concerned, he was only to pay Government revenue for the 6 annas.

Sir *Rash Behary Ghosh*, in reply.—The District Judge was wrong in ignoring the defendant's admission. I am entitled to rely on the admission as showing that Lachmipat never meant to reserve the Zemindari right to himself. So long as the defendant does not explain the circumstances of his admission, it is binding on him. The deed of gift is not ambiguous at all.

JUDGMENT.—This appeal arises out of a suit for recovery of rent in respect of the land described in the plaint. The defence was that there was no relationship of landlord and tenant between the plaintiff and the defendant with respect to the land.

It appears that a certain Zemindari belonged to one Bazlur Rahim and his sister. His sister sold a six-annas share of the Zemindari to one Lachmipat Singh on the 1st December 1875. The remaining 10-annas of the Zemindari was sold in execution of a decree against Bazlur Rahim or his sister and the auction-purchaser of the said 10-annas share took possession of the entire sixteen annas. Lachmipat thereupon brought a suit for recovery of possession of the undivided 6-annas share of the Zemindari which had been conveyed to him by Bazlur Rahim's sister. He obtained a decree on the 23rd August 1880 and on the 23rd November of the same year, Lachmipat made a gift of the 6-annas share of the Zemindari in favour of one Mirza Ahmed Ali Beg.

It appears from the deed of gift that Lachmipat was at the date of the deed in *khas* possession of a certain quantity of land (168 *bighas*) consisting of a garden and some paddy land situated within the Zemindari. It is the plaintiff's case that Lachmipat had in these lands Mourasi Mokarari right from before the acquisition of the Zemindari interest, and the main question for consideration in this case is whether the Zemindari interest in those 168 *bighas* of land, which includes the lands in suit, passed to the donee under the deed of gift. The interest of the donee in the 6-annas Zemindari has passed to the plaintiff and he, therefore, now claims the Zemindari interest in those lands. The defendant pur-

chased the disputed land which remained in the possession of Lachmipat at an auction sale in execution of a decree against his son Chatrapat.

The Courts below have agreed in holding that Lachmipat reserved to himself the Zemindari interest in the 168 *bighas* of lands and that, therefore, the plaintiff could not recover rent from the defendant.

It is stated in the deed of gift that the whole of the 6-annas share of the Zemindari (Touzi No. 182), for which the plaintiff had obtained a decree on the 23rd August 1880 in the Court of the Subordinate Judge of the 24-Parganahs, was conveyed to the donee and that the donee was to pay the Government revenue payable for the six-annas share. By the deed, however, Lachmipat reserved to himself 168 *bighas* of land consisting of a garden and paddy lands attached thereto mentioned above.

The learned District Judge has held that the donor reserved the Zemindari right in the 168 *bighas* for himself. The fact that in the body of the document the Zemindari interest is described as six annas share with the exception of the lands mentioned in the schedule, would go to support the view taken by the District Judge. On the other hand, if, as alleged by the plaintiff, Lachmipat had Maurasi Mokurrari rights in those lands, then that fact, taken together with the fact that the entire 6 annas share in respect of which Lachmipat had obtained a decree was conveyed, raises an ambiguity, *viz.*, whether the interest which was reserved by Lachmipat in the lands in suit was the Zamindari interest or the interest of a tenure-holder which he had from before the acquisition of his Zemindari. In these circumstances extrinsic evidence (including evidence as to the course of dealing with the property) may be taken into consideration, in construing the deed.

It is pointed out on behalf of the respondent that on each successive transfer of the six annas Zemindari, the land reserved by Lachmipat has been excepted. On the other hand, it is pointed out on behalf of the appellant that the donee got his name registered in respect of the entire six-annas share of the Zemindari without any protest or objection on the part of Lachmipat and that after each successive devolution of interest there has been such registration of name. Then again, reliance is placed upon a statement contained in a petition of objection made by the defendant in a claim case, in which the land is described as bearing a rental of Rs. 179 payable to the Sherista of Dinabandhu and Nagendra Kumar. Dinabandhu is the plaintiff in the present case. The learned District Judge in his judgment said: "No doubt in Exhibit I there is an admission by the defendant that rent is paid for this land. The respondent has explained, and I think his explanation is a reasonable one, that he had at that time, namely, on the 20th of March 1905, only just come into possession of the land and he was not properly acquainted with the incidence of the tenancy."

It is contended on behalf of the appellant that the defendant had purchased the property about 2 years before he made the statement in the claim case, and that there is no evidence in support of the finding that the defendant was not properly acquainted with the incidents of the property when this statement was made.

In these circumstances, we think that the case ought to go back to the lower Appellate Court for a further enquiry and re-hearing of the appeal. It may be mentioned that it is denied before us on behalf of the respondents that Lachmipat had any Maurasi Mokurari tenure in these lands before he acquired six annas share of the Zemindari. That question will be gone into by the Court below. It will be open to both parties to adduce fresh evidence on this question as also upon the question whether the defendant was or was not properly acquainted with the incidents of the property at the time when he made the statements in Exhibit I. The lower Appellate Court may direct the Court of first instance to take such evidence as the parties may adduce and send up the evidence to the lower Appellate Court.

Costs to abide the result.

Case sent back.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 17 OF 1918 19.

April 1, 1919.

Present:—Mr. Ferard, S M., and Mr. Hopkins, J. M.

GIRWAR—APPELLANT

versus

BEHARI LAL—RESPONDENT.

Landlord and tenant—Occupancy rights, acquisition of—Ejectment to prevent accrual of occupancy rights, whether can be allowed—Colourable transaction, effect of—Appeal, second—Finding of fact based upon inference which contravenes Statute, whether binding.

The law allows a Zemindar to eject a tenant in order to prevent the accrual of occupancy rights, but the ejectment must be effective and must last at least for one year.

A colourable transaction intended to defeat the provisions of the law cannot be given effect to by the Courts.

Where in arriving at findings of fact the Court puts an inference upon the facts which, if accepted, would defeat the provisions of the law, such findings can be questioned in second appeal.

Second appeal from the order of the Commissioner, Agra Division, dated the 30th October 1918, in the case of ejectment.

JUDGMENT.

HOPKINS, J. M.—The facts of this case are not in dispute. The appellant tenant was ejected with effect from the end of 1314 F. In 1315 F. one Bhajna was recorded as tenant, but did not cultivate. The appellant remained in cultivating possession and was shown as sub-tenant in the papers. From 1316 F. onwards the name of Bhajna disappears and the appellant is shown as tenant-in-chief.

The Commissioner considers that there is absolutely no reason to suppose that the Zemindar admitted the appellant as a tenant in 1315 F. The Zemindar, he says, would not have gone to the trouble of ejecting the appellant and then lost all the advantage by re-admitting him.

But the fact remains that the appellant was re-admitted. He remained in possession in 1315 F. The nominal tenant Bhajna did not cultivate the land at all. There is the evidence that he sublet the land to the appellant. It is perfectly clear that the tenancy of Bhajna was only culturable.

It is urged that the Commissioner's findings of fact cannot be questioned in

second appeal. The facts, as I have said, are not disputed. But the inference which the Commissioner puts upon them is one which, if accepted, would defeat the provisions of section 13 of the Tenancy Act. The Zemindar is allowed by law to eject a tenant in order to prevent the accrual of occupancy rights. But it must be an effective ejectment and it must last at least a year. The law does not allow the Zemindar to keep his tenant and at the same time to treat the period counting towards the accrual of occupancy rights. He may do one or the other but not both. The device of retaining the tenant in possession, while putting up a fictitous tenant-in-chief who is really never a tenant at all, is a colourable transaction intended to defeat the provisions of the law and the decision of the Commissioner in giving effect to it is, in my opinion, contrary to law Except as regards No. 64, in which no occupancy rights have accrued, I would accept the appeal and setting aside the order of the Commissioner would restore that of the Assistant Collector and give the appellant his costs in proportion in all Courts.

FERARD, S. M.—I concur. Respondent's cases would have been arguable if there had been a formal lease to Bhajna for 1315, showing that he and not appellant *prima facie* had the status of a tenant in that year. Here there was none, Bhajna did not cultivate, and the inference from facts is that the record of Bhajna's name was '*farzi*' and appellant's status of tenant continued throughout that year.

Appeal allowed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 99 OF 1918.

May 7, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

Musammat RAM DAI—APPLICANT

versus

RAM CHANDRABALI DEBI—OPPOSITE PARTY.

Registration Act (XVI of 1903), s. 28—Property comprised in deed situated in different districts—Registration in district where transferor has ceased to

RAM DAI v. RAMCHANDRABALI DEBI.

have interest in property, validity of—Fraud or collusion, effect of.

If any portion of the property to which a document relates is within the district of the Sub-Registrar of the office where it is registered, the registration is a valid registration within section 28 of the Registration Act, even if it turns out that the transferor, though acting in a perfectly *bona fide* manner, has ceased to have an interest in that property, provided the property described exists. It is only where there is fraud or collusion between the parties for the purpose of giving jurisdiction to a particular Sub-Registrar to register a document by including property which does not exist, that registration is rendered invalid. [p. 447, cols. 1 & 2.]

Application for leave to appeal to His Majesty in Council

Mr. *P. K. Sen* (with him Mr. *Tribhuan Nath Sahay*), for the Applicant.

Mr. *Banwari Lal*, for the Opposite Party.

JUDGMENT.—In our opinion this application should be rejected. The petitioner contended before this Court when the matter came here on appeal that a deed of sale relied upon by the other side was not valid on the ground that it had not been properly registered. A portion of the property to which the document related was undoubtedly situate at Benares, the bulk of the property was situate elsewhere and the deed was registered at Benares. The section specifying the particular registration office in which a document must be registered is section 28 of the Registration Act, and that section provides that the document shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate. Therefore (*prima facie*) if any portion of the property to which the document relates is within the district of the Sub Registrar of the office where it is registered, there is a valid registration within that section. It turned out in fact that the only property mentioned in the document and situate within the district of the registration office where the document was registered was property over which the transferor had no title, and it was contended before this Court that in such circumstances the registration must be deemed to be invalid. This contention was rejected.

It has been held in the Courts in this country that a mere flaw in the vendor's title in the only part of the property situate within the district of the registration office is not sufficient to invalidate the registration if it is made in good faith. [See *Broja Gopal Mukherjee* v. *Abinash Chandra Biswas* (1).] There is a later decision of their Lordships of the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Srimati Hari Dasi Debi* (2) which is relied on by the petitioner. There the deed was registered in Calcutta. The only property in Calcutta to which it related did not exist at all, and it was found as a fact that the inclusion of this property was merely done with the intention to give jurisdiction to the Sub-Registrar in Calcutta, the parties knowing full well that they had no interest in the property therein mentioned. Where there is any fraud or collusion between the parties for the purpose of giving jurisdiction to a particular Sub Registrar to register the document by including property which does not exist this is sufficient to invalidate the registration, but it seems to us well established that registration is not invalid if the property described exists, merely because the transferor, though acting in a perfectly *bona fide* manner, turns out to have ceased to have an interest in that property. This Court found that there was no fraud on the part of the transferor or collusion between the parties in order to deceive the Registrar and obtain registration. The transaction must, therefore, be regarded as done in good faith. The petitioner has been unable to adduce any authority in his favour, and it seems to us quite clear that as long as the case complies with section 28, that is to say, as long as the document does refer to some property situate within the district where registration takes place, that is sufficient to bring it within the section, and the cases clearly lay down that, unless there is some fraud or collusion, the registration is in itself perfectly valid, whether in fact the person registering eventually proves his title to the property or not. In these circumstances and as there is no authority to support the contention of the petitioner, we do not think that there is sufficient substance in this point of law to entitle him

(1) 5 Ind. Cas. 127: 14 C. W. N. 532.

(2) 23 Ind. Cas. 637; 19 C. L. J. 484; 27 M. L. J. 80; 41 C. 972; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 1 L. W. 1050 16 Bom. L. R. 400; 12 A. L. J. 774; 41 I. A. 110 (P. C.).

to take the opinion of their Lordships of the Privy Council. This application is dismissed with costs.

Application dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 1 OF 1918.

November 21, 1918.

Present :—Sir John Wallis, KT., Chief Justice, and Mr. Justice Napier.

ORIGANTI VENKATARATHNAM—DEFENDANT No. 3—APPELLANT

versus

K. DESIKACHARI AND ANOTHER—RESPONDENTS.

Madras High Court Original Side Rules, r. 119—*Official Referee, disobedience of order of—Contempt of Court—Power of Court to commit—Form of order.*

A Judge presiding on the original side of the Madras High Court has power under rule 119 of the Original Side Rules to commit a person for contempt for disobeying the order of the Official Referee to produce certain documents alleged to be in his possession

Dhurandhardas Sakharam v. *Bhau Govind*, 10 B. H. C. R. 4, followed.

Appeal from the judgment of Mr. Justice Coutts-Trotter, passed in the exercise of the ordinary original civil jurisdiction of this Court in Civil Suit No. 306 of 1916.

Mr. *T. Narasimha Iyengar*, for the Appellant.

Messrs. *V. V. Srinivasa Aiyangar*, *Venkatasubba Row* and *Raahakrishnayya*, for the Respondents.

JUDGMENT.—This is an appeal from an order of Coutts Trotter, J., directing the third defendant to be committed for contempt for disobeying four orders of the Official Referee to produce certain documents alleged to be in his possession. The account-books in question were admitted by the third defendant in his affidavit of documents to be then in his possession. He was in charge of the Bezwada branch of the suit business, and the accounts which were the accounts of the branch were kept there. They had been sent to Madras, for the purpose of an arbitration in the present suit and then taken back to Bezwada, and the correspondence shows that they were again sent to Madras in connection with the arbitration in February 1913. The arbitration fell through, as appears from a summons taken out on 3rd March 1917 relating to the further prosecution of the suit. There is evidence that the books in question were sent back to Bezwada on the 6th of March, where it appears they were wanted for the purpose of making up accounts with the Bombay branch of the business. Exhibit XXXV, dated 20th May 1917, clearly establishes in our opinion that the missing books were then at Bezwada, as it would have been impossible to make up the accounts for the successive years 1911, 1912, 1913 and 1914 without them, and we cannot accept the third defendant's story that these accounts were written up in Bezwada from materials obtained from the books in Madras. The third defendant was in possession of the books in May and should have produced them with the rest of the books produced by him at the beginning of August. He has neither produced them nor given any satisfactory account of what has become of them, and we are unable to interfere with the finding of Courts Trotter, J., that he has been guilty of wilful disobedience to the order of the Official Referee, and has rendered himself liable to commitment for contempt under rule 119 of the Original Side Rules. The fact that the order for production was made by the Official Referee to whom the case had been referred makes no difference. *Dhurandhardas Sakharam* v. *Bhau Govind* (1). The order, as drawn up, contains this :—"Until such time as he shall comply in all respects with the said orders of the Official Referee and purge himself of the said contempt." It is not clear whether at the date of the application for committal the missing books were in his possession or that of the first defendant who has now fallen out with him, and in these circumstances we modify the order by substituting for the words "until such time as he shall" the words "for a term of three months from the date of his arrest unless he shall at any time before the expiration of the said term." a form of order approved in *Fernandez, Ex parte* (2) and by Mathew, J., in *Davies, In re* (3). Otherwise the appeal is dismissed with costs of plaintiff

(1) 10 B. H. C. R. 4.

(2) (1861) 10 C. B. (N. S.) 3 at p. 39; 30 L. J. C. P. 321; 4 L. T. 324; 7 Jur. (N. S.) 571; 9 W. R. 832; 142 E. R. 349; 128 R. R. 575.

(3) (1888) 21 Q. B. D. 236; 37 W. R. 57.

Memo. of objections dismissed with costs payable by plaintiff.

M. C. P.

Order varied.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 161 OF 1917.

May 30, 1919.

Present:—Mr. Lyle, 1st A. J. C., and Mr. Ashworth, 2nd A. J. C.

CHANDIKA BAKHSH SINGH AND OTHERS —DEFENDANTS—APPELLANTS

versus

WIDOW OF JAGAN SINGH AND OTHERS—PLAINTIFFS, AND BHAGWAT SINGH—DEFENDANT—RESPONDENTS.

Sikhism—Marriage between different castes, validity of—Transfer of Property Act IV of 1882), s 59—Evidence Act (I of 1872), s. 69—Transfer of Property (Validating) Act XXVI of 1917), s. 2—Mortgage-deed—Attestation, proof of—Hindu Law—Antecedent debt, what is.

BS., a Sikh, mortgaged his ancestral joint family property to *SS.*, another Sikh, on the 26th July 1904, and subsequently executed four deeds of further charge on the same property in favour of *JS* who, alleging himself to be the son of *SS.*, brought the present suit for sale of the mortgaged property, on the basis of these deeds, against *BS.* Subsequently, the sons of *BS.* were joined as defendants. *JS* obtained a decree against *BS* alone on the deeds of further charge, and against all the defendants on the mortgage-deed of the 26th July 1904. The sons of *BS* challenged this latter decree in appeal to the udicial Commissioner The first point taken in appeal was that *JS* was not the legitimate son of *SS.* as his mother, a *sunar* woman, was the mistress of *SS.* and *JS.* had been born to her before she was taken over by *SS.*:

Held, that the parties being Sikhs, and it being open to a Sikh to marry any woman he pleased provided she adopted the Sikh religion, the facts (*i*) that *JS*'s mother was always treated among the brotherhood as the wife of *SS.*, (*ii*) that *JS.* was always treated as the legitimate son of *SS.*, (*iii*) that *SS.* made no disposition of his property by Will or otherwise, and (*iv*) that *JS.* was referred to in the deeds of further charge as the son of *SS.*, sufficiently proved that he was the legitimate son of *SS.* [p. 450, col. 2.]

It was next objected that the deed of mortgage of the 26th July 1904 was not properly attested as required by section 59 of the Transfer of Property Act, inasmuch as the executant of the deed had not signed the deed in the presence of one of the three attesting witnesses:

Held, that under section 2 of the Transfer of Property (Validating) Act, 1917, it was sufficient if the witness, before signing his name, received from the executant a personal acknowledgment of his signature to the same, and that unless this was proved, the witness was not an attesting witness, but that as it had been proved that the signatures of the other two witnesses were in their handwriting, and as the presumption under section 69 of the Evidence Act had not been rebutted, the due execution and attestation of the deed had been proved. [p. 451, cols. 1 & 2.]

Lastly, it was contended that no portion of the consideration of the mortgage-deed was borrowed either for legal necessity or to pay off an antecedent debt, and that, therefore, the deed was not in any way binding on the sons of *BS.*:

Held, that under the Hindu Law the principle of antecedent debt applied only when the sale or charge had been incurred not only antecedently but wholly apart from the ownership of the joint estate, or the security afforded or supposed to be available by such joint estate, and that a debt could not be regarded as antecedent so as to bind the sons as such, unless it had been incurred irrespective of the credit obtainable from the joint family property, and that as it had not been shown that the debts, for the payment of which the money was borrowed by *BS.* were incurred wholly apart from the ownership of the joint estate and irrespective of the credit obtainable from the joint family property, the sons of *BS.* were not liable to pay any portion of the mortgage debt of the 26th July 1904. [p. 451, col. 2.]

Appeal against the decree of the Subordinate Judge, Sitapur, Tahsil Biswan, dated the 23rd June 1917.

Mr. *Nabi Ullah*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—Bhagwant Singh, the defendant No. 1, executed a deed of mortgage in favour of Sher Singh for Rs. 8,500 on the 26th of July 1904. In this deed he mortgaged the ancestral joint family property. He subsequently executed four other deeds of further charge on the same property in favour of Thakur Jangu Singh, the present plaintiff. The plaintiff, alleging himself to be the son of Sher Singh, brought the present suit for sale of the mortgaged property on the basis of the mortgage-deed of the 26th of July 1904 and the four deeds of further charge. The suit was instituted against Bhagwant Singh alone, but his four sons subsequently applied to be joined as defendants and

their application was allowed. They defend the suit on the ground that Jangu Singh was not the legitimate son of Sher Singh. They also put the plaintiff to proof that the mortgage-deed and the deeds of further charge had been duly executed and attested, and they pleaded further that as the property was ancestral joint family property and the deeds had not been executed for antecedent debt or legal necessity, they were not binding upon them.

The learned Subordinate Judge found that the plaintiff Jangu Singh was the legitimate son of Sher Singh in whose favour the mortgage of the 26th July 1904 was executed and that deed and the four deeds of further charge had been duly executed for consideration by the defendant No. 1 and had been duly attested. He found further that out of the consideration of the mortgage of the 26th July 1904 the sum of Rs. 8,000 had been borrowed for the purpose of paying off an antecedent debt and that it was to this extent binding upon the sons of Bhagwant Singh, defendants Nos 2 to 5, but that it was not shown that the deeds of further charge were executed either for legal necessity or to pay off an antecedent debt and that, therefore, they were not binding upon the defendants Nos. 2 to 5. He gave the plaintiff a decree against all the defendants in respect of Rs. 8,000 out of the first mortgage-deed with interest thereon. He decreed the plaintiff's claim with regard to the deeds of further charge against Bhagwant Singh alone. Against this decree the sons of Bhagwant Singh have appealed.

They challenge the decree given against them with regard to the mortgage-deed of 26th July 1904 on three grounds:—

(1) That Jangu Singh was not the legitimate son of Sher Singh, (2) that the mortgage-deed of the 26th of July 1904 was not properly attested, and (3) that the money was not borrowed either for legal necessity or to pay off an antecedent debt and that the mortgage-deed is, therefore, not binding upon them. We shall first discuss the question whether it has been proved that the plaintiff Jangu Singh is the legitimate son of Sher Singh. Sher Singh was admittedly a Sikh and the plaintiff alleges that he is the legitimate son of Sher Singh by a Sunar woman who was converted to Sikhism before her marriage to Sher Singh. It is an admitted fact that a Sikh may marry a woman of any caste, but that before marriage the woman must be converted to the Sikh religion. The learned Counsel for the appellants would argue that there is no sufficient evidence to show that the Sunar woman was in fact converted to Sikhism or that Jangu Singh was born of the marriage. In the case of *Musammat Dalip Kaur* v. *Musammat Fatti* (1) it was held that in the case of a woman all that is required before she can lawfully marry a Sikh is that she should adopt Sikhism and no particular form of conversion need be observed before a woman, who is not a Sikhni, can be regarded as having been duly converted to that faith. In the present case we have the evidence of two respectable Sikh witnesses, who state that the only ceremony necessary for a woman to adopt Sikhism is the tasting of the Amrit, and we have the evidence of two other witnesses Sant Singh and Ishwar Singh to the effect that they were present at the marriage of the woman to Sher Singh, that the marriage was performed with the necessary ceremonies and that the Amrit was given to the woman before the marriage. One of these witnesses Sant Singh is a retired Sub Inspector of Police and there is no good reason why his evidence should be disbelieved. The other witness Ishwar Singh is not a man of any great position in life but he is married to one of the daughters of Sher Singh by this woman. Another of the daughters of Sher Singh by that marriage is married to the cousin of the witness Sant Singh.

The defendants appellants alleged that the woman was the mistress of Sher Singh and that Jangu Singh had been born to her before she was taken into the keeping of Sher Singh. They produced three witnesses in an attempt to support this story, but their learned Counsel has not even referred to the evidence of these witnesses in his argument. It is further proved that among the brotherhood this woman is and always has been treated as the wife of Sher Singh and Jangu Singh has always been treated as the legitimate son of Sher Singh. We find also that Sher Singh did not leave any Will or make any disposition of his

(1) 18 Ind. Cas. 930; 99 P. R. 1913; 100 P. L. R. 1913; 41 P. W. R. 1913.

property, as he almost certainly would have done had Jangu Singh not been his legitimate son. Furthermore, we find that, in the deeds of further charge executed by the father of the appellants, Jangu Singh is referred to as the son of Sher Singh. In all the circumstances of the case we are clearly of opinion that the learned Subordinate Judge was right in holding that Jangu Singh was the legitimate son of Sher Singh.

The next question is whether the mortgage deed of the 26th July 1904 was duly attested. There are three witnesses to the mortgage-deed Sheobaran Singh, Dal Chand and Sitla Singh. Sheobaran Singh and Dal Chand are dead. Sitla Singh has been produced as a witness by the plaintiff but according to him Bhagwant Singh did not sign the deed in his presence. He states: "Bhagwant Singh executed a deed for Rs. 8,500 in favour of Sher Singh. This is the deed and it bears my signature as an attesting witness. I signed the deed at the door of the Registration Office at Sitapur. Bhagwant Singh brought me from the south of the gate of Thompsongunj and asked me to witness the deed. Bhagwant Singh did not sign the deed in my sight. Bhagwant Singh and Sher Singh told me that the other two witnesses had already signed the deed. I did not ask Bhagwant Singh regarding his signature on the deed as I saw it written there."

The learned Counsel for the plaintiff suggests, and not without reason, that this witness has been won over to give evidence which, in view of the ruling of their Lordships of the Privy Council in *Shamu Patter* v. *Abdul Kadir Rowthan* (2), would indicate that the document was not duly attested as required by section 59 of the Transfer of Property Act. But if this is so, the defendants-appellants appear to have overlooked the fact that as a result of that ruling the Transfer of Property (Validating) Act, 1917, was passed. Under section 2 of that Act it is sufficient that the witness before signing his name to the instrument should have received from the executant a personal acknowledgment of his signature to the same. The statement of Sitla Singh, which we have quoted above, clearly indicates that Bhagwant Singh acknowledged to Sitla Singh before the latter signed his name as a witness that he had executed the deed. Furthermore, if we were to hold that it has not been proved that Bhagwant Singh acknowledged his signature to Sitla Singh, then Sitla Singh would not be an attesting witness within the meaning of section 59 of the Transfer of Property Act, and the provisions of section 69 of the Evidence Act have been duly complied with, as it has been proved that the document was executed by Bhagwant Singh and that the attestation of Dal Chand, one of the attesting witnesses, is in his handwriting. The presumption that Sheobaran Singh and Dal Chand duly attested the document has in no way been rebutted. We agree, therefore, with the finding of the lower Court that the mortgage-deed of the 26th of July 1904 has been duly executed and attested.

We come now to the third ground on which the decree of the learned Subordinate Judge is challenged, namely, that no portion of the consideration of the mortgage deed of the 26th of July 1904 was borrowed by the father either for legal necessity or to pay off an antecedent debt and that, therefore, that mortgage-deed is not in any way binding upon the appellants. The only evidence with regard to this is that out of the sum of Rs. 8,500, Rs. 8,000 were left with the plaintiff to pay off prior mortgages executed by Bhagwant Singh in favour of one Basant Sah and that in fact this sum was paid to Basant Sah by the plaintiff, who has produced the mortgage-deeds. The learned Subordinate Judge has held that the debts due to Basant Sah were antecedent debts which the sons were bound to discharge, as they were incurred antecedently to the mortgage of the 26th of July 1904 and existed quite independently of that mortgage. It should be noted that there is no evidence whatsoever that the debts due to Basant Sah were incurred for any family necessity and the learned Subordinate Judge has held that the sons are liable to the extent of Rs. 8,000, merely on the ground that that sum was borrowed for the purpose of paying off an antecedent debt. We find ourselves unable to accept the view taken by the learned Subordinate Judge. He has attempted to distinguish

(2) 16 Ind. Cas. 250; 35 M. 607; 23 M. L. J. 321; 16 C. W. N. 1009; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

the ruling of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (3), but in our opinion that ruling is directly applicable to the present case. In our judgment in First Civil Appeal No. 44 of 1918 [*Nawab Mirza Muhammad Baqar Ali Khan* v. *Hazari Lal* (4)] we have summarized the principles relating to the liability of sons in a joint Hindu family for debts incurred by their father which have been set forth by their Lordships of the Privy Council in the case above-noted, and it is unnecessary to repeat what we have said in that judgment. One of those principles clearly laid down by their Lordships of the Privy Council is that the principle of antecedent debt applies only when the sale or charge has been incurred not only antecedently but wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate, and that a debt cannot be regarded as antecedent so as to bind the sons as such unless it has been incurred irrespective of the credit obtainable from the joint family property. In the present case the money was borrowed by Bhagwant Singh from Basant Sah on the security of the joint family property, and it cannot be said that those debts were incurred wholly apart from the ownership of the joint estate and irrespective of the credit obtainable from the joint family property. It is clear, therefore, in view of the ruling of their Lordships that the appellants cannot be held liable to pay any portion of the mortgage-debt of the 26th of July 1904.

The result is that the appeal is allowed and the decree passed against the defendants-appellants is set aside. The decree of the lower Court will stand against Bhagwant Singh alone. The appellants will be allowed their costs in both Courts

Appeal allowed.

(3) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 428; 26 C. L. J. 1; 33 M. L. J. 14, (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 123 (P. C.).
(4) 52 Ind. Cas. 108; 6 O. L. J. 297.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 442 OF 1918.
CIVIL REVISION No. 61 OF 1918.
May 23, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

SATYA KINKAR SAHANA—
APPELLANT
versus
Raja Sri Sri SHIBA PRASAD SINGH—
RESPONDENT.

Bengal, Agra and Assam Civil Courts Act (XII of 1887), ss. 18, 21—Suit valued at less than Rs. 5,000—Appellate Court, whether entitled to award decree beyond pecuniary jurisdiction.

The plaintiff brought a suit claiming specific damages which he estimated at Rs 4,199, and for such other damages to which, on inquiry, he might be found entitled. It appeared after inquiry that he was entitled to a much larger sum than he had claimed and the District Judge, on appeal, awarded him Rs. 11,115-8-0 as damages In appeal to the High Court the defendant objected that as the amount awarded exceeded the pecuniary limit of the appellate jurisdiction of the District Judge, which was limited to suits of the value of less than Rs. 5,000, he had no jurisdiction to award a sum in excess of that amount:

Held, that as the valuation of the suit did not exceed Rs 5,000 the District Judge had jurisdiction to entertain the appeal and once having assumed jurisdiction, he legally had jurisdiction to make a decree for damages for a sum exceeding Rs 5,000, his original jurisdiction being unlimited. [p. 455, cols. 1 & 2]

Second appeal and revision from a decision of the District Judge, Manbhum Sambalpur, dated the 30th January 1918, reversing that of the Additional Subordinate Judge, Manbhum, dated the 31st August 1917.

Messrs. *Purnendu Narain Sinha* and *N. Ch. Ghosh*, for the Appellant.

Messrs. *Sakti Kanta Bhattacherji*, *Naresh Ch. Sinha* and *S. K. Mitter*, for the Respondent.

JUDGMENT.

JWALA PRASAD, J.—The defendants Nos. 2 and 3 have come to this Court in second appeal.

As the value of the claim laid in the plaint was only Rs. 4,199, the defendants have also filed an application in Revision No. 61 of 1918, under section 107 of the Government of India Act.

An attempt has been made in second appeal to question the finding of the learned Subordinate Judge that the land in suit is not included in the leasehold property of the defendants Nos. 2 and 3. This finding of the

Subordinate Judge was not challenged in the lower Appellate Court and it is not open to the defendants to challenge it in second appeal. Even if it were open to them to attack that finding, there does not appear to be any doubt as to the correctness of the finding upon the evidence in the case. Village Dobaria has been shown in the revenue survey map as bearing No. 784 and lying to the east of Jherria Khas and north-east of Fatehpur. The Chuck Laya Kanali has been given a different number 783. In the *pattas* of the defendants Nos. 2 and 3 of 1303 the lands settled are stated to be in village Dobaria as bearing Survey No. 784. In the said *patta* it is also mentioned that the surface right of Laya Kanali did not belong to the Raja. The learned Subordinate Judge was, therefore, right in holding that Laya Kanali was not at all settled with Gopeshwar Adhikari, the predecessor in interest of defendants Nos. 2 and 3. The contention of the defendants Nos. 2 and 3 must, therefore, fail,

The only question for determination is whether the defendants Nos. 2 and 3 are entitled to enforce the contract entered into by the plaintiff with the defendant No. 1. It appears that the defendants Nos. 2 and 3 were conscious all through that Laya Kanali did not belong to them at all, and was not included in their leases, and, whenever anybody asserted any right to it, they tried to purchase that right. They admit that Kola Dassi had no right to the underground and still they purchased that right from her by means of a *kabala* on 13th *Asin* 1314. When defendant No. 1 purchased the *brahmottar* right in the land claimed by Chamroo Pande and another and entered into an agreement to take settlement of the underground right from the plaintiff, the defendants Nos. 2 and 3 purchased those rights from defendant No. 1 by means of the *kabala* of 20th *Asin* 1318. They hotly contended in the Court of the Subordinate Judge that the plaintiff had no right to enter into any contract for settlement of Laya Kanali with the defendant No. 1. As a last resort they said that—

"Should the Court consider that the land is not included in the 86 *bighas* plot...the Court might be pleased to hold that the defendant No. 1 having performed his part of the contract dated the 30th *Asin* 13 8, and having deposited with the plaintiff's predecessor Rs. 1,000, the plaintiff is bound to execute a *patta* in terms of the said contract."

This alternative plea was not originally taken in a definite form in the written statement filed on the 20th August 1915 and was subsequently taken by supplementary written statement on 15th September 1916, more than two years after the plaint was filed and one year after the written statement was filed. For the last four years after the alleged contract the defendants did not at all think of enforcing their right, if any, for the specific performance of the contract. The Court below is, therefore, right in holding that the defendants never meant to take possession of the land by virtue of the lease in question, and that they were guilty of great delay and laches. It must also be mentioned that they did not pay a shell as rent for the land during the years of their possession on the strength of the alleged purchase of the right of the defendant No. 1 for specific performance of the contract. It is again more than doubtful whether the defendants Nos. 2 and 3 can purchase the right for the specific performance of a contract which at the most would amount to only an actionable claim. The defendant No. 1 himself did not enforce it, and I doubt whether he had a right to transfer it. Even if the defendant No. 1 had a right to transfer it and the defendants Nos. 2 and 3 did purchase that right, the latter waived their right as is obvious from the pleas taken in the written statement of August 1915 and from their trying to hold adversely to the interest of the lessor which a lessee cannot be permitted to do. They, having abandoned their right, if any, to enforce the contract, cannot resist the suit of the plaintiff to obtain *khas* possession. The conduct of the defendants Nos. 2 and 3 amounts to a denial of the title of the plaintiff and the relationship of landlord and tenant. This, to my mind, amounts to an abandonment and forfeiture of the lessee's right, if any, under the alleged agreement to lease the land in suit. The Court would certainly be chary to exercise the discretion of granting the specific performance of a contract in a case of this kind.

Again the right of the defendant No. 1 as held by the Court below, appears to be barred by lapse of time. The right of the defendants accrued on 14th October 1911, when the bonus was paid up. The plaintiff did no

execute any lease in favour of defendant No. 1, and defendant No. 1 himself did not demand it. It will, therefore, be considered a refusal on the part of the plaintiff to give him the lease in question. The claim was definitely set up for the first time in 1916, though the Court below says that it was set up in 1915 when the first written statement was filed. Whatever date, whether 1915 or 1916, be taken as the date of the assertion of the claim, it was barred by the rule of three years' limitation. The Court below is right in refusing to uphold the decree of the Subordinate Judge directing the plaintiff to execute a lease in favour of the defendants Nos. 2 and 3.

It is then contended that as the amount of damages found by the learned District Judge was Rs. 11,115-8-0, which is beyond his appellate jurisdiction, it was not competent for him to hear the appeal. Under section 21 of Act XII of 1887, the Bengal Civil Courts Act, an appeal from a decree or order of a Subordinate Judge lies to the District Judge when the value of the original suit does not exceed Rs. 5 000, and to the High Court in any other case. Under Order VII, rule 2, the plaintiff in the present case put an approximate or tentative value of less than Rs. 5,000 in respect of the damages suffered by him and prayed for a decree for such amount as may be found due to him on enquiry by the Court on payment of additional Court-fee, should the amount exceed the approximate value. The defendant in the written statement alleged that the value of the property in suit was more than Rs. 1,000, and the plaintiff was bound to pay Court-fee upon proper valuation. Upon this an issue was raised (Issue No. 4 of the Court below): "Is the suit properly valued?" The issue was not pressed by the defendant and was hence decided against the defendant. It is not clear from the written statement whether the objection as to valuation related to the value of the lands in suit, or to the amount of damages claimed, or to both. The issue also did not specify this. The suit was instituted on 20th May 1915. A Commissioner was appointed in this case who found that the quantity of coal extracted was 22,231 tons, which the District Judge valued at Rs. 11,115-8-8. The report of the Commissioner is dated 27th June 1917. The cause of action is stated in the plaint to have arisen in *Asin* 1320 (1913). The amount of damages approximately mentioned in the plaint must, therefore, relate to the period of about two years from 1913 to March 1915. Two years more had elapsed when the Commissioner made the estimate of coal extracted by the defendants. Upon the Commissioner's report it cannot, therefore, be ascertained as to what amount of damages accrued before the institution of the suit and what amount thereafter up to the time of the Commissioner's report. The Subordinate Judge had no occasion to determine the amount of damages suffered by the plaintiff, inasmuch as he dismissed the suit of the plaintiff entirely. Thus when the appeal was lodged by the plaintiff in the Court of the District Judge the amount of damages was not ascertained. To my mind the approximate value put in the plaint was, therefore, the value upon which the *forum* of appeal should be determined. There is a conflict of authorities as to the *forum* of appeal when mesne profits or damages are claimed in a suit for possession, the original valuation being less than Rs. 5,000 and the amount found due being in excess of that figure. In the Full Bench case of the Calcutta High Court, *Ijjatulla* v. *Chandra Mohan* (1), the amount of actual damages was already held in the Court of first instance to be much above Rs. 5,000. It was, therefore, held that the appeal from the decision of the Subordinate Judge could only lie to the High Court and not to the District Judge. In *Mohini Mohan Das* v. *Satis Chandra Roy* (2), where a decree for possession and mesne profits was awarded and the amount of mesne profits was ascertained to be more than Rs. 5,000 before the appeal was preferred, it was held that if the appeal had been preferred before the ascertainment of the mesne profits it would have lain to the District Court, but after the ascertainment the appeal could only lie to the High Court. The principle of this ruling, to a great extent, should apply to the present case. The question is whether the amount of damages was at all ascertained before

(1) 34 C. 954; 6 C. L. J. 255 (F. B.); 11 C. W. N. 1133.
(2) 17 C. 704; 8 Ind. Dec. (N. S.) 1011.

the appeal was lodged by the plaintiff in the District Court. It is contended that the Commissioner's report of the 27th June 1917 should be taken as having ascertained the mesne profits. But the Commissioner had only found the quantity of coal extracted and did not come to the actual amount of damages suffered, nor as to the period during which the damages occurred. Besides, his report cannot be taken to be an ascertainment of the amount of damages. I think that the ascertainment of the damages must be by the Court itself. This was not done in the present case by the Subordinate Judge and hence the value mentioned in the plaint remained intact. I, therefore, hold that if the Court of first instance dismisses a suit or awards a sum less than Rs. 5,000 and the Appellate Court comes to the conclusion that the sum exceeding that amount should be awarded, its jurisdiction to hear and dispose of the appeal is not taken away. The case of *Madho Das* v. *Ramji Patak* (3) is an authority for the proposition. Besides, under section 11 of the Suits Valuation Act the disposal of the appeal by the lower Appellate Court cannot be questioned as being without jurisdiction on the ground of the valuation being beyond the pecuniary limit of the jurisdiction of that Court, unless the disposal of the appeal on the merits was prejudicially affected. Nothing has been shown in this case to suggest that the disposal of the appeal by the lower Appellate Court was prejudicially affected by reason of the value of the suit being above Rs 5,000. I, therefore, hold that the District Judge was competent to hear the appeal in this case.

The next question is whether he could give a decree to the plaintiff for a sum exceeding the pecuniary limit of his appellate jurisdiction, that is, exceeding Rs. 5,000. The District Judge has concurrent jurisdiction with the Subordinate Judge to try original suits of any valuation under section 18 of the Bengal Civil Courts Act. His power to hear appeals is restricted to suits of the value of less than Rs 5,000. The case of *Golap Sundari Debi* v. *Indar Kumar Hazra* (4) is an authority for the proposition that the Munsif could not give a decree for over Rs. 1,000, the limit of his jurisdiction, although on enquiry the amount found due was more than Rs. 8,000. But the Munsif in that case had no jurisdiction to try original suits without any limit. In the Allahabad case of *Madho Das* v. *Ramji Patak* (3) it was held that the District Judge could make a decree for over Rs. 5,000 in a case similar to the present one. It has already been shown that in the present case there is nothing to show that the amount of damages awarded by the District Judge was only for the period prior to the institution of the suit. I think that the District Judge was right in awarding the damages found by him due to the plaintiff on the date on which the Commissioner made his report, namely, the 27th June 1917.

The Second Appeal No. 442 of 1918 and the Civil Revision No. 61 of 1918 should, therefore, be dismissed with costs. The stamp, if any, deposited by the defendants for the execution of the lease under the orders of the Subordinate Judge will be refunded to them on application being made to that Subordinate Judge

MULLICK, J.—In my opinion the District Judge had jurisdiction to entertain the appeal as the valuation of the suit did not exceed Rs. 5,000, and there was in spite of the report of the Commissioner, no finding by that Court to the contrary. Once having assumed jurisdiction legally, the District Judge had jurisdiction to make a decree for damages for a sum exceeding Rs. 5,000, his original jurisdiction being unlimited.

Both Appeal and Revision dismissed.

(3) 16 A. 286; A. W. N. (1894) 84; 9 Ind. Dec. (N. S.) 186.

(4) 1 Ind. Cas. 86; 13 C. W. N. 493; 9 C. L. J. 367; 5 M. L. T. 360.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.
REVISION PETITION No. 21 OF 1918-19.
February 15, 1919.
Present:—Mr. Ferard, S. M., and Mr. Hopkins, J. M.
RAM SARUP—APPLICANT
versus
ZALIM SINGH—RESPONDENT.

U. P. Rent Act (XII of 1881), s. 10—Sir, usufructuary mortgage of—Proprietor, whether acquires ex-proprietary rights—Occupancy rights, acquisition of—Ejectment.

A *zemindar* who makes a usufructuary mortgage of his *sir* land does not lose or part with his proprietary rights and does not, therefore, acquire any ex-proprietary rights in the *sir*; the character of the *sir* in the hands of the mortgagee remains unchanged, and, as a sub-tenant of such land cannot acquire occupancy rights therein, he is liable as such to be ejected.

Application for revision of the order of the Commissioner, Allahabad Division, dated the 9th August 1918, in the case of ejectment.

JUDGMENT.—The position admitted by both sides is that the plaintiff applicant, Ramsarup, is a mortgagee of Kuar Bhajja Singh proprietor and that the plot in suit was the latter's *sir* plot. The mortgage-deed of 1900 which is on the record shows that Kuar Bhajja Singh usufructuarily mortgaged his *sir* with other property to applicant. This was before the Tenancy Act came into force on 1st January 1902. The Commissioner has been misled by ancient decisions. After much legal discussion it was finally settled in *Madho Bharthi* v. *Barti Singh* (1) and later rulings (quoted in Mr. Agarwala's Tenancy Act, note under section 10) that under Act XII of 1881 an usufructuary mortgagee was not losing or parting with proprietary rights and did not give the mortgagor ex-proprietary rights in his *sir*. The plot in suit thus did not lose its character of *sir* when it came into the hands of applicant

He let it to the respondent Zalim Singh in 1312 and the latter was recorded as sub-tenant up to 1316, and after that erroneously as tenant-in-chief. The error in not recording him as sub-tenant of *sir* throughout cannot be held to alter the fact that the plot is *sir*, and that respondent is merely a sub-tenant of *sir*, liable as such to be ejected. He cannot acquire occupancy right in a plot of *sir*.

I consider that the Commissioner has made a gross and palpable error of law involving grave injustice. It is unjust to the applicant to have occupancy right fastened on a plot on which it cannot legally be fastened and beyond that, and which I regard as more important, it is unjust to the mortgagor proprietor whoif the Commissioner's order is maintained, will find, when he redeems his mortgage, that his *sir* plot has ceased to be *sir*.

I would, therefore, accept the application for revision and, setting aside the order of both the Courts below, would decree the ejectment of respondent, with costs to applicant throughout.

Application allowed.

(1) 16 A. 337; A. W. N. (1894) 110; 8 Ind. Dec. (N. S.) 219.

MADRAS HIGH COURT.
CIVIL APPEAL No. 54 OF 1918.
January 29, 1919.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.
ANNAMALAI CHETTI AND ANOTHER—DEFENDANTS NOS. 3 AND 4—APPELLANTS
versus
ANNAMALAI CHETTI—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 253, 254, 232—Partnership—Assets due to partnership—Suit by partner for his share in one item of partnership assets, maintainability of—Accounts, relief by way of, nature of—Suit, frame of—Nattukottai Chetties, custom among—Deposits on thavanai, *suit for—Limitation Act (IX of 1908), ss. 6, 7, Sch I, Arts 57, 60, 115—Evidence Act (I of 1872), s 32 5—Statement by father as to son's age at preparation of horoscope, admissibility of.*

No partner has a right, at least in the absence of a special agreement, to take any portion of the partnership property and to say that it is his exclusively either during the existence of the partnership or after it has become dissolved. The share of a partner to which he is entitled is his proportion of the partnership assets that have been realised and converted into money after all the partnership debts and liabilities have been paid and discharged. [p. 459, col. 1.]

A partner cannot be allowed to take one item of the firm's accounts, divide it into equal shares according to the number of partnership shares, and ask to be given one share, without first having an accoun

taken of the partnership liabilities and deducting the sum total of them from the aggregate assets of the firm. [p 459, col. 1]

Lakshmanan Chetty v. *Nagappa Chetty*, 45 Ind. Cas. 86; 34 M L J. 408, followed.

In the absence of evidence to the contrary, deposits made with Nattukottai Chetties on *thavanai* are deposits payable on demand and come within the definition of deposits under Article 60 of Schedule I to the Limitation Act. If there is evidence, however, that the money is payable without demand, Article 57 or Article 115 would be applicable, according as it is payable at any time after it was lent or after a fixed period. [p. 461, col. 1.]

A partner is competent to give a valid discharge of a debt due to the partnership even after its dissolution. [p 460, col 2.]

Mannava Annapurnamma v. *Uppala Akkayya*, 19 Ind. Cas. 12; 36 M 544; 13 M. L. T 268; (1913) M W. N. 328; 24 M. L J. 333 and *Palaniappa Chettiar* v. *Veerappa Chettiar*, 44 Ind. Cas. 466. 41 M. 446. 34 M. L. J. 41, followed.

The evidence of a person who prepared a child's horoscope, as to the statement made to him by the child's father about the date of the child's birth, is admissible in evidence under section 32 (5) of the Evidence Act, as it is the date of the commencement of a relationship. [p. 460, cols. 1 & 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 105 of 1915.

FACTS appear from the judgment.

Mr. *K. Srinivasa Aiyangar* (with him Messrs. *K. Rajah Aiyar* and *T. R Srinivasaraiagopala Aiyangar*), for the Appellants.—The suit is not sustainable in law. A partner cannot sue for one item alone of the partnership assets. His remedy is to ask for an account of the partnership assets and liabilities and then after deducting the liabilities from the assets, his share will be determined. The suit, therefore, without a prayer for accounts, is liable to be dismissed. The plaintiff should either have sued on behalf of all the partners of the Mandalay firm or should have taken appropriate proceedings in execution of the Mandalay Court's decree, see *Lakshmanan Chetty* v. *Nagappa Chetty* (1), or the plaintiff should have asked for the winding up of the Mandalay firm, for appointment of a Receiver to collect the assets, to adjust the liabilities *inter se* of the partners and to distribute the nett proceeds after payment of the partnership debts.

The suit is barred. The plaintiff cannot claim the benefit of section 6 of the Limitation Act as any of the adult members of the partnership could give a discharge without his concurrence.

Article 60 does not apply. The evidence of D. W. No. 1 is that there was to be no demand of the amount till the Thavanai date, and on that date the money was to be repaid at once.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.—One partner can sue for his share of partnership assets. The other partners may be allowed to ask for accounts being taken. *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (2), *Thiruvengada Mudaliar* v. *Sadagopa Mudaliar* (3) and *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar* (4).

The suit is not barred. The money in defendants' hands is a fixed deposit and under Article 60 of the Limitation Act a suit lies within three years of the date of demand. Deposits with Nattukottai Chetties on Thavanai are fixed deposits. See *Balakrishnudu* v. *Narayanasawmy Chetty* (5).

The plaintiff has sued within three years of his attainment of majority and is saved by the provisions of section 6.

JUDGMENT.

SPENCER, J.—The plaintiff and defendants Nos. 1 to 10 represent a firm which was started in Mandalay under the style of A. L. A. M. for doing money-lending business, which, for brevity, may be referred to as the Mandalay firm. In 1908, the 8th defendant in this suit brought a suit in the District Court of Mandalay for dissolution of the partnership of this firm and obtained a decree in which the proportionate shares of the partners were defined, seven in number, and the plaintiff in the present suit was declared to be the owner of one share. While the suit was pending and before the partnership was dissolved, a sum of Rs. 35,239 and odd was collected by one Arunachalla Chetty, who was the agent of the Mandalay firm, and this sum was deposited at interest with a firm consisting of defendants Nos. 1 to 7 and a stranger who is the 11th defendant in this suit, which may be briefly referred to as the

(1) 45 Ind. Cas. 86; 34 M. L. J. 408.

(2) 28 M. 344.

(3) 7 Ind. Cas. 811; 34 M. 112; 20 M. L. J. 937; (1910) M. W. N. 446; 8 M. L. T. 221.

(4) 3 Ind. Cas. 483; 32 M. 203; 4 M. L. T. 475.

(5) 24 Ind. Cas. 852; 37 M. 175.

Rangoon firm. It may be seen that defendants Nos. 1 to 7 are common partners in both the Mandalay and Rangoon firms. The present suit was brought to recover 1/5th share of the money deposited with the Rangoon firm and the temporary Subordinate Judge of Sivaganga has given the plaintiff a decree accordingly. Defendants Nos. 3 and 4 appeal and they attack the correctness of the Subordinate Judge's judgment upon two points:—(*a*) that the suit as framed is not maintainable, and (*b*) that it is time-barred

The grounds for saying that the suit is not maintainable are stated in full in grounds Nos. 27 to 29 of the appeal memorandum. Although in the written statement of the 1st defendant the objection was simply raised that the suit could not be maintained without giving reasons, it appears from the appeal memorandum that the reasons are that the plaintiff's only remedy was to work out the claim as an item of asset in the winding up proceedings of the Mandalay firm under the decree of the District Court, which is Exhibit IV (*a*), and was confirmed on appeal to the Judicial Commissioner by his judgment Exhibit IV (*c*), Ground No. 28 is that "the money having been advanced as a whole and there having been admittedly no division or apportionment among the several partners, it was not competent for the plaintiff to maintain a suit for the recovery of his share alone," and ground No. 29 is that "the plaintiff cannot evade the equities arising out of the state of the account between himself and his partners of the Mandalay firm as a whole." It goes on to state that either a suit should have been brought on behalf of all the partners of the Mandalay firm for recovery of the entire loan or the plaintiff should have taken proper proceedings in execution of the decree of the Mandalay Court.

Now, on this point, there is no doubt that in England an action may, in the present state of the law, be brought in some cases by one firm against another, although they may have a common partner or partners, or on behalf of a firm to recover a debt due by one of the partners of that firm. See Lindley on Partnership (5th Edition), page 323. In India, Order XXX, rule 9, of the Civil Procedure Code recognises the maintainability of suits between firms and one or more partners of such firms and also suits between firms having one or more partners in common. But a suit does not ordinarily lie if brought by one partner to recover money lent by him to a firm of which he is a member [see *Rustomji* v. *Purshotamdas* (6)], the reason being that the advance made by one partner would be only one item in the partnership account; nor can one firm sue another when the sole partners of the first firm are partners along with others in the second firm and the claim is to recover as plaintiff's share certain advances made to the second firm before it ceased to do business—see *Kashinath Kedari* v. *Ganesh Hari Narkar* (7), the reason being that, without taking a general account, it would be impossible to do justice between the parties. It was held in *Karri Venkatareddi* v. *Kollu Narasayya* (8) that in certain circumstances one partner can sue another for a partial account. Those circumstances are that the granting of the relief asked for by the plaintiff would not involve the taking of general accounts and would not work injustice to the other partners. In the same Volume of the I. L. R. Madras series at page 203 another case, *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar* (4), is reported in which it was held that a partner, who has been compelled after dissolution of the partnership to pay a debt due by the partnership, may bring a suit for contribution; but in such a suit it was laid down that the defendant must be given an opportunity of showing, if he can, that on a settlement of accounts the amount payable by him as contribution has been wiped out or reduced. In *Gottipatichina Kondiah* v. *Gottipatinarasappa Naidu* (9), to which decision I was a party, a partner was allowed to sue for his share of the collections made by another partner after dissolution of the partnership, on the condition that the defendants were given an opportunity of

(6) 25 B. 606; 3 Bom. L. R. 227.
(7) 26 B. 739; 4 Bom. L. R. 525.
(8) 1 Ind. Cas. 384; 32 M. 76; 19 M. L. J. 10, 4 M. L. T. 456.
(9) 22 Ind. Cas. 947; 26 M. L. J. 221.

showing that, if a general account of the partnership transactions were taken, the plaintiff would not be entitled to the share which he claimed. But in another case decided by a different Bench to which my learned brother was a party, *Lakshmanan Chetty* v. *Nagappa Chetty* (1), where the plaintiff sued to establish a certain liability against the defendants on the basis of accounts and he did not ask for accounts to be taken, it was held that the suit was not maintainable. What are the rights of persons in a firm *inter see* has been clearly set out in Lindley on Partnership at page 659, 8th Edition. One of these is to have the partnership assets applied in liquidation of the partnership debts and to have the surplus assets divided. This result is usually obtained by the process referred to at page 614 of having a Receiver appointed. The share of a partner to which he is entitled is his proportion of the partnership assets that have been realized and converted into money after all the partnership debts and liabilities have been paid and discharged —see page 402.

No partner has a right, at least in the absence of a special agreement, to take any portion of the partnership property and to say that it is his exclusively either during the existence of the partnership or after it has been dissolved. The decision in *Lakshmanan Chetty* v. *Nagappa Chetty* (1) proceeds upon this principle—see page 410*. The plaintiff in this suit cannot legally assert any right to a specific portion of the deposit made by his partners with the Rangoon firm. His only right is to take steps for an account being taken of the liabilities and assets of the Mandalay firm and to claim his proportionate share of the balance so arrived at.

A partner cannot be allowed to take one item of the firm's assets, divide it into equal shares according to the number of partnership shares, and ask to be given one share without first having an account taken of the partnership liabilities and deducting the sum total of them from the aggregate assets of the firm. This is what the plaintiff has done here. In the plaint there is no prayer for accounts nor has he since applied to amend his plaint. In paragraphs Nos. 1 and 8 of the 1st defendant's written statement an objection was taken to the maintainability of the suit in its present form, without specifying that the suit would have been maintainable if it had been framed differently so as to include a prayer for taking accounts and ascertaining the nett assets of the firm. Under Order VIII, rule 2, Civil Procedure Code, it was the duty of the defendants to state how the plaintiff's suit was not maintainable, but under Order VII, rule 7, a duty is cast upon the plaintiff in the first instance to state specifically what relief he claims, and he must bear the consequences of his failure to ask for the only thing that he is entitled to get when that thing is not of the nature of general relief. It was for want of a prayer for accounts that the suit concerned in *Lakshmanan Chetty* v. *Nagappa Chetty* (1) was held to be not maintainable, and as that appears to be sound law, I think, we should follow the decision. It makes no difference whether the plaintiff is, as he was in that case, a member of the defendants' firm or whether, as here, the defendants or some of them are members of the plaintiff's firm, when in either case the obvious remedy open to the plaintiff is to get the business (in this case the affairs of the Mandalay firm) wound up by getting a Receiver appointed to collect the partnership assets, to adjust the liabilities of the partners *inter se* and to distribute the nett proceeds after paying the partnership debts. In *Sokkanadha Vannimundar* v. *Sokkanada Vannimundhar* (2) and *Thiruvengada Mudaliar* v. *Sadagopa Mudaliar* (3) plaintiffs were allowed to sue for their share of assets received by a co partner after the dissolution of a partnership, but this was not without the defendants being at liberty to re-open the whole accounts of the business. *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar* (4) dealt with a suit by one partner, who had been compelled to pay the whole of a partnership debt, for contribution against his co partners. It was not, like this, a suit to recover a share in a partnership debt from the debtors including members of the plaintiff's firm, but it partook of the nature of a suit for contribution, pure and simple. The circumstances of those cases were thus different from those of the present

*Page of 34 M. L. J.—*Ed.*

suit. The 3rd and 4th issues must now be decided against the plaintiff.

The question of limitation is more difficult. It stands in this way. The sum of Rs. 35,289 and odd were placed with the Rangoon firm on August 20th, 1908. This suit was instituted on October 5th, 1915. The Subordinate Judge has found that plaintiff attained majority on October 6th, 1912. If the date, October 20th, 1908, when repayment of the money became due according to the Thavanai be taken as the starting point for limitation and if the plaintiff's minority is not treated as entitling him to exception, the suit is time-barred. It would equally be barred if 3 years were to be calculated as running from March 15th, 1909, the date of the Mandalay District Court's decree defining the plaintiff's share in the assets of the firm.

The Subordinate Judge held that the suit was in time as it was brought within 3 years of the plaintiff attaining majority. It is now argued by Mr. K. Srinivasa Ayyangar that the plaintiff cannot claim under section 6, Limitation Act, that time does not begin to run against him till he attained majority as any one of the adult members of the Mandalay firm was competent to give a discharge of the debt without his concurrence and thus the first part of section 7 of the Act is applicable. He also attacks the Subordinate Judge's finding on the question of fact. The plaintiff in his plaint gives the date of his birth as October 8th, 1891. This would make him 21 on October 8th, 1912, as a guardian of his property was appointed by the District Court of Madura in Civil Miscellaneous Petition No. 411 of 1900, which had the effect under the Indian Majority Act of extending the attainment of his majority till he completed his 21st year.

The Subordinate Judge has accepted October 6th, 1891, which was also the date given by the plaintiff as the date of his birth in another suit Original Suit No. 257 of 19 2 (compare the plaint Exhibit E1) as correct. I see no sufficient reason to differ from this finding. The evidence of P. W. No. 1 who prepared the plaintiff's horoscope, as to the statement made by plaintiff's father about the date of his son's birth, is admissible under section 32 (5), Evidence Act, as it was the date of the commencement of a relationship [*vide Oriental Government Security Life Assurance Company, Limited* v. *Narasimha Chari* (10) and Amir Ali's Evidence Act, page 359]. No doubt Exhibits II and V throw some doubt on the correctness of the age given in the later proceedings to which the plaintiff was a party, but there is no reason for supposing, in the absence of evidence to that effect, that Exhibit D related to another person of the same name as plaintiff. His statement as D. W. No. 2 that he was not aware, at the time when Exhibits II and V were drawn up, that a guardian had been appointed by Court during his minority has not been contradicted or shown to be false. If it is taken to be true, it sufficiently explains the circumstances under which he was treated on those occasions as having attained majority earlier than in 1912.

The Subordinate Judge's finding on the point must, therefore, be confirmed. On the question of law we must allow the Full Bench ruling in *Mannava Annapurnamma* v. *Uppala Akkayya* (11) and the decision in *Palaniappa Chettiar* v. *Veerappa Chettiar* (12) and pronounce in favour of the competence of one of several joint promisees or of one member of a partnership to give a valid discharge of debt due to the joint tenancy or to the firm even after it has been dissolved.

Mr. A Krishnaswami Ayyar, for the respondent, has endeavoured to support the lower Court's finding on the 2nd issue, which relates to limitation, by arguing that the money in the defendants' hands was a fixed deposit in a bank and that Article 60, under which time begins to run from the date when a demand is made for payment, is the article of limitation applicable to the case. In the plaint it is asserted that demands were made in December 1914 and at the beginning of September 1915, and this assertion is not denied in the defendants' written statements.

In *Balakrishnuda* v. *Narayanasawmy Chetty* (5) the learned Chief Justice of this Court, when sitting on the original side, traced the history of Article 60 of the

(10) 25 M. 183; 11 M. L. J. 379.
(11) 19 Ind. Cas. 12; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 333.
(12) 44 Ind. Cas. 466; 41 M. 446; 34 M. L. J. 41.

Limitation Act and showed its application to so called fixed deposits and other deposits with bankers and other bodies doing similar business, if they are repayable on demand and whether they carry interest or not, even if they are of the nature of loans. In a series of subsequent decisions, this Court has repeatedly presumed, in the absence of evidence as to the terms on which the money was handed over, that deposits made with Nattukkottai Chetties, who are the Indian bankers of this part of the country, are payable on demand and come within the definition of deposits under Article 60. [See *Ramanathan Chetty* v. *Subramaniyam Chetty* (13), *Narayanan Chettyar* v. *Vellayappa Chettyar* (14), *Vellayappa Chettiyar* v. *Unnamalai Achi* (15), *Muthiah Chettiar* v. *Ramanatham Chettiar* (16) and *Chellappa Chetty* v. *Subramania Chetty* (17).]

If there is evidence that the money was payable without demand, Article 57 or Article 115 would be applicable, according as it was payable at any time after it was lent or after a fixed period. If either of these articles governs this case, the suit is out of time. In this case there is such evidence. Although the terms on which the money was deposited with the Rangoon firm were not embodied in a bond or promissory note, we have the oral evidence of D. W. No. 1 that in this Thavanai arrangement the investor was not entitled to demand the money till the Thavanai date but when that date arrived, the person with whom it was invested was bound to repay it immediately and that it was the custom to pay it without any demand being made. There is no other evidence as to the nature of the transaction. The Subordinate Judge has accepted the evidence of this witness on this point and has found that the money was payable without demand.

This issue must, therefore, be decided against the plaintiff. The appeal is allowed and this suit is dismissed with costs in both Courts.

(13) 28 Ind. Cas. 688; 28 M. L. J. 372; 17 M. L. T. 266.

(14) 34 Ind. Cas. 347; 19 M. L. T. 237; (1916) 1 M. W. N. 206.

(15) 42 Ind. Cas. 573; 6 L. W. 687; (1917) M. W. N. 858.

(16) 43 Ind. Cas. 972; 7 L. W. 330; (1918) M. W. N. 242.

(17) 47 Ind. Cas. 948; 8 L. W. 221; (1918) M. W. N. 564; 24 M. L. T. 264.

Appellants (defendants Nos. 3 and 4) are entitled to recover their costs in both Courts from the plaintiff. The defendants who have not appealed will bear their own costs in the lower Court.

ABDUR RAHIM, J.—I agree in the conclusions which my learned brother has arrived at in the judgment prepared by him.

M. C. P.

Appeal allowed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL NO. 17 OF 1919.

May 30, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

Rajkumar GIRWAR PRASAD SINGH —APPELLANT

versus

RAMESWAR LAL BHAGAT— OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, 109 - Execution of decree—Order of High Court directing subordinate Court to execute decree, whether final order or decree—Appeal to His Majesty in Council —Leave, whether can be granted.

An order of a High Court holding that a subordinate Court has jurisdiction to execute a decree and directing it to proceed with execution is not a final order in respect of which leave may be obtained to appeal to His Majesty in Council [p. 463, col. 1.]

Such an order relates solely to jurisdiction and does not determine a question relating to the execution, discharge or satisfaction of the decree, and is not, therefore, a decree within the meaning of section 2 (2) of the Civil Procedure Code. [p. 462, col. 1.]

Application for leave to appeal to the Privy Council.

Mr. *S. N. Dutt* (with him Mr. *Ram Lal Dutt*), for the Applicant.

Messrs. *Atul Krishna Roy* and *J. M. Mukharji*, for the Opposite Party.

JUDGMENT.

MILLER, C. J.—This is an application on behalf of the defendants asking for leave to appeal to His Majesty in Council from an order of this Court made on the 10th December 1918,* setting aside an order of the Deputy Magistrate-Subordinate Judge of the district of Palamau, refusing to execute decrees pronounced in favour of the plaintiff. The petitioner was one of the

*See *Rameshwar Lal* v. *Jagaleshwar Dayal Singh*, 49 Ind. Cas. 94.—*Ed.*

defendants in the suit, and he now makes this application so far as the order affects the decree to which he was a party. The plaintiff obtained the decrees in question in his favour for possession of two villages with costs and mesne profits to be determined by the Court below. He sought to execute the decrees in the Court of the Deputy Magistrate-Subordinate Judge of the district of Palamau. When the matter came before that Judge, he came to the conclusion for reasons which it is unnecessary to state that he had no jurisdiction to hear the case. On appeal this Court took a different view and remanded the case back to the Subordinate Judge to proceed with the execution, and it is from that order that the defendant now seeks leave to appeal. The order in question does not appear to us to be a final order, and, therefore, it is not a case in which we have any power to grant leave to appeal to His Majesty in Council. It is contended that this is a case which relates to the execution, discharge or satisfaction of a decree, and that, therefore, it is a decree within section 47 of the Civil Procedure Code, and that in any case if it does not come within that section, it is a final order because it finally disposes of the rights or some of the rights of the parties. I am unable to accept that view. It does not seem to me that an order relating solely to jurisdiction determines a question relating to the execution, discharge or satisfaction of a decree within the meaning of section 2 of the Code. Nor does it appear to me that the order in itself, directing that the Court shall hear and determine the questions in dispute in execution, is an order which finally disposes of any of the rights of any of the parties. In these circumstances I think that this application should be rejected.

COUTTS, J.—I agree.

Application rejected.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 11 OF 1918-19.

April 14, 1919.

Present:—Mr. Hopkins, J. M.

PARSHOTAM DAS—APPELLANT

versus

DEONANDAN SINGH AND OTHERS —RESPONDENTS.

Mortgage—Occupancy rights, mortgage of, effect of—Death of mortgagor, effect of.

A mortgage of occupancy rights prior to 1873, while valid as between the parties thereto, did not establish any relation between the mortgagee and the land-holder of the mortgagor. The mortgagee's right lasted only so long as the mortgagor's occupancy right was not extinguished.

Second appeal from the order of the Commissioner, Benares Division, dated the 4th October 1918.

JUDGMENT.—The proposition of law for which the appellant contends is that a mortgage of an occupancy holding prior to 1873 was a valid transaction and that after the death of the mortgagor without heirs the land-holder cannot eject the mortgagee without paying the mortgage-money.

This is contrary to the law as laid down in *Chhotey Lal* v *Ajudhia Parshad* (1), *Khiali Ram* v. *Nathu Lal* (2) and in an unreported decision of the Board in *Mahabal Singh* v. *Rai Radhe Rawan* (3) (Petition No. 23 of 1908-09). The principle laid down in these decisions was that a mortgage of occupancy rights prior to 1873, while valid as between the parties to it, did not establish any relation between the mortgagee and the land holder of the mortgagor, and that the mortgagee's right lasted only so long as the mortgagor's occupancy right was not extinguished.

The appellant relies on a later unpublished decision of the Board in *Parsotam Das* v. *Jasodha Bibi* (4) (Petition No. 28 of 1913-14). In that case the Board held, as I understand from the reference to the notes on section 9, Act XII of 1881, in Mr. House's Rent Act, that the question as to whether an occupancy holding was transferable before 1873 depended upon the existence of a custom to that effect, and

(1) S. D. No. 5 of 1901.
(2) 15 A. 219 (F. B.); A. W. N. (1893), 125; 7 Ind. Dec. (N. S.) 859.
(3) 8 U. D. 258.
(4) 10 U. D. 488.

that in the case before them the transfer having been recognized by the land holder the transaction was a valid one. That case was, therefore, distinguishable from the present one, in which there is no evidence of any custom of transferability or recognition by the land-holder. In my opinion the decision of the lower Appellate Court is correct. The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2206 OF 1917.

May 6, 1919.

Present:—Mr. Justice Newbould.

HRIDOY NATH PARUI AND ANOTHER—DEFENDANTS—APPELANTS

versus

AKSHOY LAL CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, second—Document, proof of—Objection as to mode of proof, whether can be taken in second appeal—Civil Procedure Code (Act V of 1908), O. I, r. 13—Non-joinder of parties—Objection, when should be taken.

Where the decision of a lower Appellate Court was based upon findings of fact arrived at on a consideration of certain documents and an objection as to the mode of proof of those documents was taken for the first time in second appeal:

Held, that as the objection was not taken at an early stage of the suit, it could not be entertained in second appeal. [p. 464, col. 1.]

An objection as to non-joinder of parties cannot be entertained for the first time in second appeal. [p. 464, col. 2]

Appeal against the decree of the Subordinate Judge, 1st Court, Jessore, dated the 15th August 1917, reversing that of the Munsif, 2nd Court, Magura, dated the 10th July 1914.

FACTS appear from the judgment.

Babu *Amarendra Nath Bose* (with him Babu *Ajit Ghose*), for the Appellants.—The appeal arises out of a suit for recovery of possession. There are findings of fact against me but they are based on irrelevant evidence. The learned Judge was wrong in admitting documentary evidence which was quite irrelevant and inadmissible under sections 11 and 13 of the Indian Evidence Act. As regards the fact that no exception was taken at the time of admission, we were not given notice of the point in regard to which the documents were tendered. See *Abdullah* v. *Kunja Behari* (1). The Privy Council decision in *Shahzadi Begam* v. *Secretary of State for India* (2) is not applicable to this case. Upon these documents the whole decision of the lower Appellate Court rests. Section 32 of the Indian Evidence Act is also of no avail to the respondents. If a document is produced and neither the executant nor any witness proves it, the document must be deemed to have not been proved legally. But where it has been legally proved, the mere fact of not taking any exception cannot be a bar to me. I was not aware of the specific statements which were going to be proved against me. In these circumstances the Privy Council ruling is distinguishable. Whether a statement against a third person is evidence against me or not, that is no mode of proof to which I can possibly take any legal objection. The case in *Imrit Chamar* v. *Sridhar Panday* (3) is based on *Abdullah* v. *Kunja Behari* (1).

My next point is that the suit is not maintainable by the plaintiff, as the Judge has found that the plaintiff's lessors leased the land to plaintiff's son. Hence he must come as one of the plaintiffs. The learned Judge was wrong in giving a decree against the entire estate.

Dr. *Dwarka Nath Mitter* (with him Babus *Bhudar Halder* and *Neroda B. Roy*), for the Respondents.—As regards non-objection by the other side, see *Imrit Chamar* v. *Sridhar Panday* (3). If I show that these statements are admissible under section 13 of the Indian Evidence Act irrespective of section 32, then the judgment of the learned Judge can very well be supported. These documents were not objected to at the time when they were put in. Now it is too late for them to take exception to the statements contained in the documents. The learned Judge does not rely on these documents alone but also on oral evidence. See section 167

(1) 12 Ind. Cas. 149; 14 C. L. J. 467; 16 C. W. N. 252.

(2) 34 C. 1059 at p. 1074; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 439; 34 I. A. 194 (P. C.).

(3) 13 Ind. Cas. 120; 15 C. L. J. 7 at p. 9; 17 C. W. N. 108.

of the Evidence Act.' As regards the second point raised by the other side, *viz*, that the suit is not maintainable by the present plaintiff alone, I submit they never challenged the title of my lessors. They cannot raise the point now.

JUDGMENT.—This is a second appeal against a decree declaring the right and title of the plaintiffs to the land in suit and for recovery of possession of the same. The decision of the lower Appellate Court is based on findings of fact; but it is contended on the part of the appellants that these findings were arrived at on a consideration of documents which were irrelevant. The documents in question were deeds executed by persons who were not parties to the suit with reference to land on the boundary of the disputed land, in which statements were made in support of the plaintiffs' claim. No objection was taken to the admission of these documents; and it appears to me on the authority of the cases of *Imrit Chamar* v. *Sridhar Panday* (3) and *Abdullah* v. *Kunja Behari* (1) that these statements must be held to be relevant. It is urged that they should not have been admitted in evidence because the authority of these rulings is that they are admissible under clause (3) of section 32 of the Evidence Act and it has not been proved that the conditions mentioned in the first part of section 32 exist in this case. It appears to me, however, that in order to successfully take this objection the appellants should have objected to the admission of these documents at an early stage. The objection is not one as to their admissibility but as to their mode of proof. The contents of the documents are relevant and the question was whether those contents should be proved by the documents themselves or by direct evidence. When no objection was taken at an earlier stage to prove the contents by the documents, it was not necessary for the plaintiffs to adduce oral evidence to prove the statements made in these documents. I would, therefore, hold that the first objection fails and that the findings of the lower Appellate Court are not vitiated by the admission of irrelevant evidence.

The only other point is that the first Court found that the suit was bad for non-joinder fo one of the plaintiffs' sons and that the lower Appellate Court has come to no finding on this point. It will appear that any objection on this ground was waived by the appellants at an earlier stage of these proceedings. This probably accounts for the fact that this objection has not been taken in the grounds of appeal in this Court. It is sufficient to reject this contention on the ground that it has not been so taken.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2874 OF 1917.

November 20, 1918.

Present:—Mr. Justice LeRossignol.

FATEH KHAN—PLAINTIFF—APPELLANT

versus

MUHAMMAD ISA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. VI, r. 17—Amendment of plaint, when to be allowed—O. II, r. 2, whether applicable to amendment of plaint.

The object of litigation being to ascertain and give effect to the rights of parties, an amendment of the plaint should always be allowed when it does not change the nature of the suit and when the rights of the defendant are in no way prejudiced by the amendment: any inconvenience caused to him can be healed by the award of costs [p. 465, col. 1.]

Order II, rule 2, of the Civil Procedure Code merely bars a second suit for relief which should have been included in an earlier suit, and does not apply to the case of an amendment of a plaint. [p. 465, col. 1.]

Second appeal from the decree of the District Judge, Mianwali, dated the 25th June 1917, modifying that of the Munsif, 1st Class, Mianwali, dated the 1st May 1917.

Dr. *Nand Lal*, for the Appellant.

Bakhshi *Gokal Chand*, for the Respondent.

JUDGMENT.—The question here is, whether the amendment was rightly permitted by the first Court.

The District Judge finds that the amendment contravened Order II, rule 2, and decreed only for the relief first set forth in the plaint.

ARUNACHALAM PILLAI v. VELLAYA PILLAI.

Order II, rule 2, has nothing to do with the case, but merely bars a second suit for relief which should have been included in an earlier suit. The object of litigation is to ascertain and give effect to the rights of parties and amendment should always be allowed, when it does not change the nature of the suit and when any inconvenience caused to the defendant can be healed by the award of costs.

In this case application to amend was made at the first appearance in Court of the defendant and his rights were in no way prejudiced by the amendment.

The permission to amend was all the more justified as the plaintiff was a minor suing through a next friend and he would not have been bound by the neglect of the next friend.

I accept the appeal and restore the first Court's decree with costs throughout.

Appeal accepted

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 348 OF 1917.

November 8, 1918.

Present: - Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

ARUNACHALAM PILLAI—DEFENDANT No. 1—APPELLANT

versus

VELLAYA PILLAI (DEAD) AND OTHERS—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9—Evidence Act (I of 1872), s. 115—Death of plaintiff—Legal representative, application for substitution by, dismissal of—Suit by legal representative—Objection by defendant—Estoppel—Limitation Act (IX of 1908), s. 14—Time spent in prosecuting wrong remedy, exclusion of.

The mother of a last male owner brought a suit to obtain a declaration that an adoption made to the latter was invalid. During the pendency of the suit the plaintiff died, and the present plaintiffs sought to continue the suit, but the defendants contended that they were not entitled to do so and the Court, allowing the contention, dismissed the suit. The plaintiffs thereupon brought the present suit. The defendant, who was a defendant in the previous suit, contended that the suit was barred under Order XXII, rule 9 of the Civil Procedure Code, by reason of the decree dismissing the previous suit and that it was also barred by time:

Held, (1) that it was not open to the defendant to contend that the previous decision was erroneous, and that the plaintiff's proper remedy was to continue the suit first filed; [p. 465, col. 2; p. 466, col. 1.]

(2) that the plaintiffs were entitled, under section 14 of the Limitation Act, to claim a deduction of the interval between the date of their applying to continue the previous suit and the date of the Court's order dismissing that suit. [p. 466, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Madura, in Appeal Suit No. 12 of 1916 (Appeal Suit No. 407 of 1915, on the file of the District Court, Madura), preferred against the decree of the Court of the Additional District Munsif, Dindigul, in Original Suit No. 205 of 1914 (Original Suit No. 949 of 1912 on the file of the Court of the Principal District Munsif, Dindigul).

Messrs. *K. R. Guruswami Aiyar* and *A. Subramanya Aiyar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *K. S. Ganapathi Aiyar*, for the Respondents.

JUDGMENT.—Two grounds are argued in appeal: (1) that the present suit is barred under Order XXII, rule 9, by reason of the decree of this Court in Second Appeal No. 1384 of 1910 dismissing under Order XXII, rule 3 the previous suit filed by the mother of the last male owner for a declaration against the adoption (Original Suit No. 678 of 1906 on the file of the Court of the District Munsif of Dindigul), (2) that the present suit is barred by limitation.

The first plea is one which, we think, appellant is estopped from raising in the present proceedings. The plaintiff in the former suit died; and when the present plaintiffs sought to continue the suit, the present appellant (defendant in both suits) contended that they were not entitled to do so. This Court, in the view of the law which prevailed until the Privy Council decision in *Venkatanarayana Pillay* v. *Subbammal* (1), allowed this contention and dismissed the suit. Plaintiffs have now, accepting that decision, filed a fresh suit; and we think appellant cannot be allowed now to turn round and contend that the

(1) 29 Ind. Cas. 298; 38 M. 406; 28 M. L. J. 535; 21 C. L. J. 5 5; 19 C. W. N. 641; 17 Bom. L. R. 468; 17 M. L. T. 435; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125 (P. C.).

previous decision was erroneous and that their proper remedy was to continue the suit first filed, *vide Jagannadha Rao* v. *Kurmayya* (2) and *Assan* v. *Pathumma* (3).

As regards limitation, we think plaintiffs are entitled to claim under section 14, Indian Limitation Act, a deduction of the interval between the date of their applying to be allowed to continue the original suit and the date of this Court's order in second appeal dismissing the suit. This deduction, if allowed, will admittedly save limitation. Their application was finally dismissed in effect on the ground that it was one which the Court was not competent to entertain; and we think the words "other cause of a like nature" in section 14 are wide enough to cover such a case. The other objection to the application of the section raised by Mr. Guruswami Aiyar for appellant is that the Court was not really unable to entertain it but only thought it was unable. We think this distinction is without force. This Court, following the view of the law then prevalent, considered that the Munsif's Court could not entertain the application, and decreed accordingly and we think the same effect must be given to its decision in the present connection as if it had been correct. It would be most unreasonable to hold (for instance) that a party who filed an application in the wrong Court was entitled to the benefit of the section; but that one who filed an application in the right Court, which erroneously believed itself to be the wrong Court, was not so entitled. We hold that the suit is not time-barred.

The second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

(2) 17 M. L. J. 314.
(3) 22 M [illegible]; 9 M. L. J. 37; 8 Ind. Dec. (N. S.) 353.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1181 OF 1916.
February 4, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

DINU YESU DESAI—PLAINTIFF—APPELLANT

versus

SHRIPAD BAJI GARWARE—DEFENDANT—RESPONDENT.

Mortgage—Redemption—Decree, proviso in, that right would be barred on default - Default, effect of—Suit, fresh, maintainability of—Civil Procedure Code (Act V of 908), s. 47—Transfer of Property Act (IV of 1882), ss. 89, 90.

Where a redemption decree, passed before the coming into force of the Transfer of Property Act, provided in terms that the right to redeem would be barred in case the amount provided by the decree was not paid within the time fixed by the decree and a default was committed in paying the said amount:

Held, that a fresh suit, brought after the period for executing the decree had expired, was not maintainable [p. 467, cols. 1 & 2.]

The Transfer of Property Act has no application to a decree passed before that Act came into force but the last instalment payable under which fell due after that Act came into force. [p. 467, col. 1.]

Appeal from the decision of the District Judge, Satara, in Appeal No. 342 of 1915, reversing the decree passed by the Subordinate Judge, Karad, in Suit No. 49 of 1913.

Mr. *S. S. Patkar* (with him Messrs. *R. A. Randive* and *W. K. Mankar*), for the Appellant.

Mr. *B. G. Rao*, for Mr. *G. S. Rao*, for Respondent No. 1.

Mr. *K. N. Koyajee*, for Respondent No. 2.

JUDGMENT.

SHAH, J.—This appeal arises out of a suit brought by the plaintiff to redeem a mortgage of 1863. The defendants pleaded that the present suit was not maintainable in consequence of the decree in an earlier suit for redemption. In 1885, the plaintiff's predecessor-in-title had filed Suit No. 985 of 1885 for redemption, and obtained a decree on the 20th February 1888 in these terms: "It is decreed that the plaintiff do redeem on payment to defendants Nos. 1 and 2 the sum of Rs. 518-11-6 and costs in both the Courts by six equal instalments, each of which is to be payable at the close of March in the years 1888—1893. On plaintiff's default to pay the whole sum by the end of March 1893, his right to redeem shall be for ever barred." The trial Court disallowed the defendants'

contention and passed a decree in favour of the plaintiff for redemption The lower Appellate Court reversed that decree and dismissed the plaintiff's suit on the ground that the decree in the previous suit of 1885 was a bar to the present suit.

In the appeal before us it has been contended on behalf of the plaintiff that a second suit is competent, and in support thereof the recent decision of the Full Bench in the case of *Kamji* v. *Pandharinath* (1) is relied upon. After a consideration of the arguments urged on behalf of the appellant I am of opinion that the *ratio decidendi* in *Ramji's case* (1) has no application to the facts of this case. The decree in the suit of 1885, which was decided under the Dekkhan Agriculturists' Relief Act, was passed in February 1888; and though the last instalment payable under the decree fell due in March 1893, *i. e.*, after the Transfer of Property Act came into force in this Presidency, it is clear that the provisions of the Transfer of Property Act could not apply to that decree. The provisions of section 2 of the Act are clear and the decision in *Chennaya* v. *Malkapa* (2) is to the same effect. Therefore, there was no scope for any order absolute in respect of this decree as provided by the Transfer of Property Act, nor for any final decree as contemplated by the Code of 1908. The decree of 1888 was capable of execution, and it provided in terms that if there was a default in the payment of the sum due thereunder, the right to redeem was to be for ever barred. Admittedly the execution of this decree is time-barred long since, and under the provisions of section 47 of the Code, corresponding to section 244 of the old Code, no fresh suit can lie.

This case is governed by the decisions of this Court prior to the Transfer of Property Act of which *Ladu Chimaji* v. *Babaji Khanduji* (3) is a type. In these cases the subsequent suit has been held to be not maintainable. The *ratio decidendi* of these cases would still govern a case in which the earlier decree provided in terms that the right to redeem would be barred in case the amount provided by the decree was not paid within the time fixed under the decree. It is not necessary to refer to the recent cases which deal either with decrees to which the provisions of the Transfer of Property Act or the corresponding provisions of the Code of 1908 might be applicable. The learned Pleader for the appellant has not been able to cite a single case in which in spite of the earlier decree containing such a provision as we have in the decree of 1888 in this case, a fresh suit for redemption is held to be maintainable.

I am not sure that even if the Transfer of Property Act applied and if the earlier decree contained the provision such as we have in this case, a second suit for redemption would be maintainable. But that is a point which need not be considered in this case.

I would, therefore, confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

HEATON, J.—I agree. At the time when the earlier decree in the suit of 1885 was made, the only method known to our law in this Presidency by which it could be given effect to was by execution proceedings and, therefore, as provided by section 244 of the old Code, a second suit would not lie. The only possible way in which this difficulty could be overcome, would be by showing that the declaration in the decree that on failure to pay the debt the right to redeem shall be for ever barred, did not operate of itself, but could only be made operative by an order absolute or a final decree. But at the time this decree was made there was no provision in this Presidency either for an order absolute or for a final decree. Everything was done in execution proceedings. The Code of 1908, which provides for a final decree in mortgage suits, obviously could not apply to a decree made sometime in the eighties of the last century. The Transfer of Property Act could not apply, because it only came into operation in this Presidency in the year 1893. Therefore it is impossible, as I think, to get away from the effect of the pronouncement in the decree itself. It follows from this that the right to redeem has long been

(1) 49 Ind. Cas. 894; 21 Bom. L. R. 56; 43 B. 334 (F. B.).
(2) 20 B. 279; 10 Ind. Dec. (N. S.) 744.
(3) 7 B. 532; 4 Ind. Dec. (N. S.) 359.

barred and no suit to redeem, therefore, can succeed.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 73 OF 1917.

January 15, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Raja RAJESWARA MUTHURAMALINGA SETHUPATHI—PETITIONER—APPELLANT

versus

MAHALINGA RAJU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Local Boards Act (*V of* 1884), *s.* 73—*Cess paid by landlord—Tenant, liability of, extent of—Suit by landlord to recover cess paid by him from tenant—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 61, 120.

A landlord is primarily liable to Government under section 73 of the Madras Local Boards Act and a tenant is liable only to the landlord in respect of the portion of cess which the latter has actually paid and contingently on his having made the payment.

Puchakayala Jagannaikulu v. *Manager of Nandigam Estate*, 27 Ind. Cas. 122; (1914) M. W. N. 939; 28 M. L. J. 154; 39 M. 269, followed.

A suit by a landlord to recover from the tenant the cess actually paid by him must be instituted within the period prescribed by Article 120, and not by Article 61, of Schedule I to the Limitation Act.

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Seshagiri Aiyar, in Civil Revision Petition No. 413 of 1916, dated the 17th April 1917, reported as 42 Ind. Cas. 502, preferred against the decree of the Court of the District Munsif of Paramakudi, in Small Cause Suit No. 1085 of 1915.

FACTS appear from the judgment.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.—The lower Court is wrong in its construction of section 73 of the Local Boards Act. The landlord, and not the tenant, is liable to Government under the section: see *Puchakayala Jagannaikulu* v. *Manager of Nandigam Estate* (1). The tenant is only liable to the landlord for the amount actually paid by the latter.

Article 61 of the Limitation Act cannot apply, as the cess was not paid by the plaintiff for or on behalf of the defendant. Article 121 is the proper Article applicable.

JUDGMENT.—The sum at stake in this Letters Patent Appeal is small and presumably for that reason the appeal has not been opposed.

Looking at the terms of the Local Boards Act, we regret that we are unable to agree with the material portion of the learned Judge's judgment, that in which he holds the tenant liable to Government. The contrary view that only the landholder is liable to Government was taken by Tyabji, J., in *Puchakayala Jagannaikulu* v. *Manager of Nandigam Estate* (1) and is, we think, entailed by the language of section 73, Local Boards Act, the only liability of the tenant being that imposed by the proviso thereto. He is liable only to the landlord in respect of the portion of the cess which the latter has actually paid and contingently on his having made the payment.

Taking this view, we cannot apply Article 61, Schedule I of the Limitation Act, since it applies to cases of money paid by the plaintiff on behalf of the defendants, and plaintiff's payment was not of that description. No other contention being suggested, the Article applicable is No 120. The decision of the learned Judge must, therefore, be set aside and that of the lower Court must be modified by addition of Rs 5-6-0 to the decree amount, Rs. 3-15-1. Defendants will pay half plaintiff's costs in this Court.

M.C.P.

Decree modified.

(1) 27 Ind. Cas. 122; (1914) M. W. N. 939; 28 M. L. J. 154; 39 M. 269.

MURLI DHAR SINGH *v.* GYASI RAM.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION NO. 12 OF 1918-19.

March 31, 1919.

Present:—Mr. Ferard, S. M., and Mr. Hopkins, J. M.

MURLI DHAR SINGH—APPELLANT

versus

GYASI RAM AND OTHERS—RESPONDENTS.

Landlord and tenant—Possession, long, effect of—Tenancy, whether can be presumed—Agra Tenancy Act (II of 1901), s. 34, suit under—Limitation.

Where a person has been in possession of land for a long period without payment of rent, according to the records, it is permissible to infer that the fact of such occupation did at sometime or other come to the knowledge of the landholder, but no inference would arise that the actual occupation was with consent. The fact that the landholder took no steps to eject the occupier would not justify the inference that he had entered into an express or implied contract of tenancy with him.

No period of limitation is prescribed for a suit under section 34 of the Agra Tenancy Act.

Second appeal from the order of the Commissioner of Agra Division, dated the 26th August 1918, in the case of ejectment.

JUDGMENT.

HOPKINS, J. M.—The respondents tenants have held the land in suit for some 43 years without payment of rent according to the records. They resisted ejectment on the ground that they did not hold the land without payment of rent, the rent being included in that of other land held with occupancy rights, and that they held with consent of the landholders and were, therefore, tenants. The Assistant Collector found that the rent of the land in suit was not included in that of the respondents' occupancy holding and following *Babu Sat Narain Prasad* v. *Ram Kumar* (1) ordered their ejectment.

The Commissioner thought that the case was not one of encroachment covered by *Shaikh Nihal Ahmad* v. *Kalka Singh* (2) on which the respondents relied, but that it was probably one of breaking up and bringing under cultivation of fallow land. He also noted that at the Settlement of 1285 F., although the land was recorded in the *jamabandi* as '*bila lagan*', there was also an entry in the *khasra* that the rent was included in the rent shown against other (*i.e.*, the occupancy) numbers.

From the settlement entries, however, he only inferred that the landholder must have had knowledge at that time of the land being in the respondents' possession. He found that the landholder must have known of the respondents' possession for 42 years and that it must be held that all the fields held for a period of over 30 years were held with knowledge and consent and that occupancy rights had accrued in them; and he decreed the suit accordingly.

It is certainly warrantable to infer from a long period of occupation that the fact of such occupation must at some time or other have come to the knowledge of the landholder, but no inference arises that the actual occupation was with consent, nor does the mere negative fact that the landholder took no steps to eject the occupier justify the inference that he entered into express or implied contract of tenancy with him. There is no limitation for a suit for ejectment based on section 34 of the Tenancy Act.

In the present case, however, there seems some ground for supposing that the respondents entered on the land with the consent of the landholder for the purpose of breaking up fallow land, also that they were actually paying rent at the last settlement, although such rent was not shown against the lands in suit in the revenue papers but was included in the rent of other holdings.

I would remand the case to the Commissioner for a finding on the above question of fact and would allow the parties to produce fresh evidence, return being directed within 2 months and 10 days being allowed for objections. The parties will not necessarily be heard again.

FERARD, S. M.—It is well to have the facts in this case. I, therefore, agree with the order of remand.

Case remanded.

(1) S. D. No. 3 of 1910.
(2) S. D. No. 2 of 1912.

KUMARAPPA CHETTIAR *v.* SAMINATHA CHETTIAR.

MADRAS HIGH COURT.

CIVIL APPEAL No. 358 OF 1917.

October 15, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

KUMARAPPA CHETTIAR AND OTHERS —DEFENDANTS NOS. 3 TO 7 AND 9 TO 12 —APPELLANTS

versus

SAMINATHA CHETTIAR *alias* AVATHA CHETTIAR AND OTHERS —PLAINTIFF AND DEFENDANTS NOS. 1 AND 2 —RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 127, 144—Joint family—Members in possession of specific items, whether exclude others from joint property—Co-tenancy—Co-tenant in possession of specific item—Adverse possession—English and Indian Law.

Where individual members of a joint family are in possession of specific items of joint property, such possession does not constitute an exclusion of the others from the family properties. To bar a plaintiff's right under Article 127 of Schedule I to the Limitation Act there must be exclusion from the whole of the joint family property. [p 470, col. 1.]

Vishnu Ramchandra v. *Ganesh Appaji Chaudhri*, 21 B. 325; 11 Ind. Dec. (N. S.) 220, dissented from.

In the case of a tenancy-in-common, the possession of one tenant is the possession of all, and is not adverse to his co-tenants in the absence of clear evidence of ouster. [p 470, col. 2.]

Corea v. *Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836, followed.

English and Indian Law on the subject of adverse possession among co-tenants reviewed by Seshagiri Aiyar, J.

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 60 of 1916.

Messrs. *T. R. Venkatarama Sastri* and *K. R. Rangasami Ayyangar*, for the Appellants.

Messrs. *T. Narasimha Ayyangar* and *M. S. Ramanuja Ayyangar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—I have had the advantage of reading the judgment prepared by Seshagiri Aiyar, J., and will state my conclusions very briefly. If the property was undivided and Article 127 is applicable, I entirely agree with him that to bar the plaintiff there must be exclusion from the whole of the joint family property and that exclusion from the suit property only will not do. The decision in *Vishnu Ramchandra* v. *Ganesh Appaji Chaudhuri* (1) appears to me to be opposed to the decree of the Privy Council in the Belgaum case and to the other cases cited by my learned brother as well as to the language of the Article, and I am unable to follow it. Assuming, however, that a division must be presumed to have taken place, it is said that Article 127 does not apply because the plaintiff is not a person excluded from joint family property within the meaning of the Article but only a tenant in-common excluded from the common property. The words "joint family property" are used in the corresponding section 1, clause 13 of the Act of 1859, and I think the scope of the two enactments is the same though the starting points of the limitation are different. It is, in my opinion, unnecessary to review the decisions on the question whether the words "joint family property" in the Article apply where there has been a division in status but no division of immoveable properties by metes and bounds. In such a case if Article 127 does not apply, Article 144 must apply. Under that Article the suit would not be barred, as the possession of one tenant in-common is the possession of all, and is not adverse to his co-tenants in the absence of clear evidence of ouster. *Corea* v. *Appuhamy* (2). The Subordinate Judge has not found that there was anything amounting to ouster in this case, and there is no sufficient evidence of it. I agree with the order proposed by my learned brother.

SESHAGIRI AIYAR, J.—This is a suit for partition. Defendants Nos. 1 and 2 represent one branch; defendants Nos. 3, 4 and 5 the second branch; the 6th defendant the third branch; and the 7th defendant the fourth branch. The fifth branch is not represented in this litigation. Defendants Nos. 8 to 12 are alienees from defendants Nos. 3 to 7. The plaintiffs purchased the suit properties from defendants Nos. 1 and 2. The plaintiffs' case is that the family was divided and that, as the purchasers from defendants Nos. 1 and 2, they are entitled to the sole possession of the properties in the suit. They also set up the alternative plea that defendants Nos. 1 and 2 had acquired title by prescription to the properties.

The defence is that the members of the family are undivided and that the

(1) 21 B, 325; 11 Ind. Dec. (N. S.) 220,

(2) (1912) A. C. 230, 81 L. J. P, C. 151; 105 L. T. 836,

plaintiffs are not entitled to more than a fifth share in the properties conveyed to them. The Subordinate Judge held that as the plaintiffs' vendors were in exclusive and hostile possession of the suit properties for more than 12 years, they were competent to convey them to the plaintiffs He also expressed the opinion that the five branches had become divided in status; though the properties were not divided by metes and bounds. The appeal was argued on the supposition that the finding as to division by status was correct without deciding the point.

The point for decision is whether the possession of defendants Nos. 1 and 2 of a portion of the family properties was adverse to the other members of the family. In my opinion, the decision of the Subordinate Judge is wrong. I shall shortly trace the history of the legislation regarding adverse possession by co tenants in England and in India before dealing with the decided cases. In England before the enactment of 3 and 4 William IV, Ch. 27 the law as to possession by co-tenants was this (*vide* the First Report of the Common Law Commissioners made in the year 1851 as to forms of action relating to ejectment). "In cases where by reason of the rule plaintiff and defendant being tenants-in-common, joint tenants or co-parceners an actual ouster must be established in order to found an action of trespass, the rule is modified by requiring the substituted defendant to admit fictitious ouster only in case an actual ouster of the lessor of the plaintiff is proved." Then came the Statute 3 and 4 William IV, Ch. 27. Section 12 ran thus:—"That when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants or tenants in common shall have been in possession or receipt of the entirety or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt *shall not be deemed to have been* the possession or receipt of or by such last mentioned person or persons or any of them." This section was apparently enacted to negative the presumption that possession by one of co-tenant is possession on behalf of all them. As was pointed out in *Holmes* v. *Newlands* (3) and *Culley* v. *Doe* (4), before the Statute of William IV, there was no adverse possession in such cases. The bare receipt of all rents and profits by a tenant-in-common was not adverse to his co-tenants. *Reading* v. *Rawsterne* (5) and *Fairclaim* v. *Shackleton* (6). In *Peaceable* v. *Read* (7) it was held that where one tenant-in-common levied a fine and received all the rents for more than five years afterwards without any entry or claim made to avoid the fine, no actual ouster of his co-tenant could be presumed. After the passing of the Statute, as has been pointed out in 19 Halsbury, paragraph 247: "the possession of the joint tenants, tenants in-common and co-parceners is separate and is not the possession of the other joint tenants." It was held in *Thornton* v. *France* (8) that if a person entitled to an undivided share in the land is in exclusive possession of the whole land or any part of it, the title of his co owner to his undivided share would be extinguished by such possession. In *Glyn* v. *Howell* (9), Eve, J., says: "Mr. Upjohn is right when he says the decisions have proceeded upon two lines, the one being those cases where the possession of the part has been treated as possession of the whole, because the Court has found, either by contract or according to conscience, that possession of the whole is what the person possessed of the part was intended to have, and the other being those cases in which the Court, finding no just reason for inferring, in favour of a person relying solely on possession of a part, a constructive possession of the whole, has refused to make such inference." This is the state of the law under 3 and 4 William IV. Now we have to see how the law stands in India Under Act

(3) (1839) 11 A. & E. 44; 113 E. R. 329.
(4) (1840) 11 A. & E. 1003; 3 P. & D. 539; 9 L. J. Q. B. 288; 113 E. R. 697; 52 R. R. 566.
(5) 2 Raymond 829; Salk. 423; 92 E. R. 54.
(6) (1770) 5 Bur. 2604; 98 E. R. 370.
(7) (1801) 1 East 568; 102 E. R. 220.
(8) 1897 2 Q. B. D. 143; 66 L. J. Q. B. 705; 77 L. T. 38 46 W. R. 56.
(9) (1909) 1 Ch. 633, 78 L. J. Ch. 331; 100 L. T. 324; 53 S. J. 269.

XIV of 1859, section 1, clause 13 enacted the general rule that suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is the joint family property must be brought within 12 years from the death of the person from whom the property alleged to be joint is said to have descended or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share. The Limitation Acts of 1871 and of 1877, although they fixed the starting point of limitation from demand and refusal in the one case and from exclusion in the other, introduced no substantial changes in the first column of the Schedule.

Two things are clear from the history of the Indian Limitation Acts. One is that no distinction is made between moveable and immoveable property as in the cases of 3 and 4 William IV. Secondly, there is no special provision regarding the hostile possession of tenants-in-common. The reason is not far to seek. In India coparcenary and joint enjoyment are normal: whereas in England they are exceptions. The Legislature apparently considered that it would be dangerous to introduce the principle enunciated in 3 and 4 William IV into this country, where managers and other members of the family are ordinarily in enjoyment of either the whole or portions of the property exclusively to avoid the disruption of the family ties and the partition of family properties.

I am of opinion that the decisions passed on section 1, clause 13, of the Act XIV of 1859 govern Article 127 in the later Acts. Under the Act of 1859 it was held in *Runjeet Singh* v. *Kooer Gujraj Singh* (10) that if one of the members of the family was in possession of only a portion of the property to the exclusion of the others, the presumption will be that the possession was for and on behalf of the other members of the family. This is what their Lordships say:—"Their Lordships entertaining the view which they have expressed, there was no partition, but that the plaintiffs took the *sir* land as equivalent to a payment in respect of their shares by the defendant, are of opinion that the proceeds of those *sir* lands have been substantially payments by the defendant within the meaning of that section, payments which have continued to the time of action brought, and that, therefore, the Statute of Limitation does not apply." In *Sakho Narayan Khandalkar* v. *Narayan Bhikaji Khandalkar* (11), the learned Judges say at page 241: "But in the class of cases similar to the one before us, where both parties are in possession of portions, we should require a definite finding as to whether there had or had not been partition between the parties. In this particular case we have a clear finding that no partition was made, and that each party is in possession of a portion of the entire estate, either by mutual agreement or accidental circumstances. In this view of the matter we consider the suit not barred." In *Udayarpalayam case* (12), which related to the Udayarpalayam Zemindari, it was pointed out "that although one member of the family was in sole possession of the estate the receipt of maintenance by the other member and his enjoyment of portions of property allotted to him for maintenance would be regarded as participation in the family income." In *Sri Raja Lakhshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrazu Bahadur Garu* (13) which related to the Belgaum Zemindari one member of the family, believing the estate to be impartible, was in sole possession of the major portion of the Zemindari. The others were given a few villages for their maintenance. After the death of the last Zemindar the question was whether the other members, who were enjoying the villages for maintenance, were not barred by limitation. On behalf of the widow the plea of limitation was raised on the ground that the other members notwithstanding their possession of portions of property were excluded from the Zemindari. Both the High Court and the Judicial Committee overruled this contention. They held that so long as there was no total exclusion of the claimants there can be no adverse possession in favour of persons holding portions of the property. As against these decisions we were referred

(10) 1 I. A. 9; 3 Sar. P. C. J. 304 (P. C.).

(11) 6 B. H. C. R. 238.
(12) 24 M. 562; 11 M. L. J. 191.
(13) 20 M. 256 (P. C.); 24 I. A. 118; 7 Sar. P. C. J. 185; 7 Ind. Dec. (N. S.) 182.

to *Vishnu Ramchandra* v. *Ganesh Appaji Chaudhuri* (1), in which it was held that the possession of a part of the property exclusively by a member of the joint family would be hostile to the other members of the family. I am unable to agree with this decision. It is inconsistent with the decisions I have quoted and with the judgment of Lord Macnaghten in *Corea* v. *Appuhamy* (2), where it was pointed—"Before the Act 3 and 4 William IV was passed it was a settled rule of law that the possession of anyone of such persons was the possession of the other or others of the co proprietors. It was not disputed at the Bar that such is now the law in Ceylon." I may add that this is the law in India as well. Having regard to the decisions I have referred to and to the observations of Lord Macnaghten, it seems to me that the decision in *Vishnu Ramchandra* v. *Ganesh Appaji Chaudhuri* (1) is not right. There is only one other decision to which I shall refer and that is the decision in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (14). That was a case in which the co parcener wanted to establish his rights to his own share as well as to a moiety of his father's interest to which he became entitled on the death of his father. It was held that section 1, clause 13 of the Act of 1859 applied to such a case. As regards the plea of limitation the Judicial Committee says at page 59:—"Now, so far as the immoveable property of the family is concerned, there seems to be no ground for the application of the Statute. Not only has the respondent all along been in the enjoyment of part of that property, *viz*., the house at Shahpur but...is also entitled to exclude from the computation the period of limitation during which he had prosecuted the suit." This decision is authority for the proposition that possession of part of the property would save limitation, as regards the rest of the property. In the present case it is not denied that defendants Nos. 3 to 12 have been in possession of portions of the joint family property.

It was contended for the respondent that the expression "joint family property" in Article 127 does not apply to the case of persons who have become divided in status. Granting this contention is well founded, as to which I express no opinion, the cases referred to by me establish that even if Article 144 applied to the case, the possession of the plaintiffs' vendor would not be adverse to the other defendants. In any view, therefore, the decision of the Court below is wrong and his decree must be reversed.

The plaintiffs as purchasers of the share of defendants Nos. 1 and 2 are entitled to a two-fifth share in the suit properties by partition and to the mesne profits on that share from the date mentioned in the judgment of the Subordinate Judge: plaintiffs are entitled to the damages awarded by the lower Court, on the security of the B Schedule properties as provided in the judgment of the lower Court. Plaintiffs are entitled to the costs from defendants Nos. 1 and 2, who in their turn will get all their costs from defendants Nos. 3 to 7 and 9 to 12 personally and from the security of the B Schedule properties and must pay defendants Nos. 3 to 7 and 9 to 12 their costs in both the Courts. Plaintiffs are also entitled to interest on Rs. 7,500 from 26th March 1912 up to date of payment.

M. C. P.

Appeal allowed.

(14) 5 B. 48 (P. C.); 7 I. A. 181; 4 Sar. P. C. J. 173; 3 Suth. P. C. J. 778; 3 Shome L. R. 217; 4 Ind. Jur. 472; 7 C. L. R. 320; 3 Ind. Dec. (N. S.) 34.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1330 OF 1917.

June 25, 1919.

Present:—Mr. Justice Atkinson.

SHEO BARAT SINGH—PLAINTIFF—APPELLANT

versus

PADARATH MAHTON AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage, usufructuary—Landlord and tenant, relationship of, whether created—Transfer of Property Act (IV of 1882), s. 76—Mortgagee, power of, to grant leases—Tenant, position of—Redemption—Suit for ejectment of tenant—Limitation, commencement of—Bengal Tenancy Act VIII B. C. of 1885), Sch. III, Art. 1 (a).

SHEO BARAT SINGH *v.* PADARATH MAHTON.

In 1893 the plaintiffs mortgaged the *zemindari* interest in certain lands to defendants Nos. 1 to 5. The mortgage was in form a usufructuary mortgage. In 1913 the mortgagors redeemed the mortgage, but during the currency of the mortgage the mortgagees had let the land to defendants Nos. 6 and 7. The plaintiffs brought the present suit for a declaration that they were entitled to the land as their *khudkasht* land, and contended that defendants Nos. 1 to 5 had no right or title to settle the land with defendants Nos 6 and 7, who had not acquired occupancy rights in respect of the property and that in fact they were trespassers thereon. In appeal to the High Court the first contention put forward was that the *ijara zarpeshgi* mortgage did not create as between the mortgagors and mortgagees the relationship of landlord and tenant so as to make the defendants Nos. 1 to 5 tenants of the plaintiff in the ordinary legal acceptation of the term:

Held, that the mortgage-deed in suit did not create the relationship of landlord and tenant between the mortgagors and mortgagees: the character of the deed was not a lease but a *mortgage*. [p. 475, cols. 1 & 2.]

It was next contended that the defendants Nos. 1 to 5 were mortgagees only and had not the power or right to create an interest affecting the mortgaged premises of longer duration than their own interest in the same:

Held, that the defendants Nos. 1 to 5 were mortgagees in possession under a usufructuary mortgage of the *zemindari* right pledged as security for the mortgage-debt, and that they had the power in law to induct a tenant into the tenanted land subject to such mortgage when the whole or part of such tenanted land became unlet or vacant and without a tenant, and that such tenant when inducted by the mortgagees acquired non-occupancy rights in the tenanted land subject to such mortgage as aforesaid; [p. 477, col. 1.]

Held, further, that the plaintiff's suit was barred by limitation under Article 1, clause (*a*) of Schedule III to the Bengal Tenancy Act. The obligation in law upon the plaintiffs, if he desired to dispossess defendants Nos. 6 and 7, was to bring a suit in ejectment to eject them within six months after the expiration of the mortgage, or after the mortgage had been redeemed. [p. 477, col. 1.]

Appeal from a decision of the District Judge, Gaya, dated the 14th June 1917.

Mr. *Shib Narayan Bose*, for the Appellant.

Mr. Rai *Guru Saran Prosad*, for the Respondents.

JUDGMENT.—This appeal comes before me from the decision of the District Judge of Gaya, dated the 14th June 1917.

The plaintiffs seek a declaration that they are entitled to the lands in suit as their *khudkasht* lands; and they claim that the defendants Nos. 1 to 5 had no right or title to settle the same with defendants Nos. 6 and 7; and they also allege that defendants Nos. 6 and 7 have not acquired occupancy rights in respect of the property in suit, and that in fact they are trespassers thereon.

The plaintiffs on partition became entitled to a 7 *dams* odd share in Mouza Dihuri Hasanpur situated in the District of Gaya. The interest which the plaintiffs acquired on partition in the aforesaid Mouza was the proprietary or Zemindari right therein, and the share of the plaintiffs is represented by two *bighas* 18 *kathas* and 17 *dhurs* of land.

The plaintiffs in the year 1893 mortgaged the Zemindari interest in the lands in suit to defendants Nos. 1—5 to secure a sum of Rs. 450. The mortgage was in form a usufructuary mortgage; and the mortgage-deed provided that the mortgagees were to be in possession of the mortgaged premises for a period of seven years; that they were to discharge the outgoings and to pay whatever balance was left over out of the yearly rent reserved by the deed itself to the mortgagors. What was in fact mortgaged was the proprietary interest of the plaintiffs in Mouza Dihuri Hasanpur which, as I have said, comprised of two *bighas* 18 *kathas* and 17 *dhurs* of land. The usufructuary mortgage-deed clearly reserved power to the mortgagors to redeem the mortgaged premises by paying up the amount of the mortgage-debt even after the term of the mortgage itself had expired. The mortgage would have expired in the year 1900, but in fact the mortgagor did not exercise the right of redemption until the 18th June 1913. Consequently from the year 1893 down to June 1913 the mortgagees have been in possession of the Zemindari interest in the lands in suit as usufructuary mortgagees.

The mortgage was redeemed not by a redemption suit but by mutual agreement between the parties. During the currency of the mortgage the mortgagees let the two odd *bighas* of land above referred to, the Zemindari right in which was the security for the amount of the mortgage money advanced, to the defendants Nos. 6 and 7. The precise date when the letting was made to the defendants Nos. 6 and 7 has not been ascertained; but it would appear from the judgments of the two lower Courts that the defendants Nos. 6 and 7 have been in possession of the lands in suit for a very considerable time.

SHEO BARAT SINGH v. PADARATH MAHTON.

These are the short facts of the case and it is necessary to consider the legal points involved in the light of the legal arguments which have been addressed to me.

As I have already pointed out the plaintiff claimed that the lands in suit were his *khudkasht* lands. Both the lower Courts concur in a finding of fact that the lands in suit were not the *khudkasht* or *bakasht* lands of the plaintiff. Consequently when the mortgage was executed in the year 1893, the inference must be that the lands in suit were then *raiyati* lands, and that the mortgagees merely secured the proprietary or Zemindari interest in the lands as security for their mortgage-debt.

I gather that subsequent to the creation of the mortgage the *raiyati* interest, which had been in existence in respect of the 2 *bighas* odd when the mortgage deed was executed, lapsed or expired, for some reason which does not definitely and precisely appear. It may be that the original *raiyat* of this small miserable holding of two *bighas* 18 *kathas* and 17 *dhurs* abandoned his interest therein, and that thereupon the lands became unoccupied as *raiyati* lands for the time being; and that the defendants Nos. 1 - 5 as mortgagees of the Zemindari interest inducted the defendants Nos. 6 and 7 upon these lands and since which time the defendants Nos. 6 and 7 have been in possession thereof. Now these defendants Nos. 6 and 7, by virtue of the letting made to them by the defendants Nos. 1 to 5, claim to have acquired, if not occupancy rights, at least non-occupancy right in the lands in suit.

The first contention put forward is that the *ijara zarpeshgi* mortgage deed did not create as between the mortgagors and the mortgagees the relationship of landlord and tenant; and that in effect it was nothing more than a simple usufructuary mortgage, and did not in law make the defendants Nos. 1 to 5 tenants of the plaintiff in the ordinary legal acceptation of the term.

The learned District Judge in appeal held that the usufructuary mortgage bond had in law the effect of creating the defendants Nos. 1 to 5 tenants of the lands in dispute to the plaintiffs.

In my opinion the learned District Judge was clearly wrong in point of law in arriving at this conclusion, having regard to the decision of this Court in a case reported as *Raj Kumar Thakur Ranjit Narayon Singh* v. *Motilal Marwari* (1), and in addition there are numerous other authorities to show that a deed of the character of the deed in this case is not a lease *but a mortgage*; *vide Nidha Sah* v. *Murli Dhar* (2).

In argument before me the learned Vakil appearing on behalf of the respondents admits that the decision of the learned Appellate Court that the usufructuary mortgage-bond referred to in this suit did in law create a letting as between landlord and tenant in the ordinary acceptation of the term is wrong and cannot be supported.

The plaintiff-appellant contends that the defendants Nos. 1 to 5 were mortgagees only, and that they as mortgagees had not the power or right to create an interest affecting the mortgaged premises of longer duration than their own interest in the same. That being limited owners in effect they could not create a burden or interest affecting the Zamindari right which would ensure as against the mortgagor after redemption.

This argument at first seemed well founded, but on a closer examination it appears to me to be without foundation. A mortgagee in possession of the property of the mortgagor has clearly defined rights and duties to discharge relative to the mortgaged property pledged as security for the mortgage-debt. These rights and obligations are embodied in sections 72 to 76 of the Transfer of Property Act; and one of the obligations imposed upon a mortgagee in possession is that he shall manage the mortgaged property in a prudent way such as an ordinary man would manage his own business.

It appears to me reasonable and rational that if a mortgagee while in possession lets a portion of the mortgaged premises which has become vacant or untenanted during the currency of the mortgage security that then clearly it is the mortgagee's duty either to occupy the land himself and cultivate it to the best advantage or in the alternative as a prudent business man to let such land to a solvent tenant. The

(1) 42 Ind. Cas. 808; (1917) Pat. 24.
(2) 25 A. 115 (P. C.); 30 I. A. 54; 5 Bom. L. R. 111; 7 C. W. N. 289; 8 Sar. P. C. J 435.

law precludes the possibility of the mortgagee allowing the land to remain fallow, and if the mortgagee did allow the land to remain in a wasteful and unprofitable condition so as to be wholly unproductive the law would impose upon the mortgagee liability for gross mismanagement and default.

Therefore, the position in this case is this that the mortgagees of the Zemindari right and interest in exercise of their statutory duty and obligation created a tenancy or a letting of the lands which formed the subject-matter of their mortgage security to the defendants Nos. 6 and 7.

The question that remains to be considered is what right did the defendants Nos. 6 and 7 acquire in respect of the letting, which was clearly made to them by the action of the mortgagees in possession of the Zemindari interest in the mortgaged property.

The case reported as *Atal Chandra Rishi* v. *Lakhi Narain Ghose* (3) seems to me to indicate very clearly that the tenant to whom the letting was made by the mortgagees was at least a non-occupancy *raiyat* within the meaning of the Bengal Tenancy Act.

Mr. Justice Mookerji deals with this aspect of the case at page 56* of the report, and at page 57* he says: "The possession of the fourth defendant, therefore, in its inception was lawful and as he became a *raiyat* he acquired the rights of at least a non-occupancy *raiyat*."

The well-known case which is a Full Bench ruling of the Calcutta High Court reported as *Binad Lal* v. *Kalu Pramanik* (4) seems to me in its reasoning to apply with considerable force to the facts of this case. In the case immediately referred to it was laid down that a trespasser, who believing himself to be the *de facto* landlord of certain premises, inducted a tenant thereon and who made a letting of a certain portion of the premises in the alleged landlord's possession and whom the tenant believed to be the *de facto* landlord, created *qua* the tenant a tenancy in the lands so let of a non occupancy character.

This Full Bench ruling referred to has been considered in subsequent cases, but it has never been dissented from though the principle underlying it has been made plainer and clearer by subsequent decisions. Reading the Full Bench ruling with the later authorities reported as *Upendra Narain Bhattacharya* v. *Protab Chandra Pardhan* (5), *Krishna Nath Chakravarti* v. *Muhammad Wafiz* (6) the sum and substance of these authorities amount to this that where a man believes himself *bona fide* to be landlord of certain premises, though in law he is not so, and he makes a letting to a person who believes *bona fide* that such person is the landlord and has power to make such letting that then the interest created by virtue of such letting creates a non-occupancy *raiyat* interest in favour of the person to whom the letting is made.

The only answer urged in reply to this argument is the definition of a *raiyat* contained in section 5, sub-section 3 of the Bengal Tenancy Act.

Sub-section 3 provides that a person shall not be deemed to be a *raiyat* unless he holds lands either immediately under a proprietor or immediately under a tenure-holder, and the argument is that as a mortgagee is neither a proprietor nor a tenure-holder, that, therefore, the person to whom a mortgagee lets lands cannot be said to be *raiyat*.

Section 60 of the Bengal Tenancy Act is relied upon for the purpose of showing that that Act contemplates a distinction between a proprietor and a mortgagee.

I cannot agree with this argument. It seems to me to be against the entire current of all modern authority; and if it were open to me to hold I would hold, that a usufructuary mortgagee of the proprietary interest in landed property is *qua* the occupying tenants on the estate in the position *pro tem.* of a proprietor; because the whole legal estate of the proprietor is for the time being during the currency of the mortgage vested in the mortgagee as such and all that the true owner of the estate has is a right in equity to redeem the property, when he himself conceives that he is able to discharge the obligation of paying the mortgage debt.

(3) 2 Ind. Cas. 417; 10 C. L. J. 55.
(4) 20 C. 708 (F. B); 10 Ind. Dec. (N. S.) 477.
(5) 8 C. W. N. 320; 31 C. 703.
(6) 31 Ind. Cas. 789; 21 C. W. N. 93; 23 C. L. J. 563.

*Pages of 10 C. L. J.—*Ed.*

Therefore, I hold that in point of law the learned Judge was wrong in deciding that the defendants Nos. 1—5 were tenants of the plaintiffs. But I hold that they were mortgagees in possession under a usufructuary mortgage of the Zemindari right pledged as security for the mortgage debt and that they had power in law to induct a tenant into the tenanted land subject to such mortgage when the whole or part of such tenanted land became unlet or vacant and without a tenant, and that such tenant when inducted by the mortgagees acquired non-occupancy rights in the tenanted land subject to such mortgage as aforesaid.

The question remains to be considered whether the plaintiff's suit is barred by limitation. If I am right in holding that the defendants Nos. 6 and 7 have acquired non-occupancy rights in the lands in suit, then I think it is reasonably clear, having regard to the Full Bench ruling of this Court reported as *Janki Singh* v. *Mahant Jagannath Das* (7), that the plaintiff's rights are barred and that this suit is not maintainable, under Schedule III, Article 1, clause (*a*). If the defendants Nos. 6 and 7 are non-occupancy *raiyats*, then the obligation in law is upon the plaintiff, if he desires to dispossess the defendants, to bring a suit in ejectment to eject the defendants Nos. 6 and 7 within six months after the expiration of the mortgage or after the mortgage had been redeemed. This the plaintiffs did not do inasmuch as they only brought this suit $2\frac{1}{2}$ years after the mortgage itself was redeemed. The mortgage having been redeemed on the 18th June 1913, the present suit was instituted on the 11th November 1915.

Clearly, in my opinion, having regard to the Full Bench of this Court this suit was barred. The lower Appellate Court found that the plaintiff's claim was not barred by limitation, but the Court failed to consider the question of limitation in the light of the Full Bench ruling of this Court.

Accordingly I hold that the plaintiff's suit ought to have been dismissed and that this second appeal is unsustainable in point of law and must be dismissed with costs and the plaintiff's suit in all Courts dismissed with costs.

Appeal dismissed.

(7) 44 Ind. Cas. 94; 3 P. L. J. 1.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 444 OF 1918.

October 10, 1918.

Present:—Mr. Justice Seshagiri Aiyar.

KUNHI KOYA HAJI—PLAINTIFF—PETITIONER

versus

PANIKKA VITTIL ASSAN BAVA HAJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899), s. 19—Promissory note, unstamped, executed outside British India, suit on, maintainability of—Admissibility, without affixture of proper British Indian stamp.

If a promissory note executed outside British India is valid according to the law of the place where it was executed, it can ordinarily be sued upon in India and is admissible in a British Indian Court without affixing any Indian stamp on it. If any stamp is necessary, it is sufficient if, at the time of the decree, an Indian stamp is affixed to it. [p. 478, col. 1.]

Simulu Ebrahim Rowthan v. *Abdul Rahiman Mahomed*, 8 M. L. J. 182 and *Mahomed Rowthan* v. *Mahomed Husin Rowthan*, 22 M. 337; 9 M. L. J. 135; 8 Ind. Dec. (N. S.) 240, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, South Malabar at Calicut, in Small Cause Suit No. 317 of 1917.

FACTS appear from the judgment.

Messrs. *V. Mahadeva Ayyar* and *G. R. Sivaramakrishna Ayyar*, for the Petitioner.—The decisions in *Simulu Ebrahim Rowthan* v. *Abdul Rahiman Mahomed* (1) and *Mahomed Rowthan* v. *Mahomed Husin Rowthan* (2) only lay down that it is not necessary before suit to affix a British stamp on documents executed outside British India unless it be for purposes of acceptance, payment, endorsement, transfer or negotiation. Filing a suit does not come under any of these categories. It is not shown that, under the law prevailing in Mecca, the promissory note could have been sued on without a stamp on it.

Mr. *K. P. Kesava Menon*, for the Respondents.—No Indian stamp is necessary to be affixed before filing the suit. *Simulu Ebrahim Rowthan* v. *Abdul Rahiman Mahomed* (1) and *Mahomed Rowthan* v. *Mahomed Husin Rowthan* (2). The limitations in the deci-

(1) 8 M. L. J. 182.

(2) 22 M. 337; 9 M. L. J. 135; 8 Ind. Dec. (N. S.) 240.

sions do not apply to the filing of suits. The only condition is that the document was legally enforceable in the place where it was executed.

JUDGMENT.—The suit is based upon the promissory-notes executed at Mecca in favour of the plaintiff. The Subordinate Judge has held that they are inadmissible in evidence. He has not referred to any authorities in support of his possession. Apparently what he had in mind was section 19 of the Stamp Act. It was pointed out in *Simulu Ebrahim Rowthan* v. *Abdul Rahiman Mahomed* (1) and *Mohamad Rowthan* v. *Mohamed Husin Rowthan* (2) that it is not necessary before suit to affix a British stamp on documents executed outside British India unless it be for the purposes of acceptance, payment, endorsement, transfer or negotiation. It is argued for the respondents that filing a suit comes under one of these categories. I am unable to agree with this suggestion. If a document is valid according to the law of the place where it was executed, it can ordinarily be sued upon in India without affixing any Indian stamp on the document. Probably the suggestion of Shephard, J., in *Simulu Ebrahim Rowthan* v. *Abdul Rahiman Mahomed* (1) may be accepted, namely, that if any stamp is necessary it would be sufficient if at the time of the decree an Indian stamp was affixed to the document. I am not sure whether, under the law prevailing in Mecca, a promissory note like this without any stamp on it could have been sued upon.

But the position taken up by the Subordinate Judge is certainly untenable. It is opposed to the decisions I have referred to. I must, therefore, reverse his decision and remand the suit for disposal in the light of the above observations. Costs hitherto incurred will follow the event.

M. C. P.

Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION NO. 39 OF 1918-19.

April 8, 1919.

Present:—Mr. Ferard, S. M.

TEKA RAM AND OTHERS—APPELLANTS

versus

GAYADIN AND OTHERS—RESPONDENTS.

Oudh Rent Act (XXII of 886), s 67 (2)—"*Settlement*", *meaning of*—*U. P. Land Revenue Act (III of 1901), s. 57*—*Settlement records, correctness of*—*Presumption*—Sir, *plot recorded as, effect of.*

The phrase "settlement" in clause 2 of section 67 of the Oudh Rent Act refers to the last settlement prior to the passing of that Act.

Section 57 of the U. P. Land Revenue Act authorises the presumption that the latest settlement and current records are true. Where in the settlement records a plot of land is recorded as *sir*, it must be assumed that the record was made after proper inquiry that the plot had become arable and had been in the personal cultivation of the proprietor for seven years prior to the passing of the Land Revenue Act.

Second appeal from the order of the Commissioner, Lucknow Division, dated the 8th October 1918, in the case of ejectment.

JUDGMENT.—I am unable to accept the ingenious argument of appellant's Counsel that the Commissioner has misconstrued the law. There is no doubt that 'settlement' in clause 2 of section 77, an original section of the Oudh Rent Act, 1886, refers to the last settlement prior to the passing of that Act This is quite clear if we turn to the proviso which follows section 13 (*b*) of the Land Revenue Act of 1901. As the plot in suit was recorded *grove* without the addition of *sir* in the 1864 settlement, *i.e.*, the last settlement preceding the Oudh Rent Act, it is quite true that the plot does not come under section 67 (1) (*a*), Oudh Rent Act, or section 13 (*a*), Land Revenue Act. But the Commissioner never said it did. We find it recorded in the 1900 settlement as *sir*, no longer as grove but as arable land. The Commissioner's argument amplified is that as it had become arable in 1900, it had probably become arable some time before, probably 7 years before the passing of the Oudh Rent Act in 1886 and was *sir* under section 13 (*b*), Land Revenue Act, 1901, which is a reproduction of section 67 (*b*), Oudh Rent Act, 1886. At this length of time it is impossible to ascertain exactly what the case was in 1879-1886, but

under section 57, Land Revenue Act, to which the Commissioner rightly refers, we have to presume that our later settlement and current records are true. The current and 1900 settlement records show the land as *sir* and we are warranted in assuming that proper enquiry was made at the 1900 settlement and that it was found that the plot had become arable and been in the personal cultivation of the proprietor from 1879-1886. The 1900 Settlement Officer, therefore, recorded it as *sir* as defined in section 4 (13) (*b*), Land Revenue Act The appellant has not shown that the Settlement Officer was wrong and that plot was not arable, in the personal cultivation of the proprieter between 1879 and 1886. I agree, therefore, in not going behind the entry.

Appeal dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 971 OF 1914.

November 31, 1918.

Present:—Mr. Justice Wilberforce and Mr. Justice Martineau.

MANOHAR LAL—PLAINTIFF—APPELLANT

versus

NANAK CHAND—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 33—*Court, duty of, to prepare decree—Failure to prepare decree, effect of—Appeal, right of, whether affected.*

Although under section 33 of the Code of Civil Procedure, it is imperative that a decrée should follow the judgment and it is the duty of the Court to have one drawn up, yet an omission or neglect by the Court in the performance of its duties in this respect cannot deprive an appellant of his right of appeal.

First appeal from the order of the District Judge, Lahore, dated the 22nd January 1914.

The Hon'ble Mr. *Muhammad Shafi*, Mr. *Abdul Rashid* and Dewan *Mehr Chand*, for the Appellant.

The Hon'ble Pandit *Sheo Narain* and Mr. *Tirath Ram*, for the Respondent.

JUDGMENT.—In this case the plaintiff sued the defendant in respect of four different properties. The District Judge held that four distinct causes of action had been combined in one suit, that they should be separately stamped and valued, and that in respect of the claim under appeal, permission for its combination with the other causes of action should be refused. The plaintiff accordingly has instituted a separate suit regarding the other causes of action and the objection regarding misjoinder in the present case has disappeared. In the same case the District Judge also held that the claim must fail on account of the want of the sanction of the Collector under section 92 of the Civil Procedure Code, and dismissed the suit with costs with liberty to bring a fresh suit, but no decree was drawn up. It is against the latter part of the District Judge's judgment that an appeal has been preferred.

A preliminary objection has been raised by the respondent that no appeal lies merely against the judgment and that Order XLI, rule 1, requiring the memorandum of appeal to be accompanied by a copy of the decree has not been complied with. Further, Counsel for the respondent argues that even if a decree should have been drawn up, it was the duty of the appellant to move the Court for this purpose. Against this, Counsel for the appellant argues that, under section 33 of the Civil Procedure Code, it is imperative that a decree shall follow the judgment and that it is the duty of the Court to comply with the provisions of the law. We agree that a decree should have followed the judgment and that it was the duty of the Court to have had it drawn up, and we do not think that such an omission or neglect of its duties can deprive the appellant of his right of appeal. We, therefore, overrule this objection and allow the appellant to apply to the lower Court within one month for the drawing up of a formal decree, to be attached to the memorandum of appeal as soon as it is obtained.

We think, however, the appellant somewhat to blame in preferring this appeal without a copy of the decree, and for this hearing grant costs to the respondent.

Order accordingly.

CHANDRA KISHORE HADI *v.* SHEIKH KUDRAT.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2706 OF 1917.

May 21, 1919.

Present:—Mr. Justice Newbould.

CHANDRA KISHORE HADI—PLAINTIFF—APPELLANT

versus

SHEIKH KUDRAT *alias* DEBBIAR BAP AND OTHERS—RESPONDENTS.

Presumption, when arises—Corroboration, whether necessary.

Where the law provides that a presumption arises under certain circumstances, that presumption must arise independently of whether there is any corroboration or not.

Appeal against the decree of the Additional District Judge, Mymensingh, dated the 4th August 1917, reversing that of the Munsif, 4th Court at Netrakona, dated the 23rd September 1916.

FACTS appear from the judgment.

Babu *Birendra Kumar De*, for the Appellant.—The plaintiff is the appellant. The suit out of which the appeal arises was for a declaration of plaintiff's *brahmottar* right and *khas* possession on the ground that the defendant was the purchaser of a non-transferable occupancy holding and as such was liable to eviction. Plaintiff purchased the *brahmottar* right from one Tarakanta, whose father got the same from the grandfather of one Ramgati, who had the *taluki* right. Ramgati sold his right in the *taluk* to one Raj Chandra. The tenant on the land was Bhagirath, who was the *ryot* of the non-transferable occupancy holding and had sold the same to the present defendant. The first Court decreed the suit. The Appellate Court dismissed it on the ground that no presumption can arise unless the Record of Rights is corroborated and that neither the plaintiff nor his vendor had ever been in possession within 12 years My submission is that Bhagirath's possession amounts to the possession of the plaintiff landlord. The question of limitation, therefore, does not arise. The first question is as to plaintiff's title. The learned Judge ought not to have lightly discarded the entry in the Record of Rights. He had decided the case entirely on an erroneous view of the law. The Record of Rights unless rebutted would be presumed to be correct.

Babu *Jatindra Mohan Chowdhury*, for the Respondents, was not called upon to reply.

JUDGMENT.—The plaintiff brought the suit out of which this appeal arises for declaration of his *debutter* title to and for *khas* possession of certain land. His claim was principally based on an entry in the Record of Rights. The first Court held that the presumption arising from that entry had not been rebutted and decreed the suit. The lower Appellate Court on appeal by the defendants held in effect that the presumption had been rebutted and dismissed the suit. The arguments in this appeal are based on an unfortunate remark in the judgment of the Additional Judge. He says "I consider that the Record of Rights requires good corroboration before any presumption can be said to arise therefrom." That is not a correct statement of law. If the law provides that the presumption arises under certain circumstances, that presumption must arise independently of whether there is any corroboration or not. But reading the judgment as a whole, it is clear that the learned Judge considered the Record of Rights as a piece of evidence and considered the rebutting evidence and held on consideration of the whole that the plaintiff had failed to prove his case. The case solely depends on the amount of weight to be attached to the rebutting evidence in the case and I cannot say that the lower Appellate Court was wrong in law in holding that inspite of the entry in the Record of Rights in the plaintiff's favour his case would fail.

It is further argued that the finding of the lower Appellate Court on the question of limitation is wrong since the possession of the tenant, Bhagirath, must be held to be the possession of his landlord, the plaintiff, but unless we rely on the Record of Rights, it has not been proved that Bhagirath was the plaintiff's tenant. In fact this point really depends on the same consideration as the first point, that is, whether the presumption arising from the Record of Rights has or has not been rebutted.

The appeal fails and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 53 OF 1919.

February 25, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

RAMNARAYAN AMARCHAND AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *ss.* 235 239—*Joinder of charges—Preparation of false balance-sheets on two different occasions, whether same transaction.*

Accused, who were the Agents, Secretaries and Treasurers of a Company, were convicted upon charges of (1) cheating and criminal misappropriation in relation to the balance-sheet of the Company for 1912, inasmuch as in that sheet a profit was shown, which they had taken, whereas the Company had not earned a profit, and (2) wilfully making a false balance-sheet of the Company for 1913. The accused were tried jointly on five charges, four of which related to the balance-sheet of 1912 and one to the balance-sheet of 1913. In the trial Court it was objected on behalf of the accused that there could not be a joint trial of the charges relating to the two balance-sheets, but the objection was disallowed on the ground that the offences relating to these balance-sheets formed part of the same transaction On appeal to the High Court:

Held, that the trial was illegal and the convictions could not be maintained. The different acts attributed to the accused in respect of the two balance-sheets did not form part of the same transaction within the meaning of sections 235 and 239 of the Criminal Procedure Code, and the joinder of the charges was contrary to the provisions of the Code. [p. 482, col. 1; p. 484, col. 2; p. 485, col. 1.]

Criminal appeal from convictions and sentences passed by the First Class Magistrate, Poona.

Mr. *Coyajee* (with him Mr. *G. N. Thakor*), for Accused No. 1.

Mr. *Velinkar* (with him Mr. *L. J. Apte*), for Accused No. 2.

Mr. *Strangman* (Advocate-General) and Mr. *Rangnekar* (with him Mr. *S. S. Patkar*, Government Pleader), for the Crown.

JUDGMENT.

HEATON, J.—This is an appeal by two persons who were convicted by the First Class Magistrate of Poona. It was transferred by this Court for hearing from the Court of the Sessions Judge of Poona to this Court.

The case relates to a Company which for brevity's sake is called the Poona Mill. It had been working as a mill from about the year 1894 with not very fortunate results, though it survived until 1915, in which year the Company went into liquidation and has since been wound up. The accused were for a good many years the Agents, Secretaries and Treasurers of the Company, and it is in relation to the balance-sheets for the years 1912 and 1913 that criminal accusations have been made against them. I need not go into details further than this: the charges in relation to the balance-sheet for 1912 were based on the allegation that in that year the mill had not by its working earned a profit, but that a profit was shown in the balance-sheet and that in so doing and in taking the profit declared, the accused, who, it is said, were really responsible for the preparation of the balance-sheet, committed the offences of cheating and criminal misappropriation. When the balance-sheet for 1913 took its final shape which was not until June 1914, the new Companies Act had come into operation, and under that Act in virtue of section 282 it is a criminal offence to wilfully make a false statement in a balance-sheet. No charge under this section was possible in relation to the balance-sheet for 1912, but this was the charge made in regard to the balance-sheet for 1913. The trial and the appeal had a somewhat unfortunate course. At the trial itself a very large mass of evidence was recorded and a large number of details were minutely inquired into. The Magistrate has dealt with this mass of evidence and with these details in a lucid way, but it does seem to us that much of the evidence and many of the details might have been spared had there been a more painstaking and intelligent inquiry into the affair before it was brought into the Magistrate's Court. As the result of the trial before the Magistrate which, considering the mass of evidence he had to deal with, was not unduly prolonged, the accused were convicted of all the charges. After the appeal was transferred to this Court there was a most unfortunate delay due to the preparation of translations of the many papers. We are not concerned with the cause of that delay at the moment. But it has attracted our notice and I certainly do profoundly regret that such a

delay should have occurred in the disposal of a criminal appeal in this Court.

When charges were framed in the Magistrate's Court, exception was taken to them on behalf of the accused. It was urged that there could not be a joint trial of the charges relating to the balance-sheet of 1912 with the charge relating to the balance sheet of 1913. It was argued for the prosecution, as we think most mistakenly, that the joint trial could proceed, because the offences relating to these balance-sheets could be regarded as parts of the same transaction. We think not, and the result is that the trial is illegal and the conviction cannot be upheld.

Before saying why we think this, I must remark that I think where prosecutions of this kind are conducted, where you are dealing with complicated and extensive matters, it is most important that the prosecution should not urge the joint trial of matters as to the joint trial of which there could be any doubt. It does not in the long run save time or trouble. And where there are several matters in contest, if the prosecution will select that on which they have the best case, they will undoubtedly to my thinking in the long run save time and further the ends of justice. Now here there were jointly tried matters relating to two totally distinct affairs, one being the balance sheet for the year 1912, the other the balance sheet for the year 1913. It is said that both of them were prepared in pursuance of a policy of deception, that the Company was really insolvent as early as the year 1910 and that the subsequent balance-sheets were prepared falsely with the deliberate purpose of concealing this practical insolvency; and it is said that because this was so, the preparation of these two balance-sheets for successive years was in reality but one transaction. The word 'transaction' used in the Criminal Procedure Code is not defined. Its meaning has frequently been illustrated by cases which are in the books, but in the long run we have to deal with every case that arises on its own facts. Knowing the general idea of the words 'the same transaction', we have to determine whether these words do or do not apply to the particular facts of a particular case. Here it seems to me that to apply the words 'the same transaction' to these two separate proceedings is to confuse the meaning of those words with the idea of things that are done in pursuance of a conspiracy. From the prosecution point of view it is perfectly correct to say that both these balance-sheets were prepared in pursuance of a conspiracy. One only has to think over the matter, a little carefully, however, to see that this idea of a conspiracy covers a very great deal that cannot be included in the idea of 'the same transaction.' If we were to take those words as covering a case of this kind, it would lead us to treat the same acts of misconduct or fraud, however often repeated, as constituting the same transaction, if there was the same general purpose underlying the repeated acts. But something far more definite than that is required, before separate proceedings can be brought within the meaning of the words 'the same transaction'. I cannot, I confess, think of any way of describing the preparation of these two balance sheets so as to bring them within the true idea underlying the words 'the same transaction.' I regard the preparation of these two balance-sheets as entirely separated occurrences. The balance-sheet for the year 1912 was prepared from the accounts of that year. It related to the affairs of that year and had for its purpose the presentment, truly or falsely, of the condition of the Company as the Agents wished it to appear in that year. Similarly with the balance sheet of 1913. The two affairs seem to me to be quite as distinct as where you have a band of dacoits co operating with the same general purpose of plunder, who commit several dacoities at different places and at different times. I never heard it suggested that occurrences of that kind should be regarded as forming parts of one transaction, though three of such cases might be tried together on other grounds. Therefore, it seems to me that the joinder of these charges was against the law, that, therefore, there has not been a proper trial and that the appellants must be acquitted and discharged.

We then have to consider what is to follow. For my part I think it better that the proceedings should end here and now, and that they should not be revived. I think so, amongst others, for these reasons.

It is now an old story. The Company has been wound up and has come to an end. The appellants have been subjected to a trial of considerable length and to a very long period of suspense between the trial and the hearing of the appeal, and they must have been put to very serious expense in connection with legal charges. That being so, it seems to me that it would be oppressive to have them tried over again unless this were a case of a very flagrant type.

As regards the charge for the year 1912, after hearing what has been said on behalf of the defence and giving close attention to the evidence, it seems to me doubtful whether the conviction would be sustained. When we came to ask the Advocate General, who appears for the prosecution, whether he would elect, if further proceedings were taken, to go on with that charge or with the one relating to the year 1913, he said that he would go on with the latter charge, that is for the year 1913. So what we are concerned with now is the broad general facts relating to that charge. It is a charge under section 282 of the new Companies Act, which makes the preparation of a false balance-sheet in itself an offence. Prior to the enactment of that section the preparation of a false balance-sheet in itself was not an offence. That is a matter which may very properly be taken into consideration.

Then the evidence, the judgment of the Magistrate and, as I understand it, the theory of the prosecution do not so much suggest that we are dealing with fraudulent persons who have cheated their Directors or their share-holders, as with persons who have, it may be, presented the balance sheet with much concealed that ought to have been displayed, but who have done this for the purpose of enabling the Company to survive as a working Company, to give it another chance of tiding over years of difficulty and eventually reaching years of security. And I think the case as a whole suggests that this really was so and that the object of the accused—the appellants—was not the enrichment of themselves, but the benefit and survival of the Company. Whether that be really the truth of the matter I cannot say, but it is a view of the case which presents itself very readily to the mind and which we are certainly justified in accepting as a working hypothesis for the time being.

Those being the conditions, then, I think that it would indeed be rather oppressive if we were to direct that further proceedings should go on. So I think we should express that opinion and that our order should be simply that the appellants be acquitted and discharged.

SHAH, J.—In view of the importance of the case I desire to state briefly the grounds upon which I agree with my learned brother.

The two appellants in this case were tried jointly on five charges by the First Class Magistrate of Poona; and after a prolonged trial, the learned Magistrate convicted them of all the offences charged and sentenced them to different terms of imprisonment.

The appellants preferred an appeal to the Court of Session at Poona, and that appeal has been transferred to this Court.

At the outset I desire to express my agreement with the remarks of my learned brother as to the delay that has occurred in the hearing of this appeal, though in a large measure it is attributable to the exceptionally heavy record, and to the circumstance that it is an appeal from the judgment of a First Class Magistrate in a warrant case and not an appeal from the judgment of a Sessions Court, as is usually the case.

After arguing the appeal on the merits as to the set of charges connected with the balance sheet of 1912, the Counsel for the appellants urged that the joinder of the charges in the present case was contrary to the provisions of the Criminal Procedure Code, and that the whole trial was illegal. We have heard the learned Advocate-General as to the joinder of the charges and the legality of the trial and as to the order to be made in the event of the trial being found to be illegal. The first four charges against the two appellants framed by the trial Court relate to the balance-sheet for the year 1912, and the point of the charges is that the profit of Rs 35,179 for the year 1912 is shown in that balance-sheet dishonestly with a view to induce the Directors to recommend and the share-holders to sanction the declaration of a

dividend, when in fact there was no profit, and further that the two accused dishonestly received their respective dividends in connection with the shares held by them in this Company and the commission which would be due to them under the Articles of Association on the profits shown in that balance-sheet. That is the substance of the first four charges. It is not suggested that the joint trial of the accused in respect of these four charges would be open to any objection, if there were no further independent charge.

The further charge relates to the making of a false balance-sheet for the year 1913, which is an offence punishable under section 282 of the Indian Companies Act VII of 1913, the balance sheet having been submitted to the Directors and share-holders after the 1st April 1914 when the Act came into force. The joint trial of the two accused in respect of all these charges can be justified only if the acts attributed to the appellants can be reasonably held to form part of the same transaction. Under sections 235 and 239 of the Code of Criminal Procedure, the charges that could be tried must arise out of acts committed in the same transaction or so connected together as to form the same transaction. I do not think that section 234 of the Code has any application to the facts of this case. The trial Court has allowed the joinder of charges against the accused in spite of the objection raised on their behalf and the question now is whether this joinder is legal.

In my opinion the acts attributed to the accused in respect of the balance-sheet of 1912 are quite distinct and separate from the acts attributed to them in respect of the balance-sheet of 1913, and according to no possible meaning of the word 'transaction,' can it be said that these acts form part of the same transaction. The acts are quite separated in point of time; there is, in my opinion, no continuity of action. The acts attributed to the accused in respect of the balance sheet of 1912 relate to the declaration of profits for the year in the balance-sheet, while the acts attributed to the accused in respect of the balance-sheet of 1913 relate to various items, detailed in the charge, which have practically no connection with the profits of the year 1912 and the declaration of the dividend and the charging of the commission in respect of that year. The inquiry relating to the question of profits in the year 1912 would be quite distinct and essentially different in its scope from the inquiry which would have to be made with reference to the acts attributed to the accused in respect of the balance-sheet of 1913. Lastly, it cannot be said that there was any object common to these two sets of acts. As to the first set of charges the accused are said to have shown the profits during the year 1912 falsely in order to earn their commission and the dividends on the shares. As to the other charge the object is said to be to conceal the true condition of the Company, in order to keep it going. Thus the objects are essentially different. The way in which the charge in respect of the balance sheet of 1913 has been explained by the learned Advocate-General with reference to the items of depreciation, reserve fund, and the unpaid dividend accounts illustrates to my mind clearly that the acts said to have been done with reference to the charge under section 282 of the Indian Companies Act are entirely distinct and have reference solely to the balance-sheet of 1913. It is true that the charge under section 282 of the Indian Companies Act as framed in the lower Court relates to many more items; and it may be that the general object of concealing the true condition of the Company was common to the preparation of the balance-sheets for various years, including the years 1912 and 1913. That in fact is the only ground upon which it is suggested that the several acts may be treated as constituting the same transaction. It is argued that during all the years of stress and difficulty the Agents of this Company tried to underestimate the losses and to overestimate the profits of the Company with a view to conceal the true state of the Company. Assuming that to be the general purpose underlying the preparation of these balance-sheets for many years, particularly the balance sheets for the years 1910 to 1913, I do not think that such a general purpose can afford any justification for treating the different acts attributed to the accused as forming part of the same transaction within

the meaning of sections 235 and 239 of the Code. Thus the joinder of the charges is clearly contrary to the provisions of the Code: and it follows that the whole trial is illegal.

The question then arises as to whether we should order a re trial of the accused. I am clearly of opinion that in the interests of justice no re-trial is needed and that it would be proper to allow the proceedings to terminate at this stage.

The prosecution are to a certain extent responsible for the joint trial on all these charges. The original complaint contained allegations covering all the charges, and I do not find anything in the proceedings to show that the prosecution at any time attempted to make it clear to the trial Court that the joinder of charges could not well be justified. On the contrary the trial proceeded in spite of the objection raised by the defence. Further the trial in this case has been much prolonged and, as the voluminous, needlessly voluminous, record of the case shows, undoubtedly very expensive to both the parties. Besides the circumstances connected with the charge also suggest that there should be no further trial. The learned Advocate-General has pressed for a re trial in respect of the charge under section 282 of the Indian Companies Act relating to the balance-sheet of 1913 and as he explained the charge, no doubt, the re-trial would be much more limited in its scope than the trial which proceeded on the charge as framed in the lower Court. The charge under section 282 of the Indian Companies Act as framed in the trial Court necessitated an inquiry into the accounts of the Company ranging over a period from 1894 to 1913. It must be remembered that the acts attributed to the accused substantially relate to the year prior to the coming into force of the new Companies Act, and that the balance-sheet is to a certain extent the result of the accumulated errors of the past years arising out of a faulty method of keeping accounts and not the result of any dishonesty on the part of the accused. Treating the charge under section 282 of the Indian Companies Act as limited in the manner now suggested on behalf of the prosecution, I do not think that the interests of justice demand that there should be any further trial on that charge.

As regards the set of charges relating to the balance-sheet of 1912 the learned Advocate-General has fairly conceded that there need be no re-trial. I do not think that any useful purpose could be served by ordering any further proceedings in connection with those charges.

On these grounds I agree with the order proposed by my learned brother.

Accused acquitted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 127 OF 1919.

March 27, 1919.

Present:—Mr. Justice Richardson and Justice Sir Asutosh Chaudhuri, KT.

AFIRUDDI CHAKDAR AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 297, 298—Jury trial—Charge to Jury—Judge, duty of—Criminal trial—Defences, alternative, whether permissible.

In delivering a charge to a Jury care should be taken to place the defence set up fairly before the Jury and to ensure that the Jury appreciate the issue or issues which they have to try. The charge should include the usual warning as to the duty of the Jury to the prosecution on the one hand and to the prisoner on the other. [p. 486, col. 2.]

General rules as to the form a charge should take indicated. [p. 486, col. 2.]

Where the Jury was not made fully acquainted with the nature of the case for the prosecution and the nature of the case for the defence:

Held, that the mode in which the case was placed before the Jury was defective and that the convictions of the accused in accordance with the verdict of the Jury and the sentences passed upon them should be set aside and the case re-tried by another Judge. [p. 488, col. 1; p. 489, col. 1.]

It is not desirable that a Judge should resort to the services of the Public Prosecutor for the purpose of delivering his charge to the Jury. [p. 488, col. 2.]

It is open to an accused person to adopt a defence in the alternative, such as that he was not present at the occurrence and did not strike the complainant but that if he did strike him he acted in self-defence. [p. 488, col. 1.]

Appeal against the order of the Sessions Judge, Faridpur, dated the 8th February 1919.

FACTS appear from the judgment.

Mr. *K. N. Chaudhuri* (with him Moulvi *A. K. Fazlul Huq* and Babu *Atindra Nath Mukerjee*), for the Appellants.—The whole case teems with misdirections. The case is a very complicated one, with disputes as regards possession of the lands in question. The learned Judge has dealt very summarily with the case in his charge to the Jury. Nobody can understand what the case is for the prosecution from his perusal of the charge. The charge must always be clear and lucid and place the case for the prosecution and the case for the defence clearly before the Jury to enable them to judge facts. The whole thing depends upon the question of possession of the lands on which the corn was grown and cut, but your Lordships will see from the charge the perfunctory way in which he deals with this every important question. The charge cannot be said to help the Jury in any way, which it ought to. The statement of the common object is an essential element in a charge under section 149, Indian Penal Code. The learned Judge has not fully dealt with the matter. Then again the learned Judge's statement of law with regard to the offence under section 324, Indian Penal Code, is defective. That there could be the plea of private defence in the alternative should have been emphasised by the learned Judge in his charge. And lastly I complain against the learned Judge's taking the assistance of the Public Prosecutor and an officer of the Court in preparing or explaining the charge.

Babu *Manmatha Nath Mukerji*, for Mr. *Orr*, for the Crown.—It cannot be denied that the decision of the case involves a nice question of possession of the lands in dispute at the time of the occurrence, and the learned Judge's charge is defective in that respect as also in respect of the statement of the law as regards section 324, Indian Penal Code. But I submit that these are not misdirections so as to vitiate the charge. The whole evidence was there before the Jury and they brought in a verdict of guilty.

Mr. *K. N. Chaudhuri* was not called upon to reply.

Babu *Prosanta Bhusan Gupta*, for the Complainants.

JUDGMENT.

RICHARDSON, J.—The nine appellants were tried by the Sessions Judge of Faridpur and a Jury. The Jury found them all guilty under section 148 of the Indian Penal Code, and also under section 304 read with section 149. They further found four of the appellants guilty of substantive offences under section 324. The Sessions Judge accepted the verdict of the Jury and sentenced the appellants to various terms of imprisonment. The appeal is based on the ground of misdirection in the charge delivered by the learned Sessions Judge to the Jury.

The first part of the charge deals at some little length with the difference between stories which are wholly true, stories which are partly true and partly false and stories which are wholly false. No exception can be taken to this part of the charge but it may be doubtful whether it gave the Jury very much assistance.

We have no desire in this connection to lay down any precise rule as to the form which a charge should take. The form and contents of the charge will vary, of course, with the circumstances of individual cases, with the nature of the evidence the Judge has to deal with and the mode in which the case for the prosecution and the case for the defence are conducted. Generally speaking, however, it is usual to begin a charge by setting out the offence or offences which the prisoner is charged with having committed and explaining the law relating to those offences. Then the case for the prosecution and the case for the defence may be referred to, and such comments made on the evidence adduced on either side as the Sessions Judge may think it desirable or useful to the Jury, to make. Care should be taken to place the defence set up fairly before the Jury and to ensure that the Jury appreciate the issue or issues which they have to try. The charge should, of course, include the usual warning as to the duty of the Jury to the prosecution on the one hand and to the prisoner on the other. Having said so much, I repeat that I by no means imply that a charge must necessarily take one form rather than another. We should certainly not have interfered in this case merely on account of the order followed by the learned Judge in the remarks which he addressed to the Jury.

A great part of the difficulty which we have experienced in this case arises from the fact that there is no clear statement in the charge as to the case for the prosecution. In that respect the learned Vakil who has appeared for the Crown has rendered us, as he usually does, great assistance The case for the prosecution as he stated it is as follows:—

There are 3 plots of land bearing numbers 340, 341 and 342. They lie contiguous to one another. In the settlement of the year 1315, plot No. 340 was recorded in the name of Julmat, the father of the accused Lokman, plot No. 341 in the name of the complainant Umarali and his brother, and plot No 342 in the name of Afiraddi, another of the accused. The plot in the complainant's name lies between the other two plots Apparently nothing happened till 1918, when a dispute arose between the complainant's party and the party of the accused as to some of the lands covered by plot No. 341. The complainant's party informed the Sub Divisional Magistrate that there was a dispute and applied for the demarcation of the land. An Amin was sent out and he apparently found that the 3 plots had been sub-divided and that several parties were in possession. He made his report to that effect. Subsequently the complainant's party complained that the party of the accused had committed mischief on land in possession of the complainant. The accused also went before the Magistrate and moved him to take proceedings under section 107 of the Code of Criminal Procedure. An enquiry was made and proceedings were in fact initiated under section 145 of the Code. That was the state of things at the time of the occurrence which is the subject-matter of this case. Undoubtedly there was an encounter between the two parties. On the side of the complainant's party one man was killed and 4 men were seriously injured. The prosecution alleged that on Sunday, the 21st July, the complainant and his party had cut some jute on land comprised in plot No. 341. The accused came to know of that and went about collecting *lathials*. On Monday the complainant's party cut more jute and the accused came to the place in a body, consisting of men variously armed with *lathis*, spears and so forth. Those men fell upon the complainant's party with the result which I have mentioned. Upon the case so stated, the question of possession undoubtedly arises, and one objection which, I think, may be properly made to this charge is that the learned Sessions Judge has not dealt clearly with that question. What he said to the Jury is this:—"In order to decide this case if it is necessary to see who grew that crop you will consider that evidence, but you are to remember that the actual question you are sitting here to decide is not 'who grew this crop' but did these accused do the things alleged against them in the charges." As to that it may be that there is no actual error of law in the passage quoted. But as it stands, what is said is neither lucid nor very helpful.

As the learned Vakil for the Crown has put the case before us to day, he has conceded that the evidence on this record on the question who was in actual possession of the land at or about the time of the occurrence is so conflicting that it would be difficult for the Jury to come to any satisfactory conclusion on the point. Then he says that the question of possession does not very much matter, because, if the case for the prosecution is believed that the principal accused collected *lathials*, went to the land, and assaulted the complainant and his party, they committed the offence of rioting inasmuch as they had ample time to obtain the assistance of the authorities. It may be so but so far as I can see, that was not how the case was laid before the Jury. It is very doubtful whether the Jury were so instructed that they were able to appreciate the considerations which arose in such a state of things and the defence which seems to have been made.

It is perfectly true that in the statements which they made when examined by the Court the appellants simply denied that they had gone to the land or had had anything to do with any riot. They were, however, represented by a learned Pleader at the trial and the cross-examination of the witnesses shows that at any rate one of the defences set up was that the accused were acting in the exercise of the right of private defence of property.

The guilt of the accused had also to be considered with reference to the common object alleged in the charges.

All we need say now, however, is that it does not appear to us that the Jury were made fully acquainted with the nature of the case for the prosecution and the nature of the case for the defence.

What I have said relates to the charge under section 148 and to the other charges in which section 149 of the Code is mentioned.

There remains the charge against some of the accused under section 324. As to that charge the Sessions Judge says this: "Certain persons are charged with causing certain wounds. If you find they gave those wounds, they cannot plead right of private defence because they have not admitted giving those wounds."

It is conceded and very properly conceded by the learned Vakil for the Crown that those words, as they stand, do not correctly represent the law. The Judge was entitled to tell the Jury that when a prisoner is charged with wounding another, the burden of proving that the wound was inflicted in the exercise of the right of private defence lies on the prisoner The Judge might have gone further and said that a plea in this form, "I was not present and did not strike the complainant but if I did strike him, I acted in self-defence," is not very convincing. Nevertheless it is open to a prisoner to adopt such a defence in the alternative, and if he cannot satisfy the Jury that he did not strike the complainant but can satisfy them, either by the cross-examination of the complainant's witnesses or by adducing evidence on his own behalf, that in striking the complainant he acted in self-defence, then he is entitled to an acquittal.

In our opinion the mode in which this case was placed before the Jury is defective and the conviction of the appellants and the sentences passed on them must be set aside. We consider that a fresh trial should be held and it seems advisable that the trial should be conducted by another Judge who will come to the case with a fresh mind. We accordingly direct that the case be re-tried by the Additional Sessions Judge of Faridpur.

I cannot leave this case without making one or two observations as to comments made at the Bar on the mode in which the Sessions Judge prepared and delivered his charge. He tells us that he wrote one part of it in English and obtained a Bengali translation of that part from an officer of his Court. Another part was also written in English and a translation of that was obtained from the Public Prosecutor. If the charge was to be delivered in Bengali and the Sessions Judge was not himself sufficiently acquainted with that language to prepare the charge in Bengali himself, it was, in my opinion, open to him to obtain such assistance as he required from the officer of his Court. It may be suggested, however, to the learned Sessions Judge that it is not desirable that he should have resort to the services of the Public Prosecutor for this purpose. The remainder of the charge, the Judge tells us, was delivered in English and was translated sentence by sentence to the Jury by an officer of his Court. If the Sessions Judge found a difficulty in addressing the Jury in Bengali there was, as it seems to me, no alternative open to him except to employ an interpreter, and no valid exception to the proceedings can be taken on this ground.

CHAUDHURI, J.—I entirely agree. I should like to add that it was difficult for me to follow the case from the Judge's charge. I did not understand the case for the prosecution until the learned Vakil for the Crown placed it before us. The Jury may have found it more difficult to follow it, as the Judge's charge was delivered through interpreters. No doubt the Jury are responsible for their verdict and are the sole judges of fact-; but it is to be remembered that the Judge's charge is not only for the purpose of stating the law and explaining it to them, but also of helping the Jury to find facts. He has to advise the Jury as to the logical bearing of the evidence admitted upon the matters to be found by them. He ought to do that to limit the chances of error of the Jury. It is a privilege granted to Judges of our Courts and a duty cast upon them. The learned Judge says that he "placed the evidence of the witnesses before the Jury reminding them of the

nature of the offence and dealing with some of the principal points." That hardly helps us to understand the manner in which he did so. In a case of this character it is absolutely essential that the principal points should be clearly placed before the Jury and it should appear from the Judge's charge that he did so. The law requires that in rioting cases, the common object should be clearly stated in the charge which the accused have to meet. He should explain it in his charge. Having regard to the large number of persons and plots of lands concerned in this case, the different kinds of title which were apparently set up and the question of possession involved, the case for the prosecution and the defence should have been set out in the Judge's charge in greater detail, to enable us to judge whether the points requiring consideration had been clearly put before the Jury. Two points strike us as very important, namely, the point of time when the accused knew that their crops were going to be cut, and whether they could have sought the assistance of the Police in time to prevent the alleged aggression, but there is hardly any indication in the charge that these points were put before the Jury. It is no use referring to colour charts in dealing with evidence. They may confuse the Jury. I do not doubt that the learned Judge tried his very best to put the matters he considered necessary before the Jury, but judging from the charge alone we consider it unsatisfactory. It is inconvenient to have the charge delivered through interpreters. It may be worse than that. But upon the explanation given by the learned Judge that he corrected and supervised the interpretation, I do not think the manner in which the charge was delivered in this case is open to serious objection. But for the reasons above given I agree in directing that a re-trial be held by the Additional Sessions Judge of Faridpur.

Re-trial ordered.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 383 OF 1918.

January 24, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

BEHRAMSHA RATANJI AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Petroleum Act (VIII of 1899), s. 15A—Storing petrol for person not licensed to deal in petrol—Offence—Abetment.

The accused *A* and *B* were the manager and servant of a firm holding a license for storing petrol, who undertook to receive and store petrol for *C* (also an accused in the trial Court). Several drums of petrol were consigned to the firm from various places by *C* and were received and stored by *A* and *B*. *C* had no license to deal in petrol and he was convicted of importing, transporting and possessing petrol without a license. *A* and *B* were convicted for having abetted him. *C* appealed to the Sessions Judge and *A* and *B* moved the High Court:

Held, that in storing the petrol the firm in no way infringed the law, as they were under no obligation to inquire whether or not *C* had received the petrol in a licensed or unlicensed way, and that, therefore, *A* and *B* had committed no offence [p. 409, cols. 1 & 2]

Criminal application for revision from convictions and sentences passed by the City Magistrate, First Class, Ahmedabad.

Mr. *H. V. Divatia*, for Accused Nos. 2 and 3.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—We are much obliged to the Government Pleader in this case for the pains he has taken to make us acquainted with the prosecution view of the matter. He was not originally instructed to appear, but the Magistrate's judgment presented so much difficulty to us that we asked him to look into the papers of the case and put before us the case for the prosecution.

That case appears to be this: Accused No. 1, who is a trader in Ahmedabad, finding that the price of petrol had risen in February 1918 and being anxious to make a profit out of this rise in price, took to dealing in petrol. He had himself no license either for the import or transport or possession of petrol. So he entered into an arrangement with Cama Brothers, of whom accused No. 2 is a representative, that they were to receive for him and

store for him the petrol that was sent to Ahmedabad to his name. Thereafter he sold some petrol of his that was in the custody or possession of Cama Brothers. He also imported from Rajkot eleven drums which were sent covered by a railway receipt in the name of accused No. 1's firm which was taken possession of in Ahmedabad and stored by Cama Brothers. He also transported in a similar way a quantity of petrol from Ranpur to Ahmedabad. It is quite immaterial for the purposes of the point which we have to consider to trouble either about the quantities or the dates. It suffices for our purpose to assume that the transport and import by accused No. 1 was contrary to the provisions of the Petroleum Act.

All the three accused were tried by the First Class Magistrate in Ahmedabad, accused No. 1 for the commission of the offences of transporting, importing and possessing without a license and accused Nos. 2 and 3 for abetting him in so doing. They were all convicted. The sentence inflicted on accused No. 1 was an appealable sentence. He has appealed and his appeal is still pending before the Sessions Judge of Ahmedabad. The sentences inflicted on accused Nos. 2 and 3 were not appealable. So they have applied to us in our revisional capacity to set aside the sentences.

We assume for the purposes of this case that accused No. 1 has been rightly convicted, and we further assume that accused Nos. 2 and 3 have done all the physical things which the prosecution allege that they have done. The case turns entirely on what was their intention. It would be a perfectly legitimate thing for Cama Brothers or any one else with a proper license to store petrol which had been sent to Ahmedabad in the name of and for the accused No. 1. Cama Brothers had a proper license and in storing petrol they were not in any way whatever breaking the law so long as they did not exceed the quantity which they were licensed to store or possess. It is not alleged against them that they did exceed this quantity. They were under no obligation to inquire whether accused No. 1 had received the petrol in a licensed or an unlicensed way. That was no business of theirs any more than it was the business of the Railway Company, when they carried the petrol, as they did in this case, to inquire whether the person transporting it had or had not the necessary license. On the facts alleged, moreover, it is quite clear to my thinking that we must assume that Cama Brothers were ignorant that the law was being deliberately broken and we must continue so to assume, unless definite circumstances are established from which it must be reasonably inferred that Cama Brothers were in collusion with Parikh Brothers, *i e.*, the firm of accused No. 1; or at least that they knew that in storing accused No. 1's petrol they were helping him to deal in petrol which he had obtained by illegal means, that is, by importing or transporting without a license. The only particular reason which is given for inferring that Cama Brothers were colluding with Parikh Brothers and did know that the petrol was obtained by methods deliberately contrary to the provisions of the law, is that they have not given an entirely frank account of their part in the affair. It may be that they have not, though on the Magistrate's judgment I am not sure that even that can be said. Unfortunately when matters come before a Magistrate, it very commonly happens that people do not give a frank explanation of the circumstances although the true circumstances may be, as far as they are concerned, perfectly innocent. So it seems to me that there are not any circumstances proved which do definitely suggest that Cama Brothers were acting in collusion with accused No. 1 for the purpose of evading the law. Indeed, if I had to conjecture one way or the other, I should be disposed to conjecture that they were not conscious that the law was being intentionally evaded. I think the Magistrate has in some way been misled by the idea that there was something fraudulent in the case. Now there was nothing at all which was fraudulent in the ordinary sense of that word. Accused No. 1 may have been guilty of importing and transporting petroleum without a license and he may have been very properly convicted. (As to that we do not express any opinion whatever.) But so far as the evidence discloses the circumstances, he did not act in any fraudulent

way. He acted perfectly openly. Not so much as if trying to evade the law clandestinely but as if openly defying the law. For he had the petroleum sent by railway, covered by a railway receipt in his own name, so that everything which it was necessary to discover as against him was made patent. If once this idea of fraud, of something clandestine or deceitful, is eliminated, and I think it must be eliminated in this case, there really remains no reason that I can see for supposing that Cama Brothers were acting in anything but a perfectly straightforward, natural and businesslike way. I do not wish to be understood to suppose that because a man has acted openly and not fraudulently, he may not have acted contrary to the law. I am assuming that accused No. 1 did act contrary to the law and that he has been rightly convicted.

The case is, if anything, even weaker on the point of possession than it is in the matter of transport and import. It is said that accused No. 1 was for the purpose of the Act in possession of the petroleum which was actually on the premises of and under the control of Cama Brothers, who have a license. I will not say anything as to whether in such circumstances accused No. 1 could be rightly convicted of possession, because that is a point for the Sessions Judge of Ahmedabad to decide. But it seems to me that by no stretch of ingenuity can Cama Brothers be said to have abetted accused No. 1 in being in possession against the law of this petroleum unless, of course, it were clearly established that there was a conspiracy between Cama Brothers and accused No. 1 for the purpose of evading the law. As I have already explained, such a conspiracy is not suggested by the evidence and circumstances of the case. Even if it were, I should still be very doubtful whether Cama Brothers could be said to abet the unlawful possession by accused No 1 of petrol.

I have dealt with the case at quite considerable length, because it seems to me to be a case of some importance. I think the Magistrate has so used the law, in this case, as to show that there is a very real danger that perfectly legitimate business operations may be obstructed and rendered difficult by applying a law like the Petroleum Act with a stringency that was never intended. I think that when assumptions are made, in what appear to be ordinary business transactions, that there is an intention to defeat the law, those assumptions need to be based on something substantial. If too readily made, they will have the effect of impeding perfectly legitimate business.

I think, therefore, that in the case of these two applicants, Behramsha Ratanji accused No 2 and Vanmali Devchand accused No. 3, the convictions must be set aside and the fines, if paid, refunded.

SHAH, J.—I agree.

Convictions set aside.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 36 OF 1919.

June 20, 1919.

Present:—Mr Justice Atkinson.

EMPEROR - PETITIONER

versus

NAND KISHORE PRASAD—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403—Acquittal on charge of cheating—Trial on charge of falsification of accounts on same record, legality of—Penal Code (Act XLV of 1860), ss. 420, 477A.

Two persons *AR.* and *NK.* were convicted, the former under section 420 and the latter under sections 420/109 of the Penal Code. They appealed, and *N. K.* was acquitted. *AR.* moved the High Court in revision, which held that the conviction should have been under section 477A of the Penal Code and directed the Magistrate to commit the case to the Court of Session under that section The Magistrate issued a notice to both *AR* and *NK.* requiring their attendance before him to show cause why they should not be committed to the Court of Session. *NK.* protested, relying on the fact that he had been acquitted by the Sessions Judge and that until such acquittal was set aside, the Magistrate could not commit him again, on the record of the proceedings as they then stood, to take his trial for an offence under section 477A of the Penal Code. The Magistrate, however, expressed his intention of committing both accused to the Sessions. *NK.* then moved the Sessions Judge to set aside the Magistrate's order in so far as it affected his commitment. The Sessions Judge referred the

case to the High Court for directions as to the propriety of the Magistrate's order:

Held, that *NK.* could not, so long as his acquittal under section 420 of the Penal Code stood, be properly tried again, upon the record as it then stood, for an offence under section 477 and that if the Crown wished to proceed against him, they must do so in a proper manner and by a separate proceeding, and not upon the original record. [p. 492, cols. 1 & 2.]

Criminal reference by the Sessions Judge, Patna, dated the 24/26th May 1919.

FACTS appear from the following reference made by the Sessions Judge of Patna:—

"Under section 438, Criminal Procedure Code, I herewith transmit the record of the marginally noted* case to be laid before the High Court with the following report:—

"(1) *A brief analysis of the case.*

"Two persons Abdul Rauf and the petitioner Nand Kishore Prasad were charged before the Deputy Magistrate of Bankipur, the first under section 420, Indian Penal Code, and the second under section 420/109, Indian Penal Code, with cheating and abetment of cheating. They were convicted by the Deputy Magistrate, but on appeal, while the conviction of Abdul Rauf was upheld, the conviction of Nand Kishore Prasad was set aside on the merits, the Appellate Court holding that the case against him was not more than one of strong suspicion. Abdul Rauf then moved the High Court in revision questioning the jurisdiction of the Deputy Magistrate to try the case, and the High Court held that the real offences committed in this case were under section 477A, Indian Penal Code, and not within the cognizance of the Court of the Deputy Magistrate. The Hon'ble Judges, therefore, set aside the conviction and sentence and directed the Deputy Magistrate to commit the case to the Court of Session. A notice was thereupon served by the Deputy Magistrate on Nand Kishore Prasad as well as upon Abdul Rauf requiring him to appear on 1st April 1919. The petitioner protested and prayed to be discharged, but the Deputy Magistrate ordered that the petitioner Nand Kishore Prasad will have to appear as an accused in the case under section 477A.

"2. *The order recommended for revision.*

"The order requiring the petitioner to appear before the Magistrate as an accused under section 477A.

"3. *The grounds upon which in the opinion of this Court the order should be reversed.*

"The petitioner was tried on certain charges under section 420 read with section 109, which *prima facie* the Deputy Magistrate of Bankipur was competent to try. He was acquitted on the merits by the Court of Appeal and the case against him ended there. That acquittal still stands and there is nothing on the face of the record to show that the trial of Nand Kishore Prasad was without jurisdiction. The order of the High Court related only to the case against Abdul Rauf and it cannot be inferred from the mere fact that the trial of Abdul Rauf was held to be incompetent that the trial of Nand Kishore Prasad was incompetent also. The order of the High Court cannot be read as affecting Nand Kishore Prasad, who was not summoned to appear before that Court. The order was passed under section 439, Criminal Procedure Code, and sub-section 2 of that section lays down that no order under this section shall be made to the prejudice of the accused until he has had an opportunity of being heard either personally or by Pleader in his own defence. It is obvious, therefore, that the order passed by the High Court did not extend to the case of Nand Kishore Prasad nor has his acquittal been affected."

The order of the High Court (Mr. Justice Roe and Mr. Justice Jwala Prasad), dated 3rd March 1919, referred to in this reference was as follows:—

ROE, J.—It seems to us clear that the real offences committed in this case were under section 477A, Indian Penal Code, not within the cognizance of the Court of the Deputy Magistrate notwithstanding his attempt to minimise them. We set aside the conviction and sentence and direct the Deputy Magistrate to commit the case to the Court of Session. It will be open to the Sessions Judge either to try the case himself or to make it over to the Assistant Sessions Judge.

We invite the attention of the Court which will try these cases to the fact that there is considerable authority for the proposition that where the falsifying of an account has resulted in the commission of

*Emperor v. Nand Kishore Prasad.

the minor offence of cheating, not more than one charge should be investigated at one trial.

The accused will remain on bail to the satisfaction of the District Magistrate pending the decision of the case in the Sessions Court.

JWALA PRASAD, J.—I agree.

The Government Advocate, for the Crown.

Messrs. *Manuk* and *Nageshwar Prasad Sahay*, for the Opposite Party.

JUDGMENT.—This criminal revision comes before me upon a reference made by the learned Sessions Judge of Patna.

It would appear that two persons were charged with an offence under section 420 of the Indian Penal Code. Abdul Rauf was the principal offender; and Nand Kishore was charged with being an abettor, and with having committed an offence under section 420 read with section 109 of the Indian Penal Code. The charge preferred under section 420 was cognizable and triable by the Deputy Magistrate.

The Deputy Magistrate convicted both the accused; and from this conviction there was an appeal to the learned Sessions Judge of Patna.

Upon the hearing of the appeal the learned Judge affirmed the conviction as against Abdul Rauf, and acquitted his co-accused Nand Kishore, holding that there was no evidence before him upon which he could properly hold that Nand Kishore aided and abetted Abdul Rauf in committing the act of cheating that was alleged against him by the prosecution.

Abdul Rauf maintained assiduously before the learned Sessions Judge that the case against him was one not properly triable under section 420 of the Indian Penal Code, but that he should have been charged and tried for an offence under section 477A, Indian Penal Code.

The prosecution contended that the charge preferred against Abdul Rauf under section 420 was correct in form and should be maintained.

The Crown took no steps whatsoever to impeach the validity of the acquittal of Nand Kishore pronounced by the learned Sessions Judge.

Abdul Rauf applied to the High Court against the order of conviction by the learned Sessions Judge of Patna, and contended that his conviction under section 420 of the Indian Penal Code was improper; and that he ought to have been convicted, having regard to the facts of the case preferred against him, of an offence under section 477A of the Indian Penal Code.

A Division Bench of this Court, presided over by Mr. Justice Roe and Mr. Justice Jwala Prasad, held that the contention of Abdul Rauf was correct; and accordingly they set aside the conviction of Abdul Rauf under section 420 of the Indian Penal Code, and directed that he should be committed to the Sessions for trial for an offence under section 477A, Indian Penal Code. Nand Kishore was not represented, nor did he appear on the hearing of the application in revision presented to the High Court by Abdul Rauf.

The original case against Abdul Rauf, owing to the order of the High Court, was returned to the Deputy Magistrate for commitment to the Sessions.

I should observe that the High Court's judgment and order is absolutely silent with regard to the acquittal of Nand Kishore. Nor did the High Court take any steps to summon Nand Kishore before it with a view of setting aside the acquittal which had been pronounced in his favour. I, therefore, take it that the High Court never had present to its mind the case of Nand Kishore.

Upon the record of the case being returned to the Deputy Magistrate for commitment, the Deputy Magistrate served notice upon Nand Kishore, dated the 1st April 1919, requiring him to show cause why he should not be committed for trial to the Sessions jointly with Abdul Rauf for an offence under section 477A of the Indian Penal Code. Nand Kishore filed a petition by way of cause, relying strongly on the fact that he had been acquitted by the learned Sessions Judge of the offence preferred against him under section 420, and that until such acquittal was set aside the Deputy Magistrate could not commit him again on the record of the proceedings as they then stood to take his trial for an offence under section 477 of the Indian Penal Code.

The Deputy Magistrate, judging from his order, dated the 15th of April 1919, which was passed after the petitioner's petition of cause was filed, was of opinion that he was bound, having regard to the order of the High

Court, to commit not only Abdul Rauf, but also Nand Kishore to the Sessions, to stand their trial for an offence under section 477A, without in any way, so far as Nand Kishore was concerned, hearing any additional evidence which would warrant the inference that he was guilty of an offence within the meaning of that section.

The learned Deputy Magistrate expresses his intention of committing both the accused to the Sessions to stand their trial for an offence under section 477A, Indian Penal Code, on the 15th of April 1919.

Thereupon Nand Kishore applied to the learned Sessions Judge to set aside the order of the learned Deputy Magistrate in so far as it affected his commitment for an offence under section 477A, Indian Penal Code.

The learned Judge felt, and I think rightly felt, that so long as the acquittal under section 420 of the Indian Penal Code stood as against Nand Kishore, he could not properly be tried again, upon the record as it then stood, charged with an offence under section 477, and accordingly the learned Judge referred the case to this Court for directions with regard to the propriety of the order passed by the Deputy Magistrate, dated the 15th April 1919.

I am satisfied that the Deputy Magistrate was wrong in holding that by virtue of the order made by the High Court he was bound to commit Abdul Rauf and Nand Kishore jointly for having committed an offence under section 477A of the Indian Penal Code.

It may or may not be open to the Crown to proceed against Nand Kishore for an offence under section 477A, Indian Penal Code, but if they do so they must do so in a proper manner and by a separate proceeding, and not upon the original record as it at present stands. The Government Advcoate virtually admits this contention.

Therefore, I intend to set aside the order of the learned Deputy Magistrate, in so far as it expresses an intention to commit Nand Kishore to the Sessions to be tried for an offence under section 477A read in conjunction with section 109 of the Indian Penal Code.

Various arguments have been addressed to me as to the right of the Crown to proceed against Nand Kishore independently of the order of this Court made upon the application of Abdul Rauf and notwithstanding his acquittal by the learned Sessions Judge. I do not intend to discuss or consider the arguments addressed to me by the learned Government Advocate. They are, in my opinion, immaterial for the purpose of determining the short point referred to me by the learned Sessions Judge of Patna. It will be sufficient to consider the elaborate arguments of the learned Government Advocate, should any point arise, at a later stage which may require more properly their consideration. But at present, I am satisfied that it was not the intention of the High Court, nor was it possible for the High Court, to direct a prosecution of Nand Kishore, having regard to the acquittal that had been pronounced in his favour, until at least the High Court had heard Nand Kishore in his own defence, and had satisfied itself that he ought to and should be prosecuted for an offence under section 477A, Indian Penal Code.

Accordingly I hold that the order of the learned Deputy Magistrate, Mr. Sircar, dated the 15th April 1919, *qua* Nand Kishore is improper, and that he has no right under the circumstances of this case to commit Nand Kishore for trial for an offence under section 477A of the Indian Penal Code.

Answer accordingly.

PATNA HIGH COURT.

CRIMINAL REVISION No. 154 OF 1919.

June 12, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

JADUBAR SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 147—Rioting—Common object—Evidence—Proof.

The alleged common object of an assembly which renders it unlawful must be established by evidence; it is not a matter that can be inferred.

GOVIND *v.* EMPEROR.

In the absence of a clear finding as to how a fight originated, a conviction for rioting cannot be maintained.

Criminal revision against the order of the Judicial Commissioner, Chota Nagpur.

Messrs. *S. Sinha* and *Rajendra Prasad*, for the Petitioner.

JUDGMENT.

MULLICK, J.—The petitioner Jadubar Singh has been sentenced to rigorous imprisonment for six months for an offence under section 147, Indian Penal Code, in respect of a field called Suarmara.

The petitioner and his cousin Ram Singh are in dispute about this land and it appears that on the day of the occurrence each, with a party numbering seven or eight, went upon the land and a fight took place.

The finding in this case is that Jadubar was entitled to joint possession with Ram Singh in equal proportions and that on the day of the occurrence he went to cut the dried up paddy, which was then upon the land. It is found that both parties had sowed the land jointly but on account of the dispute the paddy was not watered and that, therefore, it had become dry and useless. There can be no doubt, however, that Jadubar had a right to cut half that paddy. The Police appear to have sent up both parties for rioting and both parties were convicted by the Magistrate.

In regard to Jadubar's party the learned Judicial Commissioner finds that though the claim set up in the trial Court to a right to the whole field is false, they had a joint right to cut the paddy. But the learned Judicial Commissioner thinks that, as it was their intention to assert a right to the whole field and to exclude Ram Singh, the common object of the assembly was unlawful and that in causing hurt in prosecution of that common object the offence of rioting was committed.

Now the finding as to the common object must be supported by evidence. Beyond the defence set up at the trial there appears to be no evidence that the object of Jadubar's party in going upon the field was to do more than cut their share of the produce. It would have been possible from the acts of Jadubar and his party, when Ram Singh's party arrived, to draw the conclusion that their object was something more than to assert their undoubted title to half the land; but neither the first Court nor the learned Judicial Commissioner has been able to come to any finding as to what took place when Ram Singh arrived and who began the fight. If Ram Singh began the fight while Jadubar's party were peacefully employed, there could clearly be no ground for holding Jadubar's party guilty of the offence of rioting. They had a right in that case to use appropriate force for the purpose of repelling the attack; and in the absence of any clear finding as to how the fight originated, it is impossible to support the conviction and sentence.

The result is that the conviction and sentence are set aside and the petitioner released from bail.

JWALA PRASAD, J.—I agree.

Conviction and sentence set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 9 OF 1917.

March 12, 1917.

Present:—Mr. Mittra, A. J. C.

GOVIND—APPLICANT

versus

EMPEROR—OPPOSITE PRTY.

Police Act (V of 1861), s. 34—"Causes", meaning of—C. P. Municipal Act (XVI of 1903), s. 110—Act complained of under s 34, Police Act, also offence under s. 110, C. P. Municipal Act—Conviction under Police Act, legality of—Revision—Interpretation of Statutes—Court, whether can consider policy underlying enactment.

The word "causes," as used in section 34 of the Police Act, is not a word of art but a word used in ordinary English, meaning "allows to exist." [p. 496, col. 2.]

A conviction for an offence under section 34 of the Police Act is not illegal merely because the act complained of also constitutes a breach of section 110 of the C. P. Municipal Act, and as such is punishable under that Act as well. [p .496, col. 1.]

Obiter.—A Court of revision is not concerned with the policy underlying a legislative enactment, it is only concerned with the legality of the proceedings sought to be revised. [p. 496, col. 1.]

Criminal revision against the order of the Sub-Divisional Magistrate, Chhindwara.

Messrs. *Atmaram Bhagwant* and *D. W. Kathale*, for the Applicant.

ORDER.—The applicant has been convicted of an offence under section 34 of the Police Act and fined Rs. 20. Section 34 of the Police Act, fifth clause, runs as follows: "Any person who throws or lays down any dirt, filth, rubbish or any stones or building materials; or who constructs any cow-shed, stable, or the like; or who causes any offensive matter to run from any house, factory, dung-heap, or the like."

The Civil Surgeon noticed in the course of his inspection filth from the applicant's latrine flowing on the road. What was the cause of this has not been clearly stated in the judgment, nor anywhere on the record. From a note sent by the trying Magistrate through the District Magistrate it would appear that the cause of the offensive matter running out of the house was a bad state of repairs of the outlet, which has since been put in proper order. It is contended before me that there should have been a prosecution not under the Police Act, but under the Central Provinces Municipal Act, the terms of which are said to be much wider than those of the Police Act. Section 110 of the Municipal Act says: "Whoever, without the written permission of the Committee, causes or allows the water of any sink, sewer or cess-pool, or any other offensive matter, to flow, drain or be put upon any street or public place or into any sewer or drain not set apart for the purpose, shall be punishable with fine which may extend to twenty rupees."

It is also rightly pointed out that such a prosecution could only have been at the instance of an officer authorized by the Municipal Committee, and such an offence would have been compoundable.

Reference has also been made to certain questions and answers in the Local Legislative Council regarding the policy of prosecutions being left in the hands of the Municipal Committee, but as a Judge I am not concerned with any question of policy, but only with the legality of the proceedings sought to be revised.

If the Municipal Act had been a contemporaneous Act, instead of being an Act passed nearly half a century afterwards, I should have been inclined to accept the applicant's suggestion that there is a difference between "causes" and "allows." In ordinary English, a man is said to cause a thing if he allows it to exist. The word "causes" is not a term of art. Section 268 of the Penal Code shows that a person may be guilty of a public nuisance by reason of an act or an illegal omission. The offence in this case is one of public nuisance provided for by the Police Act. On this ground I can see no reason for interference.

The conviction does not appear to have been based upon anything observed at the local inspection, but upon the evidence given in the case. The local inspection, on the contrary, disclosed that proper repairs had been made to the outlet of the latrine, in other words, that the nuisance had ceased, a fact so far favourable to the accused. This does not, however, discredit the evidence that the nuisance did exist on a previous date.

Ground 3 does not seem to have been urged in the Court below. The applicant does not say that he reported to the Municipality about the dereliction of duty on the part of the Municipal scavengers. If he had done so, it might have been taken by the lower Court in mitigation of punishment.

I see no reason to interfere with the sentence. The application is, therefore, dismissed.

Application dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 3, 1919.

Present:—Viscount Cave, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

THE MIDNAPUR ZEMINDARY COMPANY, LTD.—PLAINTIFFS—APPELLANTS

versus

UMA CHARAN MANDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Findings of fact on first appeal, finality of—High Court, power of interference of.

The High Courts in India are not entitled in a second appeal to go behind the findings of fact of the first Appellate Court, unless such findings result from the misconstruction of a document or the misapplication of law or procedure. [p 500, col. 2.]

Consolidated appeals from twenty decrees of the Calcutta High Court (Justice Sir Asutosh Mookerjee and Mr. Justice Beachcroft), dated the 1st June 1914 and reported as 26 Ind. Cas. 182, reversing in second appeal decrees, dated the 30th September and 30th November 1910, of the District Judge, Manbhum.

FACTS.—The appellants sued claiming that they were purchasers of an under-tenure sold for arrears of rent under Bengal Act VIII of 1865, and, therefore, entitled under section 16 of the Act to avoid the incumbrances held by the defendants respondents.

The defendants-respondents pleaded *inter alia* that the Court-sale at which plaintiffs purchased was really a private sale and was a collusive and fraudulent device and that plaintiffs were, therefore, not entitled to the benefit of the Act.

The Subordinate Judge of Purulia, who tried the case fixed among others the following issue:—

"7. Were the rent decree and sale in execution of the same fraudulent, collusive and illegal?"

Both parties adduced evidence and the Subordinate Judge found this issue in plaintiffs' favour. His judgment on the point is cited at length by their Lordships. It was affirmed in appeal by the District Judge of Manbhum.

The proceedings on second appeal are reported at 26 Ind. Cas. 82; 19 C. W. N. 270. The High Court held that the circumstances under which the public sale was brought about and took place established that the sale in reality was a private sale, and that plaintiffs were not entitled to avoid the incumbrances. The material part of their judgment is cited by their Lordships. They dismissed plaintiffs' suit, which the lower Courts had decreed.

Hence this appeal.

Mr. *De Gruyther*, *K. C.*, and Sir *W. Garth*, *K. C.*, for the Appellants, submitted that the High Court had no jurisdiction in second appeal to go behind the findings of fact at which the District Judge had arrived. *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1).

The two lower Courts concurrently found on the evidence that the sale was neither collusive nor fraudulent, that it was a public sale regularly held, and that defendants had notice of it. There was no evidence whatever of any fraud on the part of the plaintiff Company.

Mr. *Dube*, for the Respondents, submitted that the question whether the sale was collusive and fraudulent was a mixed question of law and fact. There was sufficient evidence from which the High Court could infer that the sale was really a private one. The District Judge found that "this arrangement undoubtedly existed between the Raja and Jiban Babu, *viz.*, that the Company should bid up to Rs. 40,000 and that the Raja should allow the sale to proceed." From that finding and others the High Court was competent in second appeal to draw the inference of fraud. Such an inference is one of law. *Ramgopal* v. *Shamskhaton* (2).

Mr. *De Gruyther*, *K.C.*, replied.

JUDGMENT.

SIR JOHN EDGE.—These are consolidated appeals from twenty decrees, dated the 1st June 1914, of the High Court at Calcutta which reversed decrees, dated the 30th September and the 30th November 1910, of the District Judge of Manbhum, which had affirmed decrees, dated the 21st March 1910, of the Subordinate Judge of Purulia. The decrees of the High Court which are the subject of these consolidated appeals dismissed the suits, which were suits for a declaration of title and for *khas* possession by

(1) 17 I. A. 122; 18 C. 23; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16 (P. C.).

(2) 19 I. A. 228; 20 C. 93; 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. S.) 63 (P. C.).

the eviction of the defendants from lands held by them severally in Pergunnah Barahabhum and for such other reliefs as the plaintiffs might be entitled to.

The plaintiffs' case was that they were successors in title of Robert Watson & Co., who, on the 8th March 1885, obtained a *patni* lease, which included the lands in question, from Rajah Brajakishore Singh, the then Zemindar. Mr. H. Mathewson, in whom were then vested the rights of Robert Watson & Co., under the *patni* lease, on the 25th June 1906, conveyed all his rights in the *patni taluk* to the plaintiffs. Under the *patni* tenure there was an old under-tenure held by one Sharup Ganjan Singh, whose interest therein was purchased in 1899 by Rajah Jagabandhu Singh at a sale in execution of a decree against Sharup Ganjan Singh. Rajah Jagabandhu Singh, made default in payment of rent due by him to the plaintiffs, and on the 19th August 1908, the plaintiffs obtained a decree for Rs. 104-13 0 and on the 7th December 1908, the under tenure of Rajah Jagabandhu Singh of the lands in question was, in execution of that decree of the 19th August 1908, sold at a Court sale under Bengal Act VIII of 1865, and was purchased by the plaintiffs who claim to have thereby acquired it free from all incumbrances within the meaning of section 16 of that Act, on the ground that such rights as the defendants or any of them had in the lands were incumbrances free from which under that section the plaintiffs acquired by that purchase the under-tenure of Rajah Jagabandhu Singh.

The case of the defendants in answer to the plaintiffs' claim may be briefly summarised as follows:—

1. That the sale of the 7th December 1908 was not held in accordance with the requirements of sections 4 and 5 of Act VIII of 1865.

2. "That the sale held on the 7th December 1908 was not a public sale, but that it was a fraudulent device on the part of the plaintiffs and Rajah Jagabandhu Singh to give to a private sale the appearance of a public sale."

3. That the lands which were sold did not constitute an under-tenure, but only part of an under-tenure.

4. That the incumbrances were in existence before the under-tenure was created, and could not be avoided by the plaintiffs.

The suits in which these appeals have arisen were tried by the Subordinate Judge of Manbhum. He fixed a number of issues for trial, the most material of which in this appeal was the seventh: "Were the rent-decree and sale in execution of the same fraudulent, collusive and illegal?" Evidence was recorded by the Subordinate Judge bearing on the seventh issue. It was contended on behalf of the defendants that from the fact that Rajah Jagabandhu Singh had not paid or tendered before the sale the amount decreed, it should be inferred that he and the plaintiffs had corruptly agreed that his under-tenure should be sold to the plaintiffs in execution of the decree, and it was endeavoured to be proved that such an agreement had been made between them in order to defeat the rights of the defendants as subordinate holders, and that in order to carry out that agreement there should be no proclamation of the intended sale.

As to the seventh issue, the Subordinate Judge stated in his judgment as follows:—

"*Seventh Issue.*—It was contended in the written statements that the rent decree and proceedings in execution of the same were fraudulent, collusive and illegal. But at the trial it was not seriously contended that the decree was collusive and fraudulent and illegal. There is not an iota of evidence on the record to show that the arrears were not due and the decree for rent was passed as a result of collusion between the plaintiffs and Raja Jagabandhu Singh. The latter was examined as a witness for the defence and he did not say so. There was no appeal against the decree and it could not by any means be held to be illegal.

"The next question for decision is whether the proceedings in execution of the decree were collusive and fraudulent. The case for the defence, as set forth in the written statements, was that from before the decree there was an arrangement between the plaintiffs and the defaulter Raja Jagabandhu Singh that the tenure would be purchased by the plaintiffs in a sale for arrears of rent, so that they could avoid the under-tenures created by Sharup Ganjan Singh, and in furtherance of that object the

sale-proclamation was not published but suppressed altogether and the defaulter did not intentionally deposit the amount due under the decree for rent, which was only Rs. 100 and odd, and the property was knocked down for a sum which had been fixed as the price of the property. That the sale-proclamation had been suppressed as a result of the negotiations between the plaintiffs' agents and the defaulter Raja Jagabandhu Singh was not stated by him or by his Dewan, Girish Chandra Baguli, who had been looking after the cases for the defence from the very beginning. On the other hand, he deposed that he came to know of the date of the sale from a copy of the sale proclamation brought to him by a Digar residing near Pandra The evidence adduced by the plaintiffs about the service of the sale-proclamation in the Mofussil is very meagre, and the statements of the witnesses examined by them are full of discrepancies and contradictions. But we must make allowance for loss of memory on the part of the peon and the identifier who went to the villages about a year and a half ago. Then the class of persons to which the witnesses belong, are apt to make mistakes in the matter of details It is quite probable that the peon and the identifier did not go to all the villages of the Taraf, but I do not think the proclamation was suppressed altogether. I believe that the sale-proclamation was published at least at Haradah. It appears that the sale was advertised in the local vernacular paper and the plaintiffs' agent must have known that the news about the property being brought to sale could not be kept secret. The fact that the defendants did not try to deposit the arrears which amounted to a trifling sum, if they came to know of the sale, may be due to their belief that the defaulter would not allow the property to be sold, especially before the decision of the appeal to the High Court."

There was, in fact, no evidence of any collusion between the plaintiffs and Rajah Jagabandhu Singh, but there was evidence that one Jiban Baku, who was a Naib in the employment of the plaintiffs, but who had no authority to make any agreement on their behalf, had promised to get the plaintiffs to bid up to Rs. 40,000 for the property at the sale. As to him the Subordinate Judge found that he had agreed to use his influence with the plaintiffs so that the property might be sold at a fair price, but that there was no evidence that he was authorised by the plaintiffs to make any negotiations with Rajah Jagabandhu Singh. The Subordinate Judge found that the sale was not fraudulent or collusive.

The District Judge, before whom the appeals from the decrees of the Subordinate Judge came, stated in his judgment that: "Before me two points and two points only have been argued. These points are common to all the appeals." These points were as to the nature of the tenure which was sold at the sale of the 7th December 1908, and as to whether the rent-decree was a fraud against the defendants and the sale was fraudulent. As to the first of these two points, the District Judge agreed with the Subordinate Judge in finding that the tenure which was sold for arrears of rent was separate tenure and had been created by a *ruffanama* in 1884. On the second of the above points the District Judge stated that the facts of the sale were suspicious and he had examined the evidence very carefully, but that "on the whole I am satisfied that, although there may have been a good deal of sharp practice over this sale, there has not been fraud in a legal sense such as would vitiate the proceedings." The District Judge examined the evidence with care. He agreed with the Subordinate Judge that there was no evidence to show that the decree for the rent in arrear was in any way collusive. As to the sale the District Judge came to the conclusion that the facts proved were not sufficient to constitute fraud and that fraud could not be inferred from them. He found that the sale was not fraudulent and collusive and could not be held to be inoperative against the defendants, and stated:—

"My findings in this case, therefore, agree in every respect with those of the learned Subordinate Judge. The plaintiffs are, therefore, entitled to annul all the encumbrances which have been created subsequent to 1884 when this tenure, which was sold for arrears of rent, was created."

The District Judge then proceeded to consider whether the incumbrances which the plaintiffs claimed as inoperative as against

them had been created before or after 1884, and made decrees which were appealed to the High Court.

In the appeals to the High Court the learned Judges stated that the questions whether Sharup Ganjan Singh had held one or two tenures and what was the effect of the deed of compromise of the 6th March 1884, were of considerable nicety and by no means free from doubt, but that it was not necessary to consider these questionsas the defendants were entitled to succeed on the ground that the sale of the 7th December 1908 was, in their opinion, "brought about and accomplished under circumstances which make it in essence a private sale, and disentitled the purchaser to claim the privileges accorded by law to a purchaser of an entire tenure at a real sale under the Bengal Rent Law." These learned Judges stated their conclusions as follows:—

"In the case before us, the default was wilfully made; the sale was deliberately brought about, though the judgment-debtor was able to pay the judgment debt; the purchasers and the price to be paid by them were settled in advance; here we have all the characteristics of a private sale. It was clearly an abuse of statutory provisions for sale of tenures in execution of decrees for rent, to bring about designedly a sale under such circumstances, so that the rights of under-tenure-holders might be destroyed, an unencumbered title conveyed to the purchaser and the maximum of benefit conferred upon the defaulter. The transaction in all its characteristics was a private sale, and if we were to regard it as a real rent sale, we would have to hold that an unscrupulous tenure-holder may successfully avail himself of the stringent provisions of the rent law, solely with a view to injure subordinate tenure-holders and to profit by their detriment, while providing, by means of a secret arrangement with the intending purchaser, ample safeguards against any possible loss to himself by the transaction. The conclusion appears to be irresistible that the plaintiffs must be treated as in no better position than purchasers by a private transfer. In this view, their claim for annulment of the under-tenure of the defendants cannot be sustained."

Upon that view of the facts and of the law they dismissed the suits.

It appears to their Lordships that the conclusions of the High Court are inconsistent with the findings of fact on first appeal, by which the High Court was bound. If the sale had been the result of a corrupt agreement between the under-tenure holder and the purchaser at the sale, the purchaser might no doubt lose the benefit of section 16 of the Bengal Act of 1865, and especially if the default in payment of rent had been deliberately incurred in furtherance of such an agreement. But in the present case there was no evidence of such a wilful default having been made; and the finding of the Subordinate Judge, with which the District Judge concurred, that there had been no fraud or collusion, was sufficient to entitle the plaintiffs to the decree. The High Court was not entitled to go behind the findings of fact of the District Judge, which did not result from the misconstruction of a document or the misapplication of law or procedure, but upon the oral evidence in the case; and the suits should not have been dismissed.

Their Lordships will humbly advise His Majesty that these appeals should be allowed with costs, that the decrees of the High Court under appeal dismissing the suits should be set aside, and that the suits should be remitted to the High Court to be disposed of in the appeals and cross-objections according to law.

Appeals allowed.

Solicitors for the Appellants: Messrs. *Buston, Yeates & Host.*

Solicitors for the Respondents: Messrs. *Watkins & Hunter.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2318 OF 1917.

May 9, 1919.

Present:—Mr. Justice Newbould.

GIRISH CHANDRA CHAKRABARTY —PLAINTIFF APPELLANT

versus

GIRISH CHANDRA ROY AND OTHERS— DEFENDANTS—RESPONDENTS.

Appeal—Fraud, plea of, whether can be raised in appeal—Appellate Court, duty of.

An Appellate Court ought not to allow a plea of fraud to be raised at the hearing of an appeal before it, which was not raised in the trial Court nor in the grounds of appeal, without giving the opposite party an opportunity of rebutting the plea.

Appeal against the decree of the Officiating Subordinate Judge, 2nd Court, Mymensingh, dated the 3rd July 1917, modifying that of the Munsif, 3rd Court at Kishoregunge, dated the 27th July 1916.

FACTS appear from the judgment.

Babu *Romesh Chandra Sen*, for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for rent. The defendants purchased the holding at an auction sale in execution of a decree for arrears of rent. The plaintiff claimed rent at the rate of Rs. 40 while the defendants averred that it was Rs. 39. The defendants' sale-certificate showed that the rent payable was Rs. 40. The first Court decreed the suit at Rs. 40. In the Court of Appeal below the defendants raised for the first time the plea that the decree was fraudulently obtained. The lower Appellate Court accepting the plea decreed the suit at Rs. 39. My only point is that the learned Judge is wrong in law in acting upon a plea that was neither raised in the written statement nor in the first Court nor in the memorandum of appeal. We should have been given an opportunity to rebut the plea.

JUDGMENT.—This appeal arises out of a suit for rent. The only point for determination is whether the rate of rent is Rs. 40 as alleged by the plaintiff or Rs. 39 as alleged by the defendants. The defendants purchased a tenancy right at an auction sale held in execution of a decree against the previous tenants for arrears of rent, in that suit and in subsequent proceedings including a sale-certificate the rent of the holding is shown as Rs. 40. The learned Subordinate Judge has reversed the finding of the Munsif that the defendants were liable to pay rent at the rate shown in the sale-certificate on the ground that the *jama* of Rs. 40 was fraudulently inserted in the plaint, decree and the sale-certificate and that the defendants were not bound by the statement of the plaintiff himself when it was found to be fraudulent. No allegation of fraud was made by the defendants at the trial of the suit in the Court of first instance, nor was such allegation even made in the grounds of appeal to the lower Appellate Court. The lower Appellate Court was not justified in allowing the plea of fraud to be raised before it without giving the plaintiff an opportunity of rebuting that plea.

The appeal must be decreed, the decree of the lower Appellate Court set aside and that of the first Court restored with costs in the lower Appellate Court.

As the respondents did not appear, I make no order as to costs in this Court.

Decree set aside.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 470 OF 1918.

July 29, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

SHEO BALAK SINGH AND OTHERS — PLAINTIFFS—APPELLANTS

versus

RADHEY SINGH AND OTHERS— DEFENDANTS—RESPONDENTS.

Ijaradar, *right of, to create tenancy—Tenants, position of—Occupancy rights, acquisition of.*

An *ijaradar* has power to induct a tenant on to the land which is the subject of his *ijara*, apart from any stipulations in his document of title which may prevent him from so doing; and, where there are no such stipulations and the persons inducted are settled *raiyats* of the village in which the land is situated, once they become tenants under the *ijaradar* they acquire an occupancy right in the land which they hold under the *ijaradar*. [p. 502, col. 1.]

SHEO BALAK SINGH *v.* RADHEY SINGH.

Appeal from a decision of the Subordinate Judge, Gaya, dated the 24th September 1917.

Mr. *Panchanan Banerjee*, for the Appellants.

Mr. *P. N. Singh*, R. B., for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal by the plaintiffs, the *maliks* of the land in suit, from a decision of the Subordinate Judge of Gaya, dated the 24th September 1917. The question in dispute between the parties is whether the defendants Nos. 1 to 5 have acquired occupancy rights in certain land the proprietary interest of which is in the plaintiffs. The learned Subordinate Judge, after dealing with the evidence in the case, has come to the conclusion, as a finding of fact, that the plaintiffs have failed to satisfy him that the Record of Rights finally published on the 5th April 1916, which is in favour of the defendants' case, has been rebutted by the evidence adduced on behalf of the plaintiffs. That is a finding of fact by which this Court in second appeal is bound, but it is contended, in the first place, that the defendants acquired their title from an Ijaradar and that, having been put in possession of the land by the Ijaradar, their interest, whatever it may be, ceased when the Ijaradar's term expired and that the landlords were thereupon entitled to eject them, claiming as they do this land as their *bakasht* land. In order to support that proposition, the learned Vakil for the plaintiffs has been driven to contend that an Ijaradar has no power whatever to induct a tenant on to the land, but in support of this proposition he has been unable to produce any authority whatsoever. I have no hesitation in holding that an Ijaradar has power to induct a tenant on to the land which is the subject of his Ijara, apart from any stipulations in his document of title which may prevent him from so doing. In the present case it has not been shown that there were any such stipulations and as the defendants were settled *raiyats* of the village in which the land is situated, it seems to me that once they became tenants under the Ijaradar they acquired an occupancy right in the land which they held under the Ijaradar. So far as that point is concerned, I think that this appeal must fail.

The next question which was raised was one of estoppel. It appears that three Ijara deeds were produced and these are dated respectively June 1894, June 1906 and January 1907. The first is an Ijara deed executed by the plaintiffs in favour of certain Ijaradars therein named. The second is a transfer of the same right by the original Ijaradars to others, and the third is a re-transfer of the same right to the present defendants. According to the description of the boundaries of the land therein transferred under the Ijara deeds it is sought to be made out that the lands in suit or some of them were in fact the lands in *khas* possession of the plaintiffs. The land which was the subject of the Ijaras mentioned was a survey plot numbered 550 and the boundaries of that plot on the north and east are described as the *kasht* of the executant; that is to say, under the first deed of the plaintiffs, and under the subsequent deeds, although the word "executant" is not used, the plaintiffs' names are mentioned. It is said that, as the defendants took a transfer of this land, they are estopped from contending that the boundaries therein described in the Ijara are not accurate. In the first place, as pointed out by the Subordinate Judge, the boundaries which are relied upon are those to the east and the north, and on looking at the survey map, it appears that none of the plots which are described as the *kasht* land of the *maliks* are amongst the 5 plots in dispute except one. Of these five Nos. 540 and 541 do not adjoin plot No. 550 at all. Plots Nos. 551 and 552 do adjoin plot No. 550 which was the subject of the Ijara but on that boundary the land is not described as the *kasht* land of the landlords The other one which is No. 539 does adjoin No. 550 and it is described as the *kasht* land of the landlords. But, for reasons which the learned Subordinate Judge gave, he came to the conclusion that this matter was not in itself sufficient to rebut the clear evidence adduced by the Record of Rights and the way he dealt with it is this: that the original Ijara which was not granted to the defendants at all contained a description given by the plaintiffs and that clearly the defendants could not be bound by that; that the subsequent Ijaras, which were a transfer of the plot in question, were merely a repetition, so far

as the boundaries went, of what was contained in the original Ijara, and that, whether they were originally right or whether they were originally wrong, there was nothing to show that at the date when the final transfer was made in 1907 the description of the boundaries therein mentioned, being merely a repetition, was accurate so far as it related to the plot in question. But it is contended that the defendants having taken this document are estopped from denying the accuracy of it. It is unnecessary to decide that question, because an estoppel, if such existed, would merely be to this extent that in the year 1907 one plot of the disputed land was in the *khas* possession of the *maliks*. Now, the Record of Rights was published long after that, in the year 1916, and it seems to me that, even if there should be an estoppel as against the defendants in this case from denying the accuracy of a document of the year 1907, that is not sufficient to rebut the evidence of the Record of Rights published in the year 1916. For these reasons I have come to the conclusion that the finding of the learned Subordinate Judge, even if it may not have rightly decided the question of estoppel about which it is unnecessary to form any opinion, would not in fact make any difference to the ultimate decision seeing that in any event, the estoppel, if such exists, does not go really far enough. For these reasons I am of opinion that this appeal should be dismissed with costs.

FOSTER, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 577 OF 1916.

November 19, 1918.

Present:—Mr. Justice Wilberforce and Mr. Justice Martineau.

MANOHAR LAL—PLAINTIFF—APPELLANT

versus

NANAK CHAND—DEFENDANT—RESPONDENT.

Res judicata—*Partition—Arbitration proceedings—Ignorance of right, effect of—Admission, gratuitous, value of—Estoppel—Waiver of right, what constitutes.*

Plaintiff instituted the present suit for partition of certain joint property and for possession of certain other property as exclusively his. In 1909 a partition of some joint property of the parties was made by arbitrators appointed by them, and the plaintiff now alleged that there was other joint property, besides that dealt with by the arbitrators, which the defendant did not disclose, and the present suit related to this property. The defendant denied that the suit property was joint, and pleaded that the arbitrators' award, and the decree thereon, estopped the plaintiff from now alleging that any property, other than that included in the award, was joint, that the plaintiff had admitted at the time of the arbitration that the suit property was the exclusive property of the defendant, and that he had abandoned his rights in respect of the other property claimed by him. The trial Court, without recording a finding whether the property alleged to be joint was joint, dismissed this portion of the suit on the ground that the plaintiff not having included the property now alleged to be joint in the claim of 1909, he was debarred from suing for it now, the matter being *res judicata*. The plaintiff appealed:

Held, (1) that as the arbitrators neither gave any adjudication nor made any inquiry about the existence of joint property other than that mentioned in the agreement to refer to arbitration, and were told nothing about the property now in suit, their award did not operate as *res judicata* so as to bar the claim for partition of this property; [p. 504, col. 2]

(2) that it was for the defendant to prove that the plaintiff had waived his rights, and waiver was not to be inferred from plaintiff's omission to give evidence and explain when and how he came to know that the property was joint; [p. 504, col. 2.]

(3) that in the absence of proof that plaintiff knew at the time of the arbitration that the property was joint, his admission would not amount to waiver; the admission being gratuitous could be withdrawn, and did not create an estoppel as it did not lead to any change in defendant's position. [p. 505, col. 1.]

First appeal from the order of the Senior Subordinate Judge, Lahore, dated the 23rd December 1915.

The Hon'ble Mr. *Muhammad Shafi*, Mr. *Abdul Rashid* and Dewan *Mehr Chand*, for the Appellant.

The Hon'ble Pandit *Sheo Narain* and Lala *Tirath Ram*, for the Respondent.

JUDGMENT.—The plaintiff is the defendant's son, but was adopted by Bhai Nand Gopal, who was a brother of the defendant's mother. It has been found by the lower Court, and the correctness of the finding has not been contested before us, that the defendant lived with Nand Gopal and managed his property

and that he continued managing it after Nand Gopal's death, which occurred in 1895. In 1909 a partition of some joint property of the parties was made by arbitrators appointed by them.

The plaintiff alleges that besides that property there was other joint property, specified in paragraph 8 of the plaint, which the defendant did not disclose. He sues for its partition, and also for possession of certain property, moveable and immoveable, mentioned in paragraph 9 of the plaint, which he claims as exclusively his, and of 3 *kanals* 16 *marlas* of land at Kila Gujar Singh, mentioned in paragraph 10, which he says is part of some land that was allotted to him at the partition in 1909.

The lower Court has dismissed the suit in regard to the property specified in paragraphs Nos. 8, 9 (*c*) and (*d*) and 10 of the plaint, and passed a decree only for that mentioned in paragraph 9 (*a*) and (*b*). Both parties have appealed.

With regard to the claim for partition of the property specified in paragraph 8 of the plaint the defendant denied that this property was joint, and pleaded that the arbitrators' award in 1909 and the decree passed thereon estopped the plaintiff from alleging that any property other than that which was included in the award was joint, that the plaintiff had admitted, at the time of the partition that the property now claimed as joint was the defendant's exclusive property, and that he had abandoned his rights in respect of the property mentioned in clause (*a*) of paragraph 8.

The lower Court, without giving a finding as to whether the property mentioned in paragraph 8 is joint, has dismissed this portion of the claim on the ground that the plaintiff, not having included the property alleged to be joint in the claim which he made in 1909, is debarred from suing for it now, the matter being *res judicata*.

The learned Subordinate Judge is of opinion that the arbitrators were appointed in 1909 to partition the whole of the joint property, and not merely the specific property mentioned in the award. This is against the evidence of Mian Jamiat Singh, one of the arbitrators, who appears to be a disinterested witness and says that they were appointed only for the purpose of partitioning the property mentioned in the award, and that they had not to inquire whether there was other joint property. The agreement of the 13th June 1909, by which the parties referred the matter to arbitration, did not recite that the whole of the joint property was to be partitioned, while in the award given on the following day it was stated by the arbitrators in the preamble that they had been appointed to divide the joint property "given below." In any case it is clear that the arbitrators neither gave any adjudication nor made any inquiry about the existence of other joint property, and they were told nothing about the property mentioned in paragraph 8 of the plaint, so that we cannot agree with the lower Court that the award of 1909 operates as *res judicata* so as to bar the claim for partition of this property.

Mr. Sheo Narain on behalf of the respondent has in fact not tried to support the lower Court's finding on this point, but has argued that the plaintiff accepted the partition in 1909 as a partition of the whole of the joint property, that he did not wish to quarrel with his father, and considered some of the property to be not worth fighting for, and that so he dropped his claim to a share in the property specified in paragraph 8 of the plaint. In other words, it is argued that the plaintiff is estopped from suing for partition of this property by having waived his rights.

In the lower Court, however, waiver was not pleaded, except in regard to the property mentioned in clause (*a*) of paragraph 8 of the plaint, and the contention now put forward is not supported by evidence. The statement of Mian Jamiat Singh, the principal witness as to the partition in 1909, does not show that the plaintiff gave up his rights in any of the property. Mr. Sheo Narain lays stress on the fact that the plaintiff has not gone into the witness-box to explain when and how he came to know that the property was joint. But it was for the defendant to prove that the plaintiff had waived his rights, and waiver is not to be inferred from the plaintiff's omission to give evidence.

Some documents have been referred to as proof of admissions on the plaintiff's part. Only two relate to property included in paragraph 8 of the plaint, namely, (1) a notice—Exhibit D-15, dated the 8th September 1911, from the plaintiff's Pleader to the defendant (page 212 of the printed record), and (2) a receipt—Exhibit D-21, dated the 21st August 1910, executed by the plaintiff (page 217 of the record).

In these the houses mentioned in clauses (*a*) and (*d*), respectively, of paragraph 8 of the plaint are spoken of as the property of the defendant.

Now, in the first place, assuming that the houses in question were joint property, it has not been proved that the plaintiff knew them to be joint when the admissions were made, and in the absence of proof of such knowledge there could be no waiver. He might well have believed that the defendant, who was managing the property and receiving the rent, was the sole owner. In the second place, the admissions referred to above were gratuitous admissions which could be withdrawn [see *Muhammad Imam Ali Khan* v. *Husain Khan* (1)] and they do not create an estoppel, as they did not lead to any change in the defendant's position.

We find no evidence to prove that the plaintiff waived his rights in the property or is estopped from suing for partition.

It becomes necessary, therefore, to determine the issues relating to the alleged joint property which the lower Court has left undisposed of. Before dealing with the claim to the remainder of the property in suit we remand the case to the lower Court, under Order XLI, rule 25, Civil Procedure Code, for findings to be given on issues Nos. 8 and 10 to 14.

Case remanded.

(1) 26 C. 81; 25 I. A. 161; 2 C. W. N. 737; 7 Sar. P. C. J. 432; 13 Ind. Dec. (N. S.) 656 (P. C.).

MADRAS HIGH COURT.

CIVIL APPEAL No. 390 OF 1917.

January 16, 1919.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

P. S. K. HAJI SENA MUHAMMAD ABDUL GAFFUR ROWTHAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

HAMIDA BEEVI AMMAL AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 3 AND 4—RESPONDENTS.

Interest Act (XXXII of 1839), scope of—Interest, right to, in cases not covered by Act—Claim for unascertained amount due as plaintiff's share of trade—Interest awardable as damages—Rate of interest—Suit by Muhammadan sharer for his share of assets—Interest, right to.

The Interest Act is not exhaustive of all claims as to interest and it is open to the Courts in India to award interest in cases not coming within the purview of the Act, on principles of equity, justice and good conscience. [p. 507, col 1: p 508, col. 1.]

To attract the provisions of the Interest Act, the amount in dispute must be a debt or a certain sum payable at a certain time or otherwise. It has no application to an unascertained sum claimed as the profits of a trade. [p. 507, cols. 1 & 2.]

Where a Muhammadan minor sued for the recovery of her deceased father's share in a family trade, which was utilized by her co-heirs in a separate business from which they derived a profit:

Held, that the plaintiff was entitled to interest on her share at the ordinary current rate of six per cent. per annum from the date of her father's death. [p. 508, col. 1.]

Marian Beeviammal v. *Kadir Meera Sahib Taragan*, 29 Ind. Cas 275, distinguished.

London, Chatham and Dover Railway Company v. *South Eastern Railway Company*, (1893) A. C. 429; 63 L. J. Ch. 93; 1 R. 275; 69 L. T. 637; 58 J. P. 36, explained.

Appeal against the preliminary decree of the Court of the Subordinate Judge, Tuticorin, in Original Suit No. 70 of 1916.

FACTS appear from the judgment.

The Hon'ble Mr. *T. Rangachariar* (with him Mr. *C. R. Subramanya Aiyar*), for the Appellants.—The plaintiff is not entitled to interest on her share of the partnership business carried on by her father. Under the Interest Act interest can be claimed only from the date of demand. Here there was no demand. See *Kamalammal* v. *Peeru Meera* (1), *Subramania*

(1) 20 M. 481; 7 M. L. J. 263; 7 Ind. Dec. (N. S.) 341.

Aiyar v. *Subramania Aiyar* (2) and *Lala Kalyan Das* v. *Sheikh Maqbul Ahmad* (3).

The claim here is for an unascertained amount and interest is not awardable. *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (4). Any claim for interest must come within the provisions of the Act and in matters outside the Act interest is not payable: see *London, Chatham and Dover Railway Company* v. *South Eastern Railway Company* (5).

The Hon'ble Mr. *S. Srinivasa Ayangar* (Advocate-General), for the Respondent.—The claim, it is true, is not governed by the Interest Act. But the Interest Act does not profess to cover all classes of cases. There is a proviso that interest shall be payable in all cases in which it is now payable in law.

The interest being claimed on an unascertained amount, interest might be awarded in the shape of damages. Indian Courts are not tied down by English precedents and are ordained to award interest on principles of equity and good conscience. The cases referred to by the appellants' Vakil are all cases under the Act.

The defendants have used the plaintiff's money and have derived profits and it is only fair that they should compensate plaintiff.

There is also a kind of *quasi*-fiduciary relationship between the plaintiff and her co heirs, the defendants, which justifies the plaintiff's claim for interest.

JUDGMENT.—This is a suit by a Mahommedan co-sharer for recovery of her share of her father's property from her brothers and sisters. The right of the plaintiff, who was a minor, to sue was denied in the Court below but has not been pressed before us. The only two points which Mr. T. Rangachariar argued were: (1) whether the plaintiff is entitled to mesne profits of the immoveable property and (2) whether she is entitled to interest upon her share of the assets of the partnership carried on by her father. On the first question it was pointed out to us that in the Court below there was no allegation that mesne profits were not payable. There is no issue upon the point, and there is no discussion in the judgment of the Court below about it. Issue No. 6 assumes that the plaintiff was entitled to mesne profits and only raises the question of the deductions claimed by the defendants in their written statement. Under these circumstances we refused to allow the learned Vakil to argue that point before us.

The second question has been argued elaborately by Mr. Rangachariar for the appellants and by the learned Advocate-General for the respondent. We have come to the conclusion that the decree of the Court below is right, though not for the reasons given by it. It is clear from the admissions in the written statement and from the evidence in the case that the share of the plaintiff in the firm's assets was utilised by the 1st and 2nd defendants in the trade carried on by them and that profits were derived from that trade; the amount of profits alone had not been ascertained. The learned Vakil for the appellant relied upon *Kamalammal* v. *Peeru Meera* (1), *Subramania Aiyar* v. *Subramania Aiyar* (2) and *Lala Kalyan Das* v. *Sheikh Maqbul Ahmad* (3) and the earlier Madras cases and contended that, as no notice of demand was made, no interest was allowable under Act XXXII of 1839. All of them were cases under the Act. In the first place, it must be pointed out that the Interest Act is not comprehensive of all claims to interest. Without going into details, it may be mentioned that the object of 3 and 4 William IV, Chapter 42, section 28, which was extended to India by Act XXXII of 1839, was to repeal the Usury Laws relating to interest. Prior to the enactment of 3 and 4 William IV, there was a law in the reign of Edward the Confessor which absolutely prohibited Courts from awarding interest in suits upon moneys lent. Attempts were made in the reign of Henry VIII to mitigate the rigour of this prohibition. 3 and 4 William IV, Chapter 42, was enacted with a view to meet such a demand. It is clear from the language of the Act that the provisions dealt with only a particular class of cases, and enabled the Courts to

(2) 31 M. 250; 3 M. L. T. 278; 18 M. L. J. 245.
(3) 46 Ind. Cas. 548; 35 M. L. J. 169; 24 M. L. T. 110; 22 C. W. N. 866; 16 A. L. J. 693; 5 P. L. W. 159; 28 C. L. J. 181; 8 L. W. 179; (1918) M. W. N. 535; 20 Bom. L. R. 864; 40 A. 497 (P. C.).
(4) 29 Ind. Cas. 275.
(5) (1893) A. C. 429; 63 L. J. Ch. 93; 1 R. 275; 69 L. T. 637; 58 J. P. 36.

give interest at the current rate under certain conditions. The framers were anxious that the right to interest, if any, otherwise possessed should not be interfered with by this enactment, and inserted the proviso to the effect that interest shall be payable "in all cases in which it is now payable by law." In India also, ancient texts can be quoted to show that there was a prohibition against the taking of interest on moneys lent. One text of Manu exemplifies the abhorrence felt by the ancient sages on this question. Manu stated: "Neither a Brahmin nor a Kshatria, though distressed, must receive interest on loans but each of them, if he please, may pay a small interest permitted by law, on borrowing for some pious use, *to the sinful man* who demands it." See Colebrooke's Digest, page 28. It looks as if when 3 and 4 William IV was extended to India, these provisions contained in the Hindu Law were kept in mind. It is, therefore, clear that the Interest Act is not exhaustive of the subject.

There is another difficulty in the way of applying the Interest Act to the present case. To attract its provisions the amount in dispute must be a debt or a certain sum payable at a certain time or otherwise. What is claimed now is a sum of money which, on taking accounts, would be payable to the plaintiff as her share. It was held in *Omrita Nath Mitter* v. *Administrator General of Bengal* (6) that unless the amount is settled the Act is not applicable. In *London, Chatham and Dover Ry. Co.*, v. *South Eastern Railway Company* (7) a claim to payment under a building contract to be paid monthly on the certificate of the engineer was held not to be a debt or a sum certain if the amount was disputed. See also *Hill* v. *South Staffordshire Ry.* (8). In *Ward* v. *Eyre* (9) it was held that a balance of account is not a sum certain within 3 and 4 William IV, Chapter 42. The Calcutta High Court in *Rutnessur Biswas* v. *Hurish Chunder Bose* (10) acted on the same principle. Therefore the Interest Act has no application to the case before us, and consequently the decisions relied on by the learned Vakil for the appellant have no bearing on the matter we have to decide. On the other hand, the cases to which the learned Advocate-General drew our attention establish that the Act was not intended to affect payments of interest or compensation in matters not coming strictly within the letter of the law. In *Miller* v. *Barlow* (11) the Judicial Committee point out that Indian Courts are Courts both of law and of equity and that they can award as damages interest not covered by the Act. In *Hurropersaud Roy* v. *Shamapersaud Roy* (12) a similar principle was enunciated by the Judicial Committee. In *Hamira Bibi* v. *Zubaida Bibi* (13), which was a case of dower, the Judicial Committee, after saying that the Interest Act was not applicable, allowed interest as damages. See also *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji* (14), another decision of the Judicial Committee. There are decisions of the High Courts in which interest was allowed apart from the Act. *Alagappa Chettiar* v. *Muthukumara Chettiar* (15), *Abdul Rahiman* v. *Rangiah Gounden* (16), *Khetra Mohan Poddar* v. *Aswini Kumar Saha* (17), *Mohamaya Prosad Singh* v. *Ram Khelawan Singh* (18), *Chaimal Das* v. *Brij Bhukan Lal* (19) and *Collector of Ahmedabad* v. *Lavji Mulji* (20). Mr. Rangachariar contended that the above cases proceeded upon the principle that there was an established practice as to interest regarding the matter dealt with in them, and

(6) 25 C. 54; 13 Ind. Dec. (N. S.) 37.

(7) (1892) 1 Ch. 120; 61 L. J. Ch. 294; 65 L. T. 722; 40 W. R. 194.

(8) (1874) 18 Eq. 154; 43 L. J. Ch. 556.

(9) (1880) 15 Ch. D. 130; 49 L. J. Ch. 657; 43 L. T. 525; 28 W. R. 712.

(10) 11 C. 221; 5 Ind. Dec. (N. S.) 906.

(11) (1872) 3 P. C. 733; 8 Moore P. C. (N. S.) 127.

(12) 3 C. 654 (P. C.); 1 C. L. R. 499; 5 I. A. 31; 3 Sar. P. C. J. 782; 3 Suth. P. C. J. 495; 2 Ind. Jur. 284; 1 Ind. Dec. (N. S.) 1000.

(13) 36 Ind. Cas. 87; 38 A. 581; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517; 43 I. A. 294 (P. C.).

(14) 28 Ind. Cas 710; 42 C. 914; 19 C. W. N. 449; 29 M. L. J. 70; (1915) M. W. N. 485; 17 M. L. T. 312; 21 C. L. J. 419; 2 L. W. 377; 13 A. L. J. 540; 17 Bom. L. R. 432; 42 I. A. 91 (P. C.).

(15) 42 Ind. Cas. 836; 41 M. 316; 22 M. L. T. 162; (1917) M. W. N. 669.

(16) 22 Ind. Cas. 597; 1 L. W. 181.

(17) 45 Ind. Cas. 667; 22 C. W. N. 488.

(18) 15 Ind. Cas 911; 15 C. L. J. 684.

(19) 17 A. 511 (P. C.); 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 652.

(20) 10 Ind. Cas. 818; 35 B. 255; 13 Bom. L. R. 259

that the principle should not be extended to the case of a Mahomedan lady claiming interest on an unascertained sum of money due to her as her share of the trade. We fail to see any difference in principle between the cases to which we have referred and to the case now before us. The only decision which supports Mr. Rangachariar is *Marian Beeviammal* v. *Madir Keera Sahib Taragan* (4). In that case there has been no discussion on the question and the reference to the earning of interest shows that the decision should be confined to the facts of the case. The learned Vakil for the appellant relied very strongly upon the observations of the noble and learned Lords in *London, Chatham and Dover Railway Company* v. *South Eastern Railway Company* (5) for the proposition that in matters outside the Interest Act no interest is payable. The noble Lords who took part in the discussion, especially Lord Herschell, point out that there has been a course of decisions in England which tied the hands of Courts from awarding interest on equitable grounds; and they regretted that they were obliged on the principle of *stare decisis* to decline to re-open the question. There is no such course of decisions in this country. On the other hand, the Privy Council held very early that on principles of equity, justice and good conscience, which are specially referred to in the Civil Courts Act, the Courts in India are at liberty to award interest in cases not coming within the purview of the Interest Act. The Indian Courts have followed this rule for a long time. The Courts in this country, therefore, are not hampered in the exercise of their equity jurisdiction in the same way that English Courts have been.

It is not necessary, therefore, to refer to another argument of the learned Advocate General which rested the claim to interest upon the existence of a *quasi*-fiduciary relationship between the plaintiff and her brothers. We think the Subordinate Judge is right in allowing interest. But, in our opinion, he ought not to have allowed more than 6 per cent. The current rate of interest in this country is ordinarily that, and no special reason has been shown why it should be raised to 9 per cent. The analogy of the Trusts Act, section 23, to which the learned Advocate-General referred us, has no bearing on the present question and we are not prepared to allow compound interest at 6 per cent. The interest allowed will be reduced to 6 per cent. throughout. Subject to this modification we dismiss the appeal with costs.

M. C. P.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 89 OF 1919.

July 24, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

Musammat CHANDERBATI KUER—PLAINTIFF—APPELLANT

versus

GOREY LAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 5—Court-fee payable on memorandum of appeal—Taxing Officer, decision by—Division Bench, whether can re-open question of valuation.

The terms of section 5 of the Court Fees Act are imperative and the decision of the Taxing Officer under that section as to the proper fee payable upon a memorandum of appeal is final, and before the appeal is admitted, a Division Bench of the High Court has no jurisdiction to re-open the valuation of the appeal. [p. 509, col. 1.]

Appeal against the decision of the Subordinate Judge, 1st Court, Monghyr.

Messrs. *S. M. Mullick, B. C. Mitter, Rai T. N. Sahai* and *N. N. Sen*, for the Appellant.

The Government Advocate, for the Respondents.

ORDER.—This is a case which has been placed before this Division Bench for orders under Order XLI of the Civil Procedure Code, the plaintiff-appellant before this Court having failed to pay the Court-fees asked by the Registrar upon her memorandum of appeal. The plaint in the suit was rejected by the trial Court on the ground that it was insufficiently stamped and the appeal is directed against that order.

The Registrar of this Court, who has been empowered under the Court Fees Act to

exercise the powers of Taxing Officer for the purposes of section 5 of the Act, has held that the valuation made by the trial Court is correct and that the appellant must pay an *ad valorem* fee calculated according to section 7, clause 4 of the Act.

It is contended by the learned Vakil for the appellant that the Taxing Officer's order is not final for the purpose of section 5, because the one and only question for decision in the appeal is the question of valuation. It is contended that in such a case the Taxing Officer has no jurisdiction to assess a fee higher than that paid in the Court below or to determine the class under which the suit falls, because by doing so he practically tries the appeal.

The terms of section 5, however, are imperative and contain no restrictions on the power of the Taxing Officer. On the contrary the Act seems to contemplate that the Taxing Officer is bound to determine what is the proper fee payable upon the memorandum of appeal and that the order shall be final, unless and until the Appeal Court makes an order of remand in which event the appellant will be entitled to a refund of the excess paid by him.

It has been held in this Court in the case of *Lagan Bari Kuer* v. *Khakhan Singh* (1) that when the Taxing Officer has made his order, the Division Bench has no jurisdiction to re open the valuation before the appeal is admitted.

As has been pointed out by the learned Government Advocate, the effect of our holding otherwise would be that in the present case the appellant could obtain a decision upon the merits of his appeal without ever paying the full Court fee if he was so minded.

The Court Fees Act being a fiscal enactment, its language must be construed in its popular sense and I think the valuation of the Taxing Officer is to be taken as final, whenever there is no express authority to the contrary. The appellant being unable to pay the Court-fee demanded, the memorandum of appeal is rejected under Order XLI, rule 3 of the Civil Procedure Code.

Memo. of appeal rejected.

(1) 43 Ind. Cas. 521 & 962; 3 P. L. J. 92.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2118 OF 1917.

October 8, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

BACHU SOORAYYA AND ANOTHER—DEFENDANTS NOS. 3 AND 4—APPELLANTS

versus

TOOMULOORI CHINNA ANJANEYALU, MINOR, BY HIS MOTHER AND NEXT FRIEND MAHALAKSHMAMMA, AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Legal representative—Decree obtained against person in possession of estate—Execution proceedings, whether binding on real heir.

Where a creditor in good faith obtains a decree against a person in possession of his debtor's property whom he believes to be, but who is not in fact, the legal heir of the debtor, execution proceedings taken in pursuance of that decree will bind the real heir. [p. 510, col. 1.]

Gnanambal Ammal v. *Veerasami Chetty*, 31 Ind. Cas. 924; 29 M. L. J. 638, explained.

Such a case must, however, be treated as an exception to the general rule that proceedings in execution of a decree do not bind the interest of any person who is not brought on the record as a party to the proceedings in the suit. [p. 510, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Cocanada, in Appeal Suit No. 73 of 1916, preferred against the decree of the Court of the District Munsif, Cocanada, in Original Suit No. 274 of 1916.

Mr. *A. Krishnaswami Aiyar*, for the Appellants.

Messrs. *P. Narayanamurthi* and *M. Patanjali Sastri*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—Defendants Nos. 3 and 4 are the appellants in this second appeal. The 4th defendant is the purchaser in Court-auction sale of the plaint property, which belonged to the plaintiff's father, who died before 1913. The decree in execution of which the sale took place, was a Small Cause decree passed in a suit of 1913 brought against the plaintiff's father's brother as 2nd defendant, he being impleaded as the legal representative of the plaintiff's father Seethayya, who was then dead. The 2nd defendant was divided from plaintiff's father and he was not the real legal representative of plaintiff's father, the minor plaintiff being such representative. The question is whether the

Court auction sale is binding on the plaintiff.

In paragraph 6 of the plaint it is alleged that the 2nd defendant was not only not the heir of the plaintiff's father, but that the plaint property was never in the possession of the 2nd defendant after the plaintiff's father's death. These allegations in the plaint were not expressly denied in the appellants' written statements. The learned Vakil for the appellants relied, among other decisions, on the decision of Napier, J., and myself in *Gnanambal Ammal* v. *Veerasami Chetty* (1). There a decree had been passed against a person in possession of the property of the deceased debtor, though that person was not the heir of the debtor. We held that if the plaintiff in good faith obtained a decree against a person who was in possession of his debtor's property and whom the plaintiff believed to be the legal heir, execution proceedings taken in pursuance of that decree will bind the real heir. We held that the cases in *General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Sing* (2) and *Rimasawmi Chettiar* v. *Oppilamani Chetti* (3) supported our view as also the new definition of "legal representative" found in section 2, clause 11 of the Civil Procedure Code (Act V of 1908). I might also refer to *Bissessur Lall Sahoo* v. *Luchmessur Singh* (4) and *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (5). The case of a decree passed in a suit brought against a person in possession but who is not the heir of the deceased debtor's estate, must, of course, be treated as an exception to the general rule that proceedings in execution of a decree do not bind the interest of any person who was never brought on the record as a party to the proceedings in the suit. [see *Kishen Chunder Ghose* v. *Musammat Ashoorun* (6) as regards the general rule.] The decisions dealing with suits which had been instituted against a debtor before his death but were continued after his death till decree or after the decree in execution proceedings with the wrong person on record as legal representative are irrelevant for the consideration of the plaint before us, as pointed out by their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (7). In the present case defendants Nos. 3 and 4 contested the plaintiff's claim, not on the ground that the 2nd defendant was in possession of the plaint property and hence might be taken as the plaintiff's father's legal representative in some sense, but on the ground that the decree was passed for a debt of the plaintiff's father and hence is binding on the plaintiff, the question who was sued as plaintiff's father's legal representative or against whom the decree was obtained as such being immaterial according to the contention put forward by the appellants. I think such a contention cannot be supported, having regard to the decision in *Khiarajmal* v. *Daim* (7). [See also *Madhayarayudu* v. *Subbamma* (8).]

I would, therefore, dismiss the second appeal with plaintiff's costs.

SPENCER, J.—I agree.

M. C. P.

Appeal dismissed.

(1) 31 Ind. Cas. 920; 29 M. L. J. 698.

(2) 14 M. I. A. 605; 17 W. R. 459; 10 B. L. R. P. C. 294; 2 Suth. P. C. J. 575; 3 Sar. P. C. J. 117; 20 E. R. 912.

(3) 4 Ind. Cas. 1059; 33 M. 6; 19 M. L. J. 671; 6 M. L. T. 269.

(4) 6 I. A. 233; 5 C. L. R. 477 (P. C.).

(5) Marsh. 614.

(6) Marsh. 647.

(7) 32 C. 296 (P. C.); 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201 (P. C.); 2 A. L. J. 71; 7 Bom. L. R. 1.

(8) 35 Ind. Cas. 124; 31 M. L. J. 222; (1916) 2 M. W. N. 233.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3253 OF 1917.

October 25, 1918.

Present:—Mr. Justice Broadway.

JAMNA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARJIT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—Abatement—Joint decree—Death of one respondent—Failure to bring legal representatives of deceased on record, effect of.

Certain proprietors of a village obtained a decree declaratory of the right of all the proprietors to obtain a share in certain land. A second appeal was filed in the Chief Court, and it appeared that, before the filing of the appeal, one of the proprietor decree-holders had died, but, owing to the default of the appellants, no notice of the appeal was served on his representatives. It was contended that the appeal

had abated in its entirety, while for the appellants it was urged that the appeal had abated only with respect to the share of deceased decree-holder:

Held, that the appeal had abated in its entirety, inasmuch as, even if it were accepted, the decree which was in favour of the proprietors jointly could not stand against only one of them.

Second appeal from the decree of the District Judge, Delhi, dated the 27th August 1917.

Mr. *Kharak Singh*, for the Appellants.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—The facts of this case, so far as it is necessary to detail them for the purposes of this appeal, are as follows: In the village of Dhakla there is a Pana known as Pana Ugam in which there are four Thullas, namely, Thullas Mughlan, Madhawan, Raghawan and Bhagwan. The land in suit measuring about $8\frac{1}{2}$ *bighas pukhta*, was claimed by the proprietors of Thullas Mughlan and Madhawan as belonging to the whole of the proprietors of Pana Ugam, whereas the proprietors of Thullas Raghawan and Bhagwan claimed that they alone were entitled to any interest in the said land. The proprietors of the Thullas Mughlan and Madhawan instituted a suit against the proprietors of the other two Thullas asking for a declaration that all the proprietors in Pana Ugam were entitled to a share in this land. The trial Court granted the plaintiffs a decree as prayed, and an appeal by the defendants was rejected by the learned District Judge. The defendants, who are the proprietors in Thullas Raghawan and Bhagwan, then preferred this second appeal through Sardar Kharak Singh which was admitted by me on the 4th of January 1918.

On the 10th June 1918 Sardar Kharak Singh filed an application under Order XXII, rule 4, Civil Procedure Code, in which he alleged that one Sheo Narain, one of the respondents, had died some five months previously and asked for his sons to be brought on to the record as his representatives in the appeal. The application was granted subject to all just exceptions and the case came up before me on the 30th July 1918, on which date it was discovered that notice to the sons of Sheo Narain had not issued owing to the fact that neither Sardar Kharak Singh nor his client had filed any process-fee. An adjournment was granted, but in my order adjourning the case I noted that Mr. Manohar Lal for the respondents stated that he had been informed that Sheo Narain had died some eight months before the application was made. Mr. Manohar Lal has to-day filed before me a certified copy of the death certificate of Sheo Narain, the correctness of which has not been challenged by Sardar Kharak Singh. According to this, Sheo Narain died on the 20th of October 1917, and his death was duly reported on the 28th of the same month. It will thus be seen that Sheo Narain had died before this second appeal was filed in this Court.

On behalf of the respondents Mr. Manohar Lal contended that the appeal abated in its entirety. Sardar Kharak Singh referred me to *Gulsher Khan* v. *Mashuq Ali Khan* (1) and *Piyare Lal* v. *Chura Mani* (2) and contended that the appeal had not abated at all, or that if it had abated, it had abated only as against Sheo Narain and his representatives. Neither of the cases cited by the learned Counsel afford him any assistance. It is obvious that the decree, so far as Sheo Narain's representatives were concerned, must stand. That decree is to the effect that the proprietors of the whole Pana Ugam are entitled to the land in suit and not only the proprietors of the defendants-appellants' Thullas. In these circumstances even if the appeal were accepted the decree, so far as Sheo Narain's sons are concerned, could not be set aside, and, therefore, I hold that the appeal has abated in its entirety.

Mr. Kharak Singh then contended that his clients did not know of the death of Sheo Narain. It has been held more than once that ignorance of the death of a respondent or a party is no excuse. As to this see *Sayad Mir Nawab* v. *Hardeo* (3) cited by Mr. Manohar Lal and *Hadu* v. *Lala* (4). I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) 22 Ind. Cas. 929.
(2) 46 Ind. Cas. 50; 84 P. R. 1918.
(3) 12 Ind. Cas. 871; 60 P. R. 1911; 42 P. L. R. 1912; 238 P. W. R. 1911.
(4) 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914.

SHEO NARAIN SAHU *v.* RAM NIREKHAN OJHA.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 840 OF 1918.

July 30, 1919.

Present:—Mr. Justice Das.

SHEO NARAIN SAHU—DEFENDANT—APPELLANT

versus

RAM NIREKHAN OJHA—PLAINTIFF—RESPONDENT.

Mortgage—Redemption, partial, whether permissible—Mortgage, splitting up of, effect of.

A purchaser of a portion of the equity of redemption who has been left out of a mortgage action, is entitled to claim partial redemption, and may also be compelled to redeem that portion of the mortgaged property in which he may be interested. [p. 512, col. 2.]

The general rule that a person who has any right to redeem has a right to redeem the whole of the mortgaged property and not a part of it, unless there is a special bargain, is subject to the exception that he has a right to redeem his own share only, where a mortgagee has acquired, in whole or in part the share of the mortgagor. The rule would not apply where the integrity of the mortgage is broken up, as where the equity of redemption is with two different persons. [p. 512, col. 2.]

Appeal from a decision of the Officiating District Judge, Saran, dated the 28th March 1918, affirming that of the 3rd Munsif's Court, Chupra, dated the 8th August 1917.

Messrs. *Lakshmi Narayan Singh* and *Nawal Kishore Prasad*, for the Appellant.

Mr. *Rajendra Prasad*, for the Respondent.

JUDGMENT.—On the 9th September 1908, plaintiff's father obtained a mortgage decree against one Mahabir. In that litigation the appellant, the purchaser of a portion of the mortgaged property in execution of a money decree in 1906, was not impleaded as a party defendant. On the 11th January 1917, the respondent commenced the action out of which this appeal arises against the appellant for possession of that portion of the mortgaged properties which had passed into the possession of the appellant by virtue of the execution sale held in pursuance of the money decree obtained in 1906. The appellant, in answer to the plaintiff's action, claims the right to redeem the whole of the mortgaged property, and not merely that part of it which is in his possession, and the substantial question which I have to determine in this appeal is whether a purchaser of a portion of the equity of redemption who has been left out of the mortgage action, can be compelled to redeem only that portion of the mortgaged properties which have passed into his possession by such purchase.

It may be conceded that a person, who has any right to redeem, has a right to redeem the whole of the mortgaged property, and not a part of it, unless there is a special bargain. *Hall* v. *Heward* (1). But an important exception has been engrafted on this general rule, namely, that a person has a right to redeem his own share only where a mortgagee has acquired, in whole or in part, the share of the mortgagor. The general rule is, of course, based on the principle that a mortgage is one and indivisible, and that the property comprised in it is in its entirety security for the entire debt and for every part of it; but the general rule cannot obviously apply when the integrity of the mortgage is broken up. In the case before me the plaintiff, who is the mortgagee, has acquired the entire share of the mortgagor, except such share which passed to the defendant by his purchase. The equity of redemption is now in two different persons, namely, the plaintiff and the defendant, with this result that the integrity of the mortgage security is broken up. In such circumstances, it is well settled that a purchaser of a portion of the equity of redemption is clearly entitled to claim partial redemption. See *Hari Kissen Bhagat* v. *Veliat Hossein* (2), *Gangadas Bhattar* v. *Jogendra Nath Mitter* (3) and *Hamida Bibi* v. *Ahmad Hussain* (4). In my opinion, whenever a person is entitled to claim partial redemption, he may also be compelled to redeem that portion of the mortgaged properties in which he may be interested. If this were not so, it would require two litigations to work out the equities between the parties. If the defendant were entitled to redeem the whole of the mortgaged property, he would have a charge on the share of his co-mortgagor (in this case, the plaintiff, in whom has vested the remaining interest of the mortgagor) as security for the amount which he has paid in excess of his own proportionate share of the mortgage debt The defendant, in this case, says: "I have a right to redeem the whole of the mortgaged property and I claim the right to

(1) (1886) 32 Ch. D. 430; 55 L. J. Ch. 604; 54 L. T. 810; 34 W. R. 571.
(2) 30 C. 755; 7 C. W. N. 723.
(3) 11 C. W. N. 403 at p. 412; 5 C. L. J. 315.
(4) 1 Ind. Cas. 779; 31 A. 335; 6 A. L. J. 387.

redeem the whole of the mortgaged property." To this, the plaintiff has a right to reply as follows: "Very well, redeem the whole of the mortgaged property, but I claim the right to pay my proportionate share of the mortgage debt and retain the property which I have purchased, free from any charge." It was exactly to meet a case like this that the last paragraph of section 60 of the Transfer of Property Act was enacted. As the learned Judges in the case of *Sobha Sah* v. *Inderjeet* (5) said: "The whole estate, as to one portion of the property, has merged in the mortgagee, and the mortgagor, if compelled to redeem by payment of the whole debt, would have to sue the mortgagee for contribution afterwards, and thus by two suits between the same parties attain the result which under the law as above interpreted is now attained by one suit."

In my judgment, the lower Appellate Court has taken an entirely correct view of the law. I would, therefore, dismiss this appeal with costs.

Appeal dismissed.

(5) 5 N. W. P. H. C. R. 148.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 183 OF 1918.

December 16, 1918.

Present:—Mr. Daniels, A. J. C.

CHAUHAN—PLAINTIFF—APPELLANT

versus

BIHARI LAL—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 115—Estoppel by conduct—Mortgage—Sale of portion of equity of redemption—Mortgagor joining purchaser in suit for redemption—Suit, subsequent, to set aside sale of equity of redemption, maintainability of.

A sold a share in the equity of redemption of certain property to *B*. *B* brought a suit to redeem the mortgage and impleaded *A*. as a defendant. *A* applied to the Court stating that he also had a right in the equity of redemption and asked to be joined with *B* as co-plaintiff. This was allowed and the redemption suit fought out by the two as co-plaintiffs Subsequently to the filing of the redemption suit *A* brought a suit for cancellation of the sale of the equity of redemption on the ground of fraud:

Held, that as by his conduct in the redemption suit *A* had elected to affirm the sale and to act upon it, he was not entitled to the relief he now was seeking. [p. 514, col. 1.]

Appeal against the decree of the District Judge, Lucknow, dated the 1st February 1918, confirming that of the Subordinate Judge, Lucknow, Tahsil Mohanlalganj, dated the 21st August 1917.

Mr. *St. C. Thompson*, for the Appellant.

Mr. *Rajeshri Prasad*, for the Respondent.

JUDGMENT.—This is an appeal in a suit for cancellation of a sale deed on the ground of fraud. The first Court dismissed the suit on merits. The plaintiff appealed to the lower Appellate Court, on the ground mainly that the appellant had not been given an adequate opportunity to produce his witnesses. The learned District Judge dismissed the appeal on the ground that after the filing of the suit the appellant had, by his conduct, elected to affirm the contract of sale in question and to act upon it and that he was, therefore, debarred from obtaining a decree for its cancellation. This position has not been controverted in argument before me. The learned Counsel for the appellant has confined his argument to suggesting that the facts relied on by the District Judge do not constitute an affirmation of the contract.

The present suit was filed on the 11th May 1917. The contract in suit was a sale of the equity of redemption in a 4 annas out of an 8-anna share held by the plaintiff Chauhan, in favour of the defendant Bihari Lal, in order to induce the latter to finance a suit for redemption of the property. The fraud alleged by the plaintiff was that the defendant had an interest in the mortgagee rights and had got a sale-deed from him with a deliberate design of not bringing the promised redemption suit but of allowing the right of redemption to become time barred. Six days later on 17th May 1917 before intimation of the filing of the present suit had been given to him the defendant filed his redemption suit, including the name of the present plaintiff Chauhan among the array of defendants. The plaintiff thereupon put in a petition stating that he also had a right in the equity of redemption and asking to be joined with Bihari Lal, a co-plaintiff. This application was allowed

and the redemption suit was afterwards fought out by the two as co-plaintiffs.

A more unequivocal adoption of the contract could hardly be imagined. The appellant's Counsel suggests that because the plaintiff was made a defendant in the suit he was under some sort of compulsion to apply to be made plaintiff. This argument will not hold water for a moment. The defendant in suing for redemption was bound by the terms of Order XXXIV, rule 1, to make him a party as the equity of redemption in half the mortgaged share admittedly remained with him, but the appellant was under no sort of compulsion to recognise the defendant's title. He could perfectly well have said that the sale in favour of the defendant had been procured by fraud, that he had sued to rescind it and that the defendant was not entitled to bring the suit. He could then have asked to have the two suits tried together or the decision of the redemption suit postponed until the issue of fraud had been decided. Moreover, when once the redemption suit was filed, there was an end of the fraud which the defendant was supposed to have meditated. As soon as the plaintiff had joined him as co-plaintiff, the respondent was justified in going on with the suit in the full confidence that his title to do so would no longer be questioned and the respondent would be placed in a position of manifest disadvantage if the appellant were allowed to resile from that position now. The decision of the learned District Judge is clearly correct and I dismiss the appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 259 OF 1918.

July 29, 1919.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

Sheikh ABDUL RAHIM—DEFENDANT—APPELLANT

versus

GUJESHAR MAHTO AND OTHERS—PLAINTIFFS AND JADU THAKUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Bengal Tenancy Act (VIII B. C. of 1885), s. 174, scope of—Rent-decree against two persons—Execution of decree against one judgment-debtor—Sale of holding—Application to set aside sale by other judgment-debtor, nature of.

Plaintiff and defendant *A* held a holding jointly. Defendant *B*, the landlord of the holding, obtained a rent-decree against plaintiff and defendant *A* and in execution of that decree against the latter alone brought the entire holding to sale. Defendant *C* purchased the holding at the sale. Plaintiff thereupon brought a suit to have the sale set aside. His plaint was treated as an application under section 47 of the Civil Procedure Code and the sale was set aside. Defendant *C* appealed, contending that plaintiff had no right to make an application under section 47 of the Code, as he was not a party to the execution proceedings, and that his remedy was to apply either under section 174 of the Bengal Tenancy Act or under Order XXI, rule 90 of the Civil Procedure Code, to set aside the sale:

Held, that section 47 of the Civil Procedure Code does not require that a person making an application thereunder should be a party to the execution proceedings, but requires that he must be a party to the suit in which the decree is passed, and as plaintiff was a party to the suit he was competent to make the application. [p. 515, col. 2.]

Section 174 of the Bengal Tenancy Act and Order XXI, rule 90 of the Civil Procedure Code, are of limited scope and application, and an application which raises questions as to the execution of a decree, clearly beyond their scope ought to be dealt with under section 47 of the Code. [p. 515, col. 2]

Appeal against the order of the District Judge, Mozaffarpur, dated the 28th May 1918.

Mr. *Abani Bhusan Mukherji*, for the Appellant.

Mr. *Gour Chandra Pal*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This is an appeal against the order of the District Judge of Mozaffarpur, dated the 28th of May 1918, confirming the order of the Munsif, dated the 28th of July 1917.

The plaintiff and the defendant 4th party held jointly a holding, which originally belonged to the former but by transfer a portion thereof came into the possession of the latter. The defendant 2nd party is the landlord of the holding and obtained a rent decree against the plaintiff and the defendant 4th party and in execution against the defendant 4th party only brought the entire holding to sale. Defendant 1st party, who is the appellant before us, purchased that holding at the auction-sale. The plaintiff thereupon brought a regular suit with the main object of hav-

ing the sale set aside. The suit was decreed but on appeal to the District Judge it was held that the suit was barred by the provisions of section 47, Civil Procedure Code, and the case was remanded to the trying Court with a direction to treat the plaint as an application under section 47, Civil Procedure Code, and to dispose of it. The parties agreed to this course. On remand, the Munsif set aside the sale, holding that the decree-holder had illegally omitted the plaintiff from the list of the judgment debtors in the execution proceeding, and that he had not served any of the processes required under the law for the attachment and the sale of property in execution of the decree. He also held that the processes were suppressed by the decree-holder in collusion with the Court peon.

Defendant No. 1 appealed to the District Judge. The aforesaid findings of fact were not challenged, but the mere contention in appeal was that the respondent had no right to make an application under section 47 of the Code, and that his remedy was to apply for setting aside the sale either under section 174 of the Bengal Tenancy Act, or Order XXI, rule 90, Civil Procedure Code. The learned District Judge overruled this contention and dismissed the appeal. The contention has been repeated before us in this second appeal The only question, therefore, before us for decision is whether the application of the respondent comes under section 47 or not.

The ground urged in support of the contention is that the respondent was not a party to the execution proceedings and, as section 47 relates only to execution proceedings, he has no right to apply under section 47. The learned Vakil for the appellant has obviously overlooked the provisions of section 47, which do not require that a person making an application under that section should be a party to the execution proceedings. All that the section requires is that he must be "a party to the suit in which the decree was passed" The plaintiff respondent was impleaded as defendant along with defendants 4th party in the rent suit in which the joint decree in question was passed. There is, therefore, no force in this contention, which is overruled.

The next ground urged has been that section 174 of the Bengal Tenancy Act and Order XXI, rule 90, of the Code of Civil Procedure bar the present application of the respondent from being entertained under section 47, Civil Procedure Code. There does not appear to be much substance in this contention also. Both the aforesaid provisions of law have limited scope and application and afford speedy remedy to the judgment-debtor or any person affected by the sale to have the sale set aside either upon deposit made within a certain period from the date of the sale or on showing that there had been material "irregularity or fraud in publishing or conducting the sale" and consequent substantial injury. The application in this case is certainly of a more far-reaching character and although some of the grounds upon which the sale is impugned are covered by the aforesaid provisions in section 174 and Order XXI, rule 90, still there are other grounds which clearly raise questions as to the execution of the decree and which are beyond the scope of the aforesaid sections. One of the principal grounds is that though the plaintiff-respondent was a judgment debtor and was interested in the holding, he was not made a party in the execution proceedings and the entire holding including his interest could not be sold in the execution of the decree against him and the defendant 4th party. Another important objection to the sale was that no notice was served on the plaintiff respondent as required by law, particularly, notice under Order XXI, rule 66, Civil Procedure Code These latter objections cannot possibly come under Order XXI, rule 90, Civil Procedure Code, or section 174 of the Bengal Tenancy Act. I, therefore, agree with the view taken by the Courts below that the application was properly dealt with under section 47.

It has been also urged that the question raised by the application of the respondent is not between the parties to the suit, inasmuch as the appellant is an auction-purchaser and he was not a party to the suit. The application does not at all raise any question subsequent to the sale

but the objections of the respondent as to the sale relate to the proceedings adopted by the decree-holder regarding the execution of the decree and the manner in which the property was brought to sale. The real dispute, therefore, is between the decree-holder and the respondent, both of whom were parties to the suit; and as the sale was being impugned, the auction purchaser who purchased the property at the sale was also made a party to the present proceedings. This contention also must, therefore, be overruled. The result is that the appeal is dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 257 OF 1918.

April 8, 1919.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

B. B. & C. I. RAILWAY—DEFENDANTS—APPLICANT

versus

RANCHHODLAL CHHOTALAL & CO.—PLAINTIFFS—OPPONENTS.

Carriage of goods by railway—Risk Note, Form B—Liability of railway, extent of—Wilful neglect or theft by railway servants, proof of—Burden of proof—Evidence Act (I of 1872), s. 103.

Where goods are booked for conveyance by a railway under Risk Note, Form B, and, in consideration of a special reduced rate being charged, the consignor agrees to hold the Railway Administration harmless for any loss except for loss of a complete consignment or complete package due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants, it being provided that wilful neglect would not include robbery from a running train, then, in the absence of proof of wilful neglect or theft by the railway servants, the Administration is free from responsibility. If neglect or theft is proved, the Administration will escape liability for loss if proof is given of robbery from a running train, etc. [p. 516, col. 2.]

Where the plaintiff alleges wilful neglect or theft by railway servants, under section 103 of the Evidence Act it lies on him to give proof of the fact. [p. 516, col. 2.]

Application against the decision of the Judge of the Court of Small Causes, Ahmedabad, in Suit No. 419 of 1917.

Mr. *Coltman*, instructed by Messrs. *Crawford, Bayley & Co*, for the Applicant.

Mr. *N. K Mehta*, for the Opponents.

JUDGMENT.—The plaintiffs shipped on the Bombay, Baroda & Central India Railway some 23 bales of cloth under a Risk Note, Form B, from Ahmedabad to Calcutta. The cloth was loaded in a closed waggon which was sealed. It was the duty of the Guard to examine the seals at every station. He went round the train at Ankleshwar and gave a certificate that all was right. At Surat, the next station at which the train stopped, one of the doors of the waggon was found to be open and one of the plaintiffs' bales was missing. Some of the cloths from the bale were subsequently discovered to have been sold by an inhabitant of Mitali, four miles on the Surat side of Ankleshwar. He was convicted and sentenced, but at the trial there was no finding that any railway servant took any part in the theft of the cloths. Under the Risk Note, in consideration of a special reduced rate being charged, the consignor agreed to hold the Railway Administration harmless for any loss except for loss of a complete consignment or complete package due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants. Provided that wilful neglect was not to be held to include robbery from a running train.

The learned Judge, after recording evidence, observed that there was absolutely no evidence to prove that there was any theft from the train; but no doubt the bale was stolen and the goods must have found their way out but there was no evidence to prove that the bale was lost whilst the train was running. He, therefore, held the defendants had failed to prove the theft from the running train and passed a decree for the plaintiffs for the amount claimed.

This judgment shows confusion as to the terms of the Risk Note.

In the absence of proof of wilful neglect or theft by the railway servants the Administration is to be held free from responsibility If, however, neglect or theft by railway servants is proved, the Administration will escape liability for loss if proof is given of robbery from a running train, etc. The plaintiffs wish the Court to believe that there was wilful neglect or theft by railway servants, it, therefore, lies on the plaintiffs under section 103 of the Indian Evidence Act to give proof of the fact. This they

have not done and no question is reached of robbery from a running train.

This conclusion accords with the decision of the Allahabad High Court in *East Indian Railway Company* v. *Nathmall Behari Lal* (1).

We set aside the decree and dismiss the suit with all costs on the plaintiffs.

Application accepted.

(1) 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1100 OF 1918.

February 27, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VENKATAPPIER—DEFENDANT—APPELLANT

versus

RAMASWAMI AIYAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Religious trust—Lease, permanent, by trustee, validity of—Ejectment, suit for—Compensation for improvements, right of lessee to—Transfer of Property Act (IV of 1882), s. 51—Mesne Profits and Improvements Act (XI of 1855), s. 2—Scope of Act—'Other absolute estate,' meaning of—Notice to quit, absence of, plea of—Appeal, second—Point taken for first time—Discretion of Court—Civil Procedure Code (Act V of 1908), s. 100, O. XLI, r. 2.

The trustee of a religious trust cannot grant a permanent lease of the trust properties. [p. 518, col. 1.]

Palaniappa Chetty v. *Sreemath Deivasikamony Pandara Sannadhi*, 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 & 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.), followed.

A lessee holding under an invalid lease cannot claim compensation for improvements before eviction under section 51 of the Transfer of Property Act or under section 2 of the Mesne Profits and Improvements Act. [p. 518, col. 1.]

The Mesne Profits and Improvements Act applies only to cases tried on the Original Side of the High Court. [p. 518, col. 1.]

The expression 'other absolute estate' in section 2 of the Mesne Profits and Improvements Act does not include the estate of a lessee with occupancy rights. [p. 518, col. 1.]

The High Court in second appeal, is not bound to consider a ground of defence not taken in the lower Courts, unless perhaps, it is a question of limitation arising out of proved or admitted facts. [p. 518, col. 2.]

In an action in ejectment the High Court will not consider the plea of want of proper notice to quit, if the same was not urged in the lower Courts and was not decided by them [p. 518, col. 2.]

Subba v. *Nagappa*, 12 M. 353: 13 Ind. Jur. 256; 4 Ind Dec. (N. S.) 595 and *Abdulla Rawutan* v. *Subbarayyar* 2 M. 346; 3 Ind. Jur. 16?; 1 Ind. Dec. (N. S.) 511, distinguished.

The fact that an Appellate Court does not take notice of a question not raised in the memorandum of appeal, cannot be said to vitiate its decision by any error or defect in procedure within the meaning of section 100, Civil Procedure Code. [p. 518, col. 2.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 618 of 1917, preferred against the decree of the Court of the District Munsif, Mayavaram, in Original Suit No. 456 of 1915.

FACTS appear from the judgment.

Messrs. *T. V. Venkatarama Aiyar* and *C. R. Subramania Aiyar*, for the Appellant.—The defendant was entitled to compensation before eviction at least under section 2 of Act XI of 1855. The words 'other absolute estate' in the section include a permanent lessee.

The suit was bad for want of a notice to quit. *Municipal Corporation of Bombay* v. *Secretary of State* (1). Though the point was not taken in the lower Courts, it raises a question of law and can be urged in second appeal.

Mr. *S. T. Srinivasagopala Chariar*, for the Respondents.—Act XI of 1855 does not apply to cases tried in the Mofussil. No compensation can be claimed by the lessee. He is only entitled to remove the materials.

As to want of notice the point was not raised in the lower Courts. The High Court is not bound to consider it in second appeal.

JUDGMENT.—The defendant is the appellant. He obtained a permanent lease of a house site from the trustee of a religious trust in 1911. The successor in the trusteeship brought this suit in 1915 to eject him. That the permanent lease is invalid against the trust cannot be denied and though the 2nd ground in the appeal memorandum contends that it is valid against the trust, the point was not seriously argued [see *Palaniappa Chetty* v.

(1) 29 B. 580 at p. 588; 7 Bom. L. R. 27.

Sreemath Deivasikamony Pandara Sannadhi (2)].

The next contention was that the defendant, who has built a house on the leased site, is entitled to compensation before his evictment and is not merely entitled to be allowed to remove the materials of the house (which he has been allowed to do by the decrees of the lower Courts). Mr. T. V. Venkatarama Aiyar conceded that he cannot rely on section 51 of Act IV of 1882 (Transfer of Property Act) in support of his claim to compensation [see on this point our judgment in *Perumal Gramani* v. *Mahamad Kasim Sahib* (3)].

He, however, relied on section 2 of Act XI of 1855 (Mesne Profits and Improvements Act). That Act applies only to cases tried on the Original Side of the High Courts to which English Law applies and even in such cases, we are not, as at present advised, prepared to agree with certain *obiter dicta* quoted by Mr. T. V. Venkatarama Aiyar that the words "other absolute estate" in section 2 of Act XI of 1855 include the estate of a lessee with permanent occupancy rights.

Lastly, it was contended that the plaint does not allege that the tenancy from year to year created by payment of rent [see *Municipal Corporation of Bombay* v. *Secretary of State* (1)] had been put an end to by a proper notice to quit and that, therefore, the suit should be dismissed as not disclosing a complete cause of action in ejectment.

It may be conceded that though this point was not taken in the lower Courts, this Court even in second appeal can allow the point to be taken and argued and can decide the case on that point [see *Subba* v. *Nagappa* (4) and *Abdulla Rawutan* v. *Subbarayyar* (5)]. But we do not think we are bound to consider it and to decide this second appeal on a point not taken in the lower Courts. In *Subba* v. *Nagappa* (4) the tenant had been in possession from 1869 and the case was finally decided against the tenant on the finding submitted after remand that reasonable notice had been given.

In *Abdulla Rawutan* v. *Subbarayyar* (5) also, the tenants had long been in possession and though the suit was remanded for a finding, the ultimate result of the case is not known.

We do not think that these cases decide that we are bound in second appeal to consider a ground of defence not taken in the lower Courts, unless perhaps it is a question of limitation arising out of proved or admitted facts.

Order XLI, rule 2, Civil Procedure Code, says: "The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal but the Appellate Court...shall not be confined to the grounds set forth, etc."

Now no ground of objection was set forth in the appeal memorandum presented to the lower Appellate Court on the question of want of notice and it was not argued there. The lower Appellate Court, therefore, was not bound to take the point itself and its decision on the grounds argued before it is correct. The defendant in this case obtained his lease only 4 or 5 years before this suit was brought and though we are entitled to consider the question of want of notice and to remand the suit for getting findings on the facts relating to that question after, if necessary, allowing plaintiff to amend his plaint, we do not think we are bound in second appeal to do more than decide whether the lower Appellate Court's decision was wrong in having been contrary to law, etc., or failed to determine an issue of law, etc., or vitiated by substantial error or defect in procedure (section 100 of the Civil Procedure Code). If the lower Appellate Court was not bound to take notice of a question not raised in the appeal memorandum presented to it, it cannot be said that its decision was vitiated by any errors in procedure or defect in determination of points which it was bound to have considered.

We do not think that, on the facts found in this case, our discretion should be exercised in favour of the question of want of notice being allowed to be raised and argued before us.

In the result, the second appeal is dismissed with costs. Three months' time from

(2) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 & 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.).

(3) 28 Ind. Cas 840.

(4) 12 M. 353; 13 Ind. Jur. 256; 4 Ind. Dec. (N. S.) 595.

(5) 2 M. 346; 3 Ind. Jur. 160; 1 Ind. Dec. (N. S.) 511.

this day is allowed to the appellant for the removal of the superstructure.

M. C. P.

Appeal dismissed.

BOMBAY HIGH HIGH.
ORIGINAL CIVIL SUIT No. 637 OF 1918.
September 18, 1918.
Present:—Mr. Justice Beaman.
HUKAMCHAND SARUPCHAND—PLAINTIFF
versus
ABRAHAM E. J. ABRAHIM—DEFENDANT.

Pakka adatia, *position of - Suit by* pakka adatia *against principal—Contract, breach of—Damages—Interest, whether can be claimed.*

A *pakka adatia* can at will become a principal to enforce any contract which has been entrusted to him as agent by his original principal against that principal, and, when he sues relying upon his character as principal, his claim differs in no respect from that upon an ordinary contract between two principals and he is entitled to demand interest upon the amount which he claims as ordinary damages for breach of contract.

Mr. *J. D. Davar* (with him Mr. *Desai*), for the Plaintiffs.

Mr. *Strangman*, Advocate General (with him Mr. *R. D. N. Wadia*), for the Defendant.

JUDGMENT.—The only point in controversy here is whether the plaintiff is entitled to interest on the amount claimed. The answer to that depends upon what is claimed. Is this damages or is it money paid by an agent on account of his principal? Clearly it is damages. A *pakka adatia*, as settled by the law of this Court, can at will become a principal to enforce any contract which has been entrusted to him as agent by his original principal against that principal. I have frequently commented upon the legal anomalies involved in this entirely new and unique legal entity. But in this Presidency at any rate we must take it as we find it. When, then, a *pakka adatia* sues, as in the present case, relying upon his character not as agent but as principal and thereby deliberately protects himself against inquiries which ordinarily are made about the amounts he has actually

expended as agent on behalf of his principal, it is, I think, too plain to admit of argument that the claim differs in no respect from that upon an ordinary contract between two principals. It cannot be said that the damages claimed are liquidated damages, because by the assertion of his privileged character as *pakka adatia* the Court cannot go behind the rate fixed by the original contract and the rate prevailing at date of breach. Viewed in any light, therefore, it ceases to be arguable that a *pakka adatia* suing in that legal character can demand interest upon the amount which is thus claimed as ordinary damages for breach of contract. This, I believe, is the first time that the point has been definitely raised, and that is the only reason why I have thought it necessary to state the simple, almost self-evident, reason for deciding it as I do.

There will, therefore, be a decree for the plaintiff for Rs. 1,06,102 and costs and interest on judgment at 6 per cent. per annum.

Suit decreed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 1941 OF 1917.
November 6, 1918.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.
MARIAPPA PILLAI—DEFENDANT No. 3—APPELLANT
versus
L. R. RAMAN CHETTIAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 36, 37—'Court,' 'void,' meanings of—Transfer by insolvent—Fraudulent preference—Sale by Official Receiver—Suit by alienee of insolvent impugning sale—Validity of transaction, whether open as defence—Annulment of transfer—Insolvency Court, exclusive jurisdiction of.

The expression 'the Court' in section 37 of the Provincial Insolvency Act signifies the Court exercising jurisdiction under that Act. [p. 520, col. 2.]

The word 'void' in section 36 of the Provincial Insolvency Act means 'voidable.' [p. 521, cols. 1 & 2.]

A special statutory provision whereby District Courts and other Courts are invested by notification of the Local Government under section 3 (1) of th

Provincial Insolvency Act with the power, among other powers, of invalidating certain defined transactions of insolvents, should not be extended to all Courts of original jurisdiction, whether notified under the Act or not. [p. 521, col. 1.]

No Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference or a voluntary transfer made within two years of an adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to declare the debtor, who made the transfer, insolvent by a petition duly presented under the Act. [p. 520, col. 2; p. 521, col 1.]

It is only the Official Receiver who can set the Court in motion to annul a transfer under section 36 or section 37 of the Provincial Insolvency Act. [p. 521, col. 1.]

Hemraj Champa Lall v. *Ramkishen Ram*, 38 Ind. Cas. 369; 2 P. L. J. 101; 1 P. L. W. 752; (1917) Pat. 303, followed.

Per *Sadasiva Aiyar, J.*—The Full Bench decision in *Lakshmi Dass* v. *Roop Laul*, 30 M. 169 (F. B.); 17 M. L. J. 19; 2 M. L. T. 4 should not be extended so as to enable a defendant to raise an equitable defence, if the Court before which it is raised would not have jurisdiction to entertain a suit if brought by the defendant to obtain the relief of cancellation based on the right put forward as the basis of the equitable defence. Where the right to grant such a relief is, by Statute Law, vested in a Special Tribunal, the defence cannot be pleaded before another Tribunal not vested with such power. A transfer, therefore, falling under section 36 of the Provincial Insolvency Act remains valid till set aside by the Insolvent Court at the instance of the Receiver and the voidability of the transfer cannot be pleaded as a defence in any Court till it is set aside. [p. 522, col. 1]

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 514 of 1916, preferred against the decree of the Court of the Additional District Munsif of Tinnevelly, in Original Suit No. 80 of 1914.

Messrs *T. M. Krishnaswami Ayyar* and *E. Vinayaga Row*, for the Appellant.

Messrs. *T. R. Venkatarama Sastri* and *G. K. Sivaramakrishna Ayyar*, for Respondent No. 2.

JUDGMENT.

SPENCER, J.—The plaintiff is the wife of the 2nd defendant. She purchased the suit property from him on 5th August 1912, the consideration for the sale being the debt to her which he had incurred for meeting the expenses of a certain litigation between himself and his father, for which he had pledged his wife's jewels. The 1st defendant was a creditor of the 2nd defendant and brought Original Suit No. 324 of 1913 in the Court of the District Munsif of Tinnevelly against him and got the suit property attached before judgment. The plaintiff put in a claim petition but it was dismissed on 2nd December 1913. On a debtor's petition presented in the District Court on 15th September 1913 the 2nd defendant was on 12th December 1913 declared insolvent. The Official Receiver sold the suit property by auction on 31st July 1914 and the 3rd defendant purchased it.

The plaintiff brought this suit to establish her title and has been successful in the lower Courts in obtaining a declaration of her title, both the Additional District Munsif and the District Judge finding that the sale by plaintiff's husband in her favour was a genuine one for good consideration. They also held that the sale by the Official Receiver was a nullity for want of a vesting order, citing the opinion of Moore, J., in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (1). The proceedings in which the 2nd defendant was adjudicated insolvent are not in the records of this second appeal. Assuming that those proceedings were regular and that under section 16 (2) (*a*) of the Provincial Insolvency Act, the insolvent's property by the order of adjudication *ipso facto* became vested in the Official Receiver, there are other obstacles in the way of the 3rd defendant, who purchased the property from the Official Receiver and is the appellant in this second appeal. The defect in his title consists in the admitted fact that the transfer of the suit property by the insolvent to the plaintiff has not been annulled by the Court of Insolvency either under section 36 or section 37 of the Provincial Insolvency Act. "The Court" in sections 36 and 37 signifies the Court exercising jurisdiction under that Act [see the definition in section 2 (*g*) of the Provincial Insolvency Act], which in the present case was the District Court. I am of opinion that no Court has the jurisdiction to annul, as such, a transfer amounting to a fraudulent preference or a voluntary transfer made within two years of the adjudication, except a Court exercising insolvency jurisdiction in proceedings which have been instituted to

(1) 34 Ind. Cas. 602; 30 M. L. J. 415.

declare the debtor, who made the transfer, insolvent by a petition duly presented under the Act. In *Gandla Veerama* v. *Ramaswamiah Garu* (2) it was held by Phillips and Krishnan, JJ., that a Receiver appointed by a Court of Insolvency could bring a regular suit in another Court to set aside a transaction under section 36 of the Provincial Insolvency Act, but with due respect, I feel doubt whether that decision was right. I do not think that a special statutory provision whereby District Courts and certain other Courts are invested by notification of the Local Government under section 3 (1) with the power, among other powers, of invalidating certain defined transactions of insolvents should be extended to all Courts of original jurisdiction whether notified under this Act or not. Otherwise conflicts might arise between the decision of a Court sitting in insolvency and the judgment of another Court exercising ordinary original jurisdiction. Transfers of this kind, if they do not fall under section 53 of the Transfer of Property Act, would, in the absence of any provision to the contrary, be valid transfers.

I further agree with the view taken in *Hemraj Champa Lall* v. *Ramkishen Ram* (3) and in *Kauleshar Ram* v. *Bhawan Prasad* (4) that it is the Official Receiver who must set the Court in motion to annul a transfer under section 36 or section 37. These sections speak of such transfers as being "void against the Receiver" not void against all the world. On the analogy of the English Bankruptcy Act it has been laid down in three decisions of this Court that "void" in section 36 of the Provincial Insolvency Act and in the corresponding section 55 of the Presidency Towns Insolvency Act means "voidable" [see *Abdul Kadhar* v. *Official Assignee of Madras* (5), *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (6) and *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (1)].

An additional reason was given by my learned brother in the latter case, *viz*, that the Act makes the intervention of the Court necessary, which would not be so if such a transfer was void *ab initio*. It has been held by another Bench of this Court in *Ussam Kasim Sait* v. *Palat Mammad Koya* (7) that even the word "void" in section 37 of the Provincial Insolvency Act only means "voidable", although that section leaves the Court no discretion in the matter, by declaring that every transfer of property which amounts to a fraudulent preference "shall be annulled by the Court," the words in section 36 being "may be annulled". It is enough for this appeal that "void" in section 36 means "voidable."

The appellant's Pleader, citing the Full Bench case of *Lakshmi Doss* v. *Roop Laul* (8), argues that he should be allowed to raise the voidability of the transaction in plaintiff's favour as an equitable defence in this suit, and further contends that the Official Receiver, when he sold the insolvent's property by auction, sufficiently indicated his intention of exercising his discretion towards the avoidance of the sale to the plaintiff.

But that is not enough. The transfer has not been annulled by the Insolvency Court. The appellant cannot be allowed, for the purposes of this suit, to stand in the shoes of the Official Receiver, an officer of Court, who has not been made a party, and to raise a defence involving the decision of a point which it is only within the jurisdiction of a Court dealing with the estate in insolvency to decide.

Moreover, the transfer to the plaintiff, looked at from the point of view of section 36, is not a voluntary transfer, as both Courts have found that there was consideration for it. For the application of section 37, it was not made within 3 months of the presentation of the petition on which the adjudication was made. Even regarded as a transfer in fraud of creditors it could, under the authority of *Palaniandi Chetty* v. *Apparu Chettiar* (9) and *Subramania Ayyar* v. *Muthia Chettiar* (10), only be avoided by a suit instituted for the purpose of having it set aside.

The appeal, therefore, fails from every point of view and is dismissed with costs.

(2) Second Appeal No. 360 of 1916.

(3) 38 Ind. Cas. 369; 2 P. L. J. 101; 1 P. L. W. 752; (1917) Pat. 303.

(4) 42 Ind. Cas. 845.

(5) 20 Ind. Cas 485; (1914) M. W. N. 247; 14 M. L. T. 51; 25 M. L. J. 308; (1913) M. W. N. 876.

(6) 49 Ind. Cas. 283; 8 L. W. 281; (1918) M. W. N. 487; 24 M. L. T. 149; 35 M. L. J. 296.

(7) 38 Ind. Cas. 231.

(8) 30 M. 169 (F. B.); 17 M. L. J. 19; 2 M. L. T. 1.

(9) 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 390.

(10) 43 Ind. Cas. 651; 33 M. L. J. 705 (F. B.); 6 L. W. 750; 41 M. 612.

VALLI MAHOMED ABU *v.* BERTHOLD REIF.

SADASIVA AIYAR, J.—The Full Bench decision in *Lakshmi Doss* v. *Roop Laul* (8) (which is binding on me sitting in a Division Bench) should not, in my opinion, be extended so as to enable a defendant to raise an equitable defence, if the Court before which it is raised would not have jurisdiction to entertain a suit if brought by the defendant to obtain the relief of cancellation based on the right put forward as the basis of the equitable defence. Such an equitable defence may be successfully pleaded in some cases, even though a suit to obtain the relief based on the facts on which the defence is based may be barred by limitation, but I do not think that where the right to grant such a relief is, by Statute Law, vested in a Special Tribunal, the defence could be pleaded before another Tribunal not vested with such power. I, therefore, agree with my learned brother that a transfer falling under section 36 of the Provincial Insolvency Act remains valid till set aside by the Insolvent Court at the instance of the Receiver and that the voidability of the transfer could not be pleaded as a defence in any Court till it is so set aside. I might further add that in this case there is nothing to show that the Receiver Gopala Ayyar knew of the transfer and elected to avoid it. It is the Receiver alone that could so elect, and not a purchaser from him. Hence assuming that an order of annulment by the Court at the Receiver's instance is unnecessary and that the Receiver's unilateral declaration of intention to avoid will suffice, there is nothing to indicate that even such a declaration of intention existed in this case. The Receiver's act of selling the property to the 3rd defendant is no proof of such intention, in the absence of evidence that the Receiver had even knowledge of the alienation to the plaintiff. A man cannot intend to destroy a thing of whose existence he is unaware.

I do not wish to enter upon a consideration of the difficult question whether the Full Bench decision in *Lakshmi Doss* v. *Roop Laul* (8) can be reconciled with the principle of the recent Full Bench decision in *Subramania Ayyar* v. *Muthia Chettiar* (10), in which it was held that a defendant cannot set up the voidability under section 53, Transfer of Property Act, of an alienation made in the plaintiff's favour in fraud of creditors till such alienation is set aside actually by a decree passed in a regular suit, especially in view of even more recent decisions which held that even a single creditor could maintain such a suit brought in his own individual interest and not necessarily on behalf of all the creditors.

M. C. P.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 17 OF 1918.

March 27, 1919.

Present:—Sir Basil Scott, KT, Chief Justice, and Mr. Justice Hayward.

VALLI MAHOMED ABU—DEFENDANT—APPELLANT

versus

BERTHOLD REIF—PLAINTIFF—RESPONDENT.

Alien enemy, debt due to—Interest, whether suspended during period between outbreak of war and grant of license.

Where a debtor is under an obligation to pay interest to an enemy firm, such obligation is not suspended between the date of the outbreak of war and the date when the firm is granted a license to conclude certain transactions. [p. 523, col. 2.]

Mr. *Taraporevala* (with him Mr. *Desai*), for the Appellant.

Mr. *Coltman* (with him Mr. *R. D. N. Wadia*), for the Respondent.

JUDGMENT.—The only question to be decided on the cross objection is whether the learned Judge in the lower Court was right in holding that the defendant was entitled in the account between the parties to a refund of any interest paid between the 10th of August 1914 and the 9th February 1915. The former date is taken as the date of the outbreak of war between England and Austria and the latter is the date when the first license was granted to the plaintiffs' representative in Bombay to conclude their indent transactions. These transactions were—so far as is indicated by the specimen indent put in—indents sent

from Bombay to Bradford for goods from the plaintiffs' firm at that place. One of the plaintiffs, Reif, was a naturalised British subject. The partnership of the plaintiffs being between an Austrian and a naturalised Englishman was dissolved by the outbreak of war but the plaintiff Reif was granted a license under the Proclamation of the 9th September 1914 in England.

Whether any of the contracts to which the accounts between the parties relate were illegal having regard to the terms of this Proclamation, has not been established and the only question for consideration is as above stated, whether the obligation to pay interest was between certain dates suspended.

The learned Judge followed to a limited extent a previous judgment of Macleod, J., who thought the plaintiffs' Bombay firm was a branch of their Hamburg firm, and held there was a suspension of the obligation to pay interest; he was of opinion that if the defendant had paid money due to the firm in Bombay he would not have been doing anything which involved a penalty but was entitled to withhold it until satisfied that it would be retained in safe custody till the suspension of hostilities. In so holding he applied certain American cases of which *Brown* v. *Hiatts* (1), a decision of the Supreme Court of the United States, is the weightiest. These decisions have, however, been questioned in *Hugh Stevenson and Sons* v. *Aktiengesellschoft Fur Cartonnagen-Industrie* (2) by several of the Law Lords: see pages 255, 259.

Moreover, in the Supreme Court of the United States it has been held that where the debtor resides in the same country as the creditor or his duly authorised agent, provided such agent was appointed before the war, interest on a debt is not suspended by the war: see *United States* v. *Grossmayer* (3) and *Ward* v. *Smith* (4). In the present case the branch firm of the plaintiffs to whose representative the defendant paid interest was established long before the war.

We think the safest course is in the circumstances to give effect to the opinion indicated by the Lord Chancellor in *Hugh Stevenson and Sons' case* (2) that it is difficult to see on what principle interest (particularly where, as here, it is stipulated for by the contract) is to be forfeited if private property is to be respected.

In the present case it may be that even according to the proposition laid down by Macleod, J., the money paid was not wrongly paid and, therefore, could not be recovered back.

We allow the cross-objection and delete the clause of the decree which varies the Commissioner's report.

The result is that the appeal is dismissed with costs and the cross-objection is allowed with costs.

Appeal dismissed.

(1) (1872) 15 Wall. 177; 82 U. S XXI, p. 128.
(2) (1918) A. C. 239 at p. 245; 87 L. J. K. B. 416.
(3) (1869) 9 Wall. 72; 76 U S XIX, p. 627.
(4) (1868) 7 Wall. 447 at p. 452; 74 U. S. XIX, p. 207.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No 618 OF 1918.
July 10, 1919.
Present:—Mr. Justice Das.
Babu HIRA SINGH—PLAINTIFF—APPELLANT
versus
Lala KESHWAR LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 60—Landlord and tenant—Rent, suit for, by registered proprietor—Tenant, whether can plead right of third person to receive rent.

Under section 60 of the Bengal Tenancy Act, it is not open to a tenant to plead in defence to a suit brought by the registered proprietor that a third person is entitled to receive the rent, nor is it for him to decide to whom he must pay rent. [p. 524, cols. 1 & 2.]

Appeal from a decision of the District Judge, Chapra.

Mr. *Jalgobind Prosad Singh*, for the Appellant.

Mr. *Har Nandan Sahay*, for the Respondents.

JUDGMENT.—The plaintiff is the proprietor in respect of the land of which the defendant is a tenant. Admittedly he has been recorded as the proprietor in the Land Registration Department. He brought a suit for recovery of arrears of rent from 1320 to 1323 and was met with the defence by the tenant that he had paid rent to the mortgagees in possession. This defence found favour with the Courts below, with the

result that they have dismissed the plaintiff's suit.

In this Court the learned Vakil appearing on behalf of the appellant urges that under section 60 of the Bengal Tenancy Act the tenant was not entitled to plead any defence to a claim by the person registered as the proprietor under the Land Registration Act of 1876 that the rent is due to any other person. In my opinion this contention is well-founded and must prevail. The whole object of section 60 of the Bengal Tenancy Act is to give to a registered proprietor facilities for recovering rent and to prevent tenants from setting up a false and fictitious defence by pleading that a third person not registered was entitled to receive rent. [See the case of *Sakori Datta* v. *Ainuddy* (1).] The defenceput forward in this case by the tenant is calculated, in my opinion, to perpetuate the mischief which it was the intention of section 60 of the Bengal Tenancy Act to prevent. The case reported as *Hem Chunder Misri* v. *Rajah Sir Sourindra Mohan Tagore* (2) is in favour of the appellant.

The Court below, however, relied upon two cases. The first of that is reported as *Durga Das Hazra* v. *Samash Akon* (3). It seems to me that that case was decided upon the findings of facts arrived at by the final Court of facts dealing with that case. The learned Judges in that case say: "We think that on the findings of fact arrived at by the learned District Judge the provisions of section 60 are not applicable to the present case. The Judge finds that the plaintiffs ceased to be in possession of the land in respect of which they claim rent some four years prior to suit, that is to say, since the defendant in good faith attorned to the Poddars and commenced to pay them rent, and we are unable to see any error of law in this finding." It is clear, therefore, that so far as *Durga Das Hazra* v. *Samash Akon* (3) was concerned, that decision was given on the findings of fact of the lower Appellate Court. The other case relied upon by the lower Appellate Court is the case of *Girish Chandra Chongdar* v. *Satish Chandra Sarkar* (4). It was held in that case that section 60 of the Bengal Tenancy Act does not preclude a tenant defendant from proving that the title under which the plaintiff claims to hold and in respect of which he has been registered under the Land Registration Act has been held by a Court properly constituted to be void and of no effect. The plaintiff in that case claimed to realise rent from the tenant. He was undoubtedly registered as the proprietor in the Land Registration Department. But in a case which was fought out between the plaintiff and another party it was established in a Court of competent jurisdiction that the plaintiff had no title to the land. It appears to me that that case is distinguishable from the present case. In this case no Court has held that the plaintiff has no title to the land. In other words, his title, as the proprietor of the land, is admitted but all that is urged before me is that although the plaintiff is undoubtedly the proprietor of the land, still as there is a mortgagee in possession it is the mortgagee in possession who is entitled to rent from the defendant. In my opinion it is not for the tenant to decide as to whom he must pay rent. Plaintiff is the registered proprietor and under section 60 of the Bengal Tenancy Act the tenant must pay rent to the registered proprietor. Of course as between the registered proprietor and the mortgagee in possession the question remains an open one and the mortgagee in possession clearly, if he can prove his title, has a remedy against the registered proprietor. I hold, therefore, that the plaintiff is entitled to rent from the defendant for 1320 to 1323. The learned Vakil on behalf of the respondent states before me that there is no dispute as to the amount of rent. I would, therefore, allow this appeal, set aside the judgments and decrees of the Courts below and in lieu thereof give a decree to the plaintiff for the amount claimed by him in the suit. The plaintiff is entitled to his costs throughout.

Appeal allowed.

(1) 6 Ind. Cas. 336; 12 C. L. J. 620 at p. 622; 14 C. W. N. 1001.
(2) 5 C. W. N. 482.
(3) 4 C. W. N. 606.
(4) 12 C. W. N. 622.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1772 OF 1915.

February 3, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

SUBA—PLAINTIFF—APPELLANT

versus

KUTBA AND ANOTHER—DEFENDANTS—RESPONDENTS

Pre-emption—Occupancy rights, sale of—Occupancy tenant, whether can challenge or pre-empt sale.

An occupancy tenant cannot challenge a sale of occupancy rights by another occupancy tenant in favour of the landlord and cannot successfully maintain a suit to pre-empt on such a sale.

Second appeal from the decree of the District Judge, Jullundur, dated the 3rd May 1915.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Fakir Chand*, for the Respondents.

JUDGMENT.—One Kutba, an occupancy tenant, has sold his occupancy rights in 54 *kanals* of land to his landlord, and the plaintiff, who is the nephew of the vendor, has brought this suit for a declaration that he is entitled to retain possession of the area sold as mortgagee, and failing to obtain that relief he asks for a declaration that as the sale is fictitious and without consideration, it shall not affect his reversionary rights, and as a final alternative he asks to be allowed to pre-empt the land sold.

Appellant's Counsel before us admits that in regard to the two latter reliefs the case is covered by authority and that the plaintiff, an occupancy tenant, cannot challenge the sale to the landlord and cannot successfully maintain a suit to pre-empt on such a sale. With regard to the first relief claimed, however, the District Judge has not come to any finding of fact, and on the material on the record before us we are unable to arrive at any conclusion on the facts involved in the case. The learned District Judge has disposed of this point by remarking that even if such a mortgage did exist it would be a nullity, and for this position he relies on sections 53 and 56 of the Tenancy Act. We are, however, unable to concur in this view, for if, as the plaintiff alleges, there was an old standing mortgage by himself, by

Kutba, vendor, and by the vendor's father which the plaintiff alone redeemed, then we hold that in respect of the occupancy land included in the mortgage which belonged to Kutba and Kutba's father, the plaintiff stands in the shoes of the original mortgagee and that the vendee in purchasing from Kutba takes what Kutba has to sell subject to the mortgagee rights. From this it follows that it must be ascertained whether the plaintiff redeemed the share of Kutba and Kutba's father with his own moneys and what amount he paid. If it be found that he did redeem Kutba's and Kutba's father's share of the mortgaged area, he is entitled to possession of that area until his mortgagee rights have been satisfied. Had Kutba effected a recent mortgage in favour of the plaintiff, the landlord-vendee could have claimed to ignore it, but the case is not the same when one of the mortgagors redeems a mortgage to which the landlord must be taken to have given his acquiescence.

For these reasons whilst agreeing that the plaintiff is entitled to no relief regarding the invalidity of the sale or on the score of pre-emption, we accept the appeal on the remaining point and remand the case to the District Judge for a finding on the facts alleged regarding redemption of the mortgages by the plaintiff and a decision in the light of the above remarks according to the facts found. Costs to follow the event.

Appeal accepted;
Case remanded.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 845 OF 1918.

April 10, 1919.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Oldfield, Mr. Justice Sadasiva Aiyar, Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

ARUMUGHAM CHETTY—PLAINTIFF—APPELLANT

versus

MUTHU KOUNDAN AND OTHERS—DEFENDANTS NOS. 2, 3 AND 1—RESPONDENTS.

Hindu Law—Joint family—Debt incurred by father

ARUMUGHAM CHETTY *v.* MUTHU KOUNDAN.

on security of family property—Antecedent debt, what is—Liability of sons.

An independent debt, not immoral or illegal, contracted by a Hindu father on the security of the joint family estate antecedent to the mortgage-debt which is being sued on may be treated as an antecedent debt, so as to support the charge on the sons' shares also to the extent of the sums secured on the prior mortgage. [p. 535, col. 1; p. 536, col. 1.]

Badagala Jogi Naidu v. *Bendalam Papiah Naidu*, 48 Ind. Cas. 289; 35 M. L. J. 382, overruled.

Brij Narain Rai v *Mangla Prasad*, 50 Ind Cas. 101; 17 A. L. J. 249; 1 U. P. L. R. (H. C.) 49; 41 A. 235, dissented from.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P L. W. 557; 15 A. L. J. 437; 19 Bom L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), explained.

Second appeal against the decree of the District Court of Salem, in Appeal Suit No. 102 of 1916, preferred against the decree of the Court of the Principal District Munsif of Salem, in Original Suit No. 297 of 1915.

This second appeal coming on for hearing on the 10th and 17th January 1919, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit, and upon hearing the arguments of Mr. *T. Narasimha Aiyangar*, for the Appellant, and of Mr. *B. Sitarama Rao*, for the 1st and 2nd Respondents, and the other respondent not appearing in person or by Pleader, and the case having stood over for consideration till 5th February 1919, the Court (Sadasiva Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SADASIVA AIYAR, J.—The plaintiff is the appellant. The suit was brought to obtain a mortgage decree for sale on the mortgage document Exhibit H, dated 11th May 1903, executed by the 1st defendant to the plaintiff for Rs. 1,150. The defendants Nos. 2 and 3 are the undivided sons of the 1st defendant. The 3rd defendant is still a minor, while the 2nd defendant was a minor on the date of the mortgage-bond Exhibit H.

According to the recital in Exhibit H the sum of Rs. 1,150 mentioned in it as consideration is made up as follows: (*a*) Rs. 833-8-0 being the sum due on the registered mortgage-bond Exhibit G of 1899; (*b*) Rs. 130-1-0 due on the simple debt bond of 1902 Exhibit K; (*c*) Rs. 42 received by the 1st defendant for excavating a well in the family garden; (*d*) Rs. 100 for discharging the debt of Nattukottai Karuppan Chettyar; (*e*) Rs. 43-7-0 received for excavating the well already mentioned and for family expenses; Total Rs. 1,150.

The 1st defendant (the father) as usual remained *ex parte*. His sons (the defendants Nos. 2 and 3) contended that their two-third share in the mortgaged properties cannot be affected by the mortgage because "the suit debt was not contracted either for family benefit or for any necessity binding on the family" (4th paragraph of the written statement).

It will be seen from the written statement that the defendants Nos. 2 and 3 did not question the genuineness of the mortgage-deed Exhibit H or the existence of the debts, that is, the passing of consideration for Exhibit H, nor did they plead that the document was legally invalid as a mortgage for any reason. Their defence was confined to the contention that the mortgaged debt was not binding on their shares of the mortgaged property.

As the 1st defendant remained *ex parte*, the District Munsif had to raise the point for determination as to his execution of the document in order to give a decision against him. On 11th June 1915, a single consolidated issue was raised by the District Munsif as follows: "Whether the suit document is genuine and supported by consideration and binding on the 2nd and 3rd defendants' shares." In the judgment of the District Munsif, the issue has been split up into two as follows: (1) Whether the suit document is genuine and supported by consideration, and (2) whether the suit document is binding on the 2nd and 3rd defendants' shares. The Munsif notes in paragraph 6 of his judgment that issue II was the only one really contested by the contesting defendants Nos. 2 and 3, whose Vakil noted on Exhibit H that he admitted its genuineness. The Vakil also noted on the documents Exhibits A to G that he admitted their genuineness. The plaintiff, who was not even cross examined, proved the genuineness of Exhibits J and K. Clearly Mr. R. Srinivasa Rao, B. A., B. L., who appeared as Vakil for the defendants Nos. 2 and 3 before the District Munsif, did not deny

the genuineness or validity as a mortgage document of the deed Exhibit H sued on or of the other documents Exhibits A to G. The Munsif found on the 1st issue (which was not contested by the contesting defendants) in the plaintiff's favour, and he found on the 2nd issue that the suit document is binding on the shares of the defendants Nos. 2 and 3 to the extent of Rs. 1,106-9-0 out of the principal sum of Rs. 1,150 mentioned in Exhibit H, the sum of Rs. 43-7 0 received in cash on the date of Exhibit H not having been proved to have been borrowed for family necessity. The District Munsif held that the remaining Rs. 1,106-9-0 constituted antecedent debts and hence the mortgage was binding to that extent on the shares of defendants Nos. 2 and 3 also He gave a mortgage decree accordingly for that sum and interest.

On appeal, the same Vakil who had appeared for the appellants in the District Munsif's Court was allowed to contend that Exhibit H was not proved to be valid as a mortgage because it had not been proved by the evidence of an attesting witness under section 68 of the Evidence Act, and the other mortgage documents Exhibits B, C, E, F and G had also not been so proved by the evidence of an attesting witness for each of the documents or by proof that the attestation of one attesting witness was in his handwriting under section 69 of the Evidence Act I might add that in the grounds of appeal to the lower Appellate Court, no express reference is made to the necessity of the proof of any of these documents by an attesting witness or to the necessity of the proof of an attesting witness's handwriting.

The District Judge accepted this contention and held that Exhibits B, C and E to H were inadmissible in evidence as not properly proved. Yet, he upheld, rather inconsistently, the decree of the District Munsif so far as it directed the sale of the 1st defendant's share in the mortgaged properties, that is, just as if Exhibit H had been properly proved as a mortgage document, so far as the 1st defendant's share was concerned.

I am clear that the contesting defendants Nos. 2 and 3 did not dispute either the genuineness or the legal validity as mortgage documents of the deeds Exhibits B, C and E to H before the District Munsif. So far as the suit document Exhibit H is concerned, I think that Order VIII, rules 3 to 5 (introduced into the new Civil Procedure Code), casting, as they do, the obligation on contesting defendants to make specific denials of facts alleged in the plaint and providing, as they do, that evasive denials are insufficient, precluded the defendants Nos. 2 and 3 from raising the question that Exhibit H did not create a valid mortgage or was not properly proved. Under section 58 of the Evidence Act, no fact need be proved which the parties have agreed to admit or which by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings, though the Court may in its discretion require the facts admitted to be proved otherwise than by such admissions. The District Court is, no doubt, given a discretion under this section to require proof of these documents B, C and E to H, but, in my opinion, it would not have exercised its discretion properly if it called for such proof, notwithstanding what took place before the District Munsif. Assuming, however, that its discretion to call for proof would have been properly exercised, it did not call for such proof but decided at once that the documents had not been proved. The affidavits of three witnesses filed in this Court on behalf of the plaintiff establish that the District Munsif dispensed with the evidence, as the contesting defendants' Vakil did not require formal proof of the documents Exhibits B, C and E to H. I would, therefore, set aside the finding of the District Judge on the first issue and hold that the suit document, Exhibit H, is genuine and supported by consideration.

I now come to the 2nd issue, namely, whether the debt is binding on the 2nd and 3rd defendants, assuming that the documents B, C and E to H are valid mortgage documents supported by consideration.

The first document Exhibit B was executed by the 1st defendant to S. Koundan for Rs. 75 in 1891. Before the personal remedy under that document was barred, the 1st defendant executed Exhibit C (which superseded B) in 1895 for Rs. 115 to the same S. Koundan. Then Exhibit E is a mortgage-deed by the 1st defendant to Chinnu Mudali in 1896 for Rs. 50. Exhibit F is a mortgage deed executed in the year 1897 by the 1st

defendant to Palaniandi Chettiar for Rs. 400 to discharge Exhibits C and E and for further sums borrowed. Exhibit G is dated 1899 for Rs. 700 to discharge Exhibit F and for monies borrowed in cash, and it was executed to the plaintiff Arumugam Chetty. Exhibits J and K are simple debt bonds for Rs. 50 and 120 respectively dated in 1900 and 1902, Exhibit K superseding Exhibit J. The plaint document, Exhibit H, was executed for Rs. 1,150 due to the plaintiff, partly under Exhibit G (Rs. 833 8 0) (within six years of Exhibit G), and partly under Exhibit K (Rs. 130-1-0) (within three years of Exhibit K) and partly under oral loans (Rs. 143) (Total Rs. 1,106-9-0), the remaining Rs. 43-7-0 borrowed in cash on the date of Exhibit H being disallowed by the District Munsif.

The District Judge has disallowed the plaintiff's claim against the shares of the defendants Nos. 2 and 3 in respect of almost the whole of this entire amount of Rs. 1,106 9-0. He has allowed only the amount of Rs. 130-1-0 (due under the simple debt bond Exhibit K) out of the above sum of Rs. 1,106-9-0. The District Judge's reason is that the term "antecedent debt", as explained in the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), does not cover the debt due under Exhibit G (Rs. 833-8 0) and that the antecedent oral debts amounting to Rs. 143-1-0 are not proved. I have already held that the defendants Nos 2 and 3 did not deny and must be deemed to have admitted the existence of all the debts which made up the Rs. 1,106 9 0.

The learned District Judge does not explain why, according to the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), the money due under the mortgage document Exhibit G would not constitute an antecedent debt. Mr. Sitarama Rao who appeared for the respondents Nos. 1 and 2 has, however, ably argued before us that according to that decision, no debt secured by a mortgage of the ancestral family property would constitute "antecedent debt" of the father and that such a debt could not, therefore, support an alienation by the father so as to bind his sons' interests. It seems to be rather a startling proposition that while an antecedent debt of a simple character, whether contracted orally or under a simple debt bond, can support a subsequent mortgage or sale of the sons' share also in the ancestral property, the fact that the antecedent creditor got the additional security of a mortgage deprives the subsequent alienee of the right given by the Hindu Law to rely upon the antecedent character of the debt discharged by the consideration paid for his alienation. The point directly decided in *Sahu Ram Chandra* v. *Bhup Singh* (1) is that a loan, *contemporaneous with or just previous* to the date of a mortgage transaction, could not be treated as an antecedent debt, as was erroneously held by Boddam and Bashyam Aiyangar, JJ., in *Chidambara Mudaliar* v. *Koothaperumal* (2), a view which had already been overruled by this Court in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (3), Mr. Sitarama Rao relies, however, on the following passages found in their Lordships' judgment: "The law was thus stated by Lord Hobhouse in *Nanomi Babuasin* v. *Modhun Mohun* (4): 'Destructive, as it may be, of the principle of independent co-parcenary rights in the sons, the decisions have, for sometime, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt * * if not tainted with immorality.' In their Lordships' opinion, these expressions...do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation *not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate.*" I think that having regard to the context, their Lordships only meant that if the so-called antecedent debt is so shortly before the execution of the mortgage, say two hours or two days, as to establish that *it was incurred on the credit, or security available by the joint family immoveable assets*, such a debt is not an antecedent debt and the mortgage-deed executed for such a so-called

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 603; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 27 M. 326.
(3) 29 M. 200; 1 M. L. T. 28; 16 M. L. J. 69.
(4) 13 C. 21 (P. C.): 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 632; 6 Ind. Dec. (N. S.) 510.

antecedent debt would not affect the sons' share. On the same page 447* their Lordships say: "to call a borrowing made on the occasion of the grant of a mortgage an antecedent debt is to extend unduly and improperly the whole scope of the exception on that topic." At page 448* their Lordships say: "It is said that the transaction substantially is that the father got the Rs. 200 into his hands and that when he granted the mortgage he was accordingly an 'antecedent debtor.' Their Lordships are of opinion that this contention cannot be upheld." Thus, their Lordships were only considering the question whether the debt incurred on the security of the mortgage was itself an antecedent debt so as to support *that* mortgage, and not whether a debt previously incurred which is really and substantially (and not in mere name and technically) a debt antecedent to the mortgage sued on could not be called an antecedent debt, when considering the validity of the *later* security deed. The antecedent mortgage debt may not be able to support itself as a mortgage security as regards the sons' share secured under it, but that it ceases to be an antecedent debt so as to support the later alienation by mortgage is, as I said before, not only a startling proposition but seems to be devoid of any support from the language of their Lordships.

In *Peda Venkanna* v. *Sreenivasa Deekshatulu* (5) my Lord the Chief Justice considered the above Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (1) and remarked as follows in answer to the argument that no suit could be brought during the lifetime of the father against the sons on a debt incurred by the father and which was neither illegal nor immoral—"As to this, Lord Halsbury's well-known observations in *Quinn* v. *Leathem* (6), that a case is only an authority for what it decides, and not for every proposition that may seem to follow logically from it, appears to me to apply with special force. That the Indian Courts have interpreted the earlier decisions ending with *Nanomi Babuasin* v. *Modhun Mohun* (4), in which last case it is stated that the sons cannot set up their rights against his creditor's remedies for their debts if not tainted with immorality, as authorising suits for such debts against the son as well as the father may be seen, as regards Calcutta, from the Full Bench decision in *Luchmun Dass* v. *Giridhur Chowdhry* (7)," and then my Lord proceeds to refer to other cases and finally holds that the Privy Council could not have meant to overrule all those decisions. Though the case of *Peda Venkanna* v. *Sreenivasa Deekshatulu* (5) did not raise the particular point now in question, I have referred to it to show that the language of their Lordships relied on by Mr. Sitarama Rao before us, namely, "an obligation incurred wholly apart from the security afforded by the joint estate", refers to the obligation under the suit bond on which a particular suit is brought and which is sought to be treated as an antecedent debt and not a prior antecedent obligation of the father, though that prior obligation was accompanied by a charge on the joint estate. I might further add that as the father's personal liability under the prior obligation under Exhibit G had not been barred on the date of the suit document Exhibit H, there was in this case an obligation wholly apart from the security afforded by the joint estate which could form an antecedent debt and could be used as the foundation to support Exhibit H to that extent, against the shares of the sons, even if their Lordships of the Privy Council intended by their language that a secured debt *as such* could never constitute an antecedent debt. While, on principle, the fact of the debt being barred on the personal covenant should make no difference, I have raised this point for consideration because, even if one is ultimately constrained by the language of their Lordships of the Privy Council to treat a debt which is altogether a mortgage debt as not being an antecedent debt, that doctrine (which, as I said before, is to my mind a startling doctrine) may not be extended an inch beyond what is absolutely necessitated by their Lordships' language.

(5) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

(6) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 179; 65 J. P. 708; 17 T. L. R 749.

(7) 5 C. 855; 6 C. L. R. 473; 3 Shome L. R. 143 2 Ind. Dec. (N. S.) 1152.

*Pages of 39 A.—*Ed.*

Mr. B. Sitarama Rao, however, relied upon the decision of Spencer and Krishnan, JJ., reported as *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (8), where the learned Judges state that an antecedent debt which was also a mortgage debt could not be relied on as an antecedent debt to support the subsequent mortgage. I feel grave doubts as to whether the language of their Lordships of the Privy Council, when interpreted with reference to the facts of the Privy Council case, was intended to lay down such a proposition and as I have above tried to show, their Lordships were only dealing with the question whether a particular loan incurred on security of the joint estate and, therefore, not incurred wholly apart from the security afforded by the said joint estate would affect the sons' shares in the joint estate. Their Lordships were not considering at all the question whether if a really antecedent debt had also been accompanied by a mortgage security, it would or would not constitute as antecedent debt capable of supporting a subsequent alienation of the sons' shares by a mortgage bond executed for the discharge of that antecedent debt (and for fresh loans) so far as that antecedent debt was concerned.

As, however, the question is an important one which must frequently occur and as my view is opposed to the decision of the Division Bench in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (8), I would refer the following questions for the decision of a Full Bench:—

(1) Whether an independent debt, not immoral or illegal, contracted by the father on the security of the joint estate antecedent to the mortgage sued on can be treated as an antecedent debt so as to support the charge on the sons' shares also to the extent of the sums secured on the prior mortgage?

(2) In such a case, can the former debt be treated as an antecedent debt for the purpose referred to, if the personal liability of the father under the earlier mortgage is not barred on the date of the suit document?

NAPIER, J.—I entirely agree with my learned brother that it was not open to defendants Nos. 2 and 3 to take the point before the Appellate Court that the mortgages A to H had not been proved. Their Vakil did not deny the accuracy of the District Munsif's endorsement and his note as to the effect of the Vakil's admission, and I am quite unable to understand why the District Judge did not give full effect to that admission. I must express my disapproval of the conduct of the Vakil concerned in putting forward such a contention in the Appellate Court after having invited the plaintiff not to prove the documents by the witnesses whom he had in attendance.

On the question of law raised by Mr. Sitarama Rao, I agree with my learned brother that it should be referred to a Full Bench. We have been much pressed with the language used by their Lordships of the Privy Council in the case reported as *Sahu Ram Chandra* v. *Bhup Singh* (1) and we have felt the same difficulty as was felt by the learned Chief Justice in *Pedi Venkanna* v. *Sreenivasa Deekshatulu* (5). In that case the learned Chief Justice, applying the observation of Lord Halsbury in *Quinn* v. *Leathem* (6), declined to apply their Lordships' judgment to any proposition beyond that which arose in the case. The point actually decided was that a mortgage transaction by a father would bind his sons' shares during his lifetime only when the debt forming the consideration for the document was antecedent. No question is raised in this case before us which is at variance with that ruling.

We are asked, however, to apply the words on page 447*: "The exception being allowed, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets that are joint family property," and to say that each prior mortgage in this case is wholly invalid as consideration for the later mortgage because its security depended on the joint family property. This proposition seems to me to entail a contradiction between their Lordships' decision and the supposed result of the dictum. Their Lordships clearly say that an existing antecedent debt not secured on a family property is good consideration for a mortgage of the family property. Clearly, therefore, if no further transaction was entered into, the mortgage would be binding

(8) 48 Ind. Cas. 289; 35 M. L. J. 382.

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on the family. It seems to me to be impossible to argue that, if subsequently the father finds it necessary to borrow another sum of money without security and then some time later creates a mortgage on the family property both for the old mortgage debt and the unsecured loan, that mortgage debt is not good consideration as against the sons on the ground that it was not incurred wholly apart from the ownership of the joint estate. I cannot understand how a debt that was once binding ceases to be binding by renewal.

My learned brother has raised the point that apart from the security, there is a personal liability in every mortgage and that, therefore, even though as a mortgage the antecedent debt might be bad, still as long as the personal remedy was not barred, the debt is a good antecedent debt apart from the mortgage security and can thus form consideration for the new mortgage binding on the sons. Speaking for myself, this distinction seems to me to be too artificial, but it has, if I may say so, the merit of meeting the difficulty raised on an extreme construction of their Lordships' language. I, therefore, agree with my learned brother that this do form part of our reference.

This second appeal came on for hearing on the 12th March 1919.

Mr. *T. Narasimha Aiyangar*, for the Appellant.—There are two exceptions to the rule against alienations as enunciated in *Nanomi Babuasin* v. *Modhun Mohun* (4), *viz*, family necessity and antecedent debt. The latter exception must be kept within proper limits and not unduly extended [*Suraj Bunsi Koer* v. *Sheo Persad Singh* (9)]. So far as these two tests are satisfied, it is immaterial whether the alienation is an out-an-out sale or only a partial alienation by way of mortgage. In *Hunnooman-persaud Panday* v. *Musammat Babooee Munraj* (10) the prior debt was a mortgage-debt and it was held that a charge could be created for the father's debt.

What is an antecedent debt is considered in *Sahu Ram Chandra* v. *Bhup Singh* (1), *Chidambara Mudaliar* v. *Koothaperumal* (2) *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (3) and *Chandra Deo Singh* v. *Mata Prasad* (11). *Brij Narain Rai* v. *Mangla Prasad* (12) considers *Sahu Ram Chandra* v. *Bhup Singh* (1). *Sahu Ram Chandra* v. *Bhup Singh* (1) should not be extended beyond what it actually decides. The only question was whether the debt in that particular case was antecedent. The other observations were beside the point.

Mr. *B. Sitarama Rao*, for the Respondents.

[WALLIS, C. J.—In *Sahu Ram Chandra* v. *Bhup Singh* (1) the only question was whether the debt was antecedent and it was decided. The rest is all *obiter*. Do you concede that?]

What the Privy Council say has to be followed see *Muttayan Chetti* v. *Zamindar of Sivagiri* (13)], even though decisions of the High Courts are overruled even without mention.

[SADASIVA AIYAR, J.—If as a mortgage-debt it is not binding, why should it bind as an ordinary debt, assuming the act of the father to be a breach of trust?]

On the basis of the pious duty of the sons which depends on joint status. Where there is a remedy by partition, this pious duty, which is a mere equity in the creditor's favour, would not arise. There is a distinction between a sale for a mere money debt and a sale for a secured debt of the father. In the one case, the equity in the creditor's favour arises. In the other case it does not The Privy Council have laid down the rules in order to protect third parties on the one hand and the sons on the other.

[WALLIS, C. J.—You cannot protect the sons and the alienee at the same time. To hold that an alienation by way of mortgage is a breach of trust would be including every such alienation.

The Privy Council say so. *Girdharee Lall* v. *Kantoo Lall* (14). If the mortgage debt was incurred by the father for enabling him to sell the joint family property, the debt will not be binding.

(9) 6 I. A. 88; 5 C. 148; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. s.) 705 (P. C.).

(10) 6 M. I. A 393 at p. 421; 18 W. R. 81 Foot Note; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(11) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

(12) 50 Ind. Cas. 101; 17 A. L. J. 249; 1 U. P. L. R. (H. C.) 49; 41 A. 235.

(13) 6 M. 1 (P. C.); 9 I. A. 128; 4 Sar. P. C. J. 354; 12 C. L. R. 169; 6 Ind Jur. 486; 5 Shome L. R. 57; 2 Ind Dec (N. s.) 279.

(14) 1 I. A. 321; 14 B. L. R. 187 (P. C.); 22 W. R. 56; 3 Sar. P. C. J. 380.

ARUMUGHAM CHETTY v. MUTHU KOUNDAN.

[SADASIVA AIYAR, J.—The pious obligation exists whether the father is alive or dead. I do not think that the Privy Council go to the extent of saying that a debt to which the pious obligation must attach is deprived of that equity, merely because it is made a charge on the joint family property.]

Where there is a personal remedy and it is barred, there is only the alienation and that will not be binding.

OPINION.

WALLIS, C. J.—This reference raises the question whether the rule as to the validity of a father's alienation for an antecedent debt is inapplicable where the antecedent debt itself has been contracted on the security of the family property, as held in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (8), on the authority of certain observations of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1). The question is of great importance owing to the far reaching consequences of our decision and has received our anxious consideration.

The appeal to the Privy Council was filed to challenge the decision of the majority of the Allahabad High Court in *Chandra Deo Singh* v. *Mata Prasad* (11), dissenting from the view taken in *Khalil-ul-Rahman* v. *Gobind Pershad* (15) and *Chidambara Mudaliar* v. *Koothaperumal* (2) and agreeing with the later Madras decision in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (3), that there must be an antecedent debt to support the father's alienation. In their judgment disposing of this most controverted question their Lordships frequently referred with approval to the exhaustive judgment of Sir John Stanley, C. J., in the case first mentioned, and, even as will be shown, adopted his enunciation of the true rule as to antecedency in terms which, it is to be noted, do not contain the further restriction now contended for.

We have next to consider the observations relied on in the judgment and the context in which they occur. Their Lordships in the course of their judgment had pointed out that the rule validating an alienation by the father for an antecedent debt of his own which was neither illegal nor immoral was an exception to the general rule of the Mitakshara which should not be extended, and, after referring to their earlier decisions and setting out the well known passage in *Nanomi Babuasin* v. *Modhun Mohun* (4) in which it is laid down that the sons cannot set up their rights against the father's alienation for an antecedent debt, they proceeded to observe: "In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply, to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, namely, that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it, nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara Law does not warrant or legalise any such transaction.

"The limits of the principle of the exception have been thus set forth because in their Lordships' opinion they form a guide to

(15) 20 C. 328; 10 Ind. Dec. (N. s.) 223.

the settlement of the conflict of authority in India on the subject of antecedent debt."

It is very important to observe that their Lordships expressly say that they are only laying down the true principle for their guidance in the decision of the point before them, and this, I think, goes to show that they did not intend to decide anything else, as for instance, the application of that principle to cases which were not before them. If they intended to go further their observations were made *obiter* and are not binding on us as authority. In the rest of their judgment they strictly confined themselves to the decision of the question before them, the necessity that the debt should be antecedent, and in answering this question they adopted the language of Sir John Stanley in *Chandradeo Singh* v. *Mata Prasad* (11): "The true rule is that a son cannot impeach an alienation of ancestral joint family property made by the father, for which the consideration is an antecedent debt of the father not tainted with immorality or the object of which is to pay such a debt... .....the doctrine has no application to a case in which no antecedent debt of the father, that is, a debt antecedent to the alienation in question, is concerned as the consideration or object of the alienation." As already observed, there is no mention in this rule of the further restriction now contended for. Their Lordships went on to deal with the argument that the antecedency might be only of an hour or a day or a year, and observed that there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact, and that the Courts would not be slow to deny effect to the mortgage where the antecedency was found to be unreal and to be merely a cover for what was essentially a breach of trust. These observations were strictly germane to the question as to the necessity of a real antecedency in fact, but they do not cover the further proposition that the antecedent debt must be one which was not incurred on the security of the joint family property.

In the passage already cited their Lordships did, in my opinion, lay down that in principle there should be such a further restriction, and they proceeded to decide the only question before them in accordance with the principle so laid down. They do not refer to any earlier case in which this further restriction had been laid down or even suggested, and possibly they were led to state the principle in these terms for the purpose in hand with reference to the considerations urged by Sir John Stanley in contesting the opinion expressed by Boddam and Bhashyam Aiyangar, JJ., in *Chidambara Mudaliar* v. *Koothaperumal* (2), that to insist on the debt being antecedent would not really afford any protection to the son.

Those learned Judges observed in *Chidambara Mudaliar* v. *Koothaperumal* (2): "On principle it is difficult to make any distinction between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son, and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son, for his share in the mortgaged property can, as a general rule, be seized and brought to sale, even in the latter case, for the recovery of the debt as a personal debt due by the father (though also secured by a mortgage), unless such share has been validly alienated in favour of a third party, since the date of the mortgage but prior to its attachment."

The learned Judges who overruled this decision in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (3) did not apparently differ in principle from this statement but considered themselves bound by authority to hold that the debt must in fact be antecedent. It was, however, contested by Sir John Stanley in *Chandra Deo Singh* v. *Mata Prasad* (11) in the judgment already mentioned, at page 202*:— "This observation is plausible, but it is capable, I think, of ready refutation. The remedy of the creditor on the basis of the son's pious duty is not so extensive with his remedy on foot of a binding security. In principle the statement is opposed to the rule of the Mitakshara. In practice it would not be correct, inasmuch as the observance of the rule of the Mitakshara does afford some protection to the interests of sons. The greed which exists for the acquisition of landed property

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in this province is well known. Money lenders are ever ready to advance money to thriftless or extravagant land-owners on the security of their landed property with a view to the ultimate acquisition of the property. Interest is allowed to accumulate until the mortgage-debt has reached such dimensions that it is unlikely that the owner can redeem. Then a suit for sale is instituted on foot of the security, the mortgagee gets leave to bid and buys and the family loses its ancestral property. *Money-lenders are chary of making large advances to land-owners on personal security.* Now if in negotiations for a loan on a mortgage, lenders are obliged to make enquiry and satisfy themselves that the loan is required to meet a legal necessity, this will afford some protection to the other members of the co-parcenary body. If a father in a joint Mitakshara family can borrow money on the security of the joint ancestral estate to satisfy any extravagant whim or fancy he may form, it is obvious that the rule of the Mitakshara is a dead letter and that the other members of the family are robbed of all protection." Their Lordships, I cannot help thinking, were influenced by these forcible observations in laying down the principle in the way they did. It is, however, clear, I think, that Sir John Stanley did not intend to lay down that there was any necessity to show that the debt was not only antecedent but also not incurred on the security of the family property, because he does not lay down any such restriction in formulating the rule, and because he refers with approval to the decision of the Full Court in *Badri Prasad* v. *Madan Lal* (16). In that case the mortgage in question was executed in satisfaction of a prior mortgage debt incurred by the father to the same mortgagee. It was contended the alienation was bad because the mortgage was effected in discharge of the mortgagee's own prior debt and was, therefore, not an antecedent debt within the meaning of the rule. Sir John Edge, C. J., with whom the other Judges concurred, rejected this contention, and, after citing a Calcutta ruling that the purchase money itself which was the consideration for a conveyance could not be said to be an antecedent debt—the point now decided by their Lordships—added: "I know of no other restriction of the term antecedent debt." This statement is equally true of the other Courts and of the legal profession and the public in India. The doctrine of the father's power of alienation for his own debt having been repeatedly enunciated for over sixty years, ever since its recognition by the Privy Council in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj* (10), without any such restriction having been suggested, it has been assumed not to exist. The only question was whether it was necessary that there should be any antecedent debt at all, and numberless transactions have taken place on that footing which, as has been represented to us, it would involve great hardship to disturb. Observations in judgments must be read with reference to the context and to the pre-existing law, and the very recent decision in *Nachiyappa Goundan* v. *Rangasami Goundan*, as yet unreported, contains an express warning against deducing from particular expressions in their Lordships' judgments novel propositions unsupported either by principle or authority, and against construing decisions putting an end to a conflict of authority on a particular question as unsettling what till then had been treated as settled. However sound in principle, and however applicable to this Presidency with reference to the son's shares, if not to the father's, the suggested restriction might be if the matter were *res integra*, it would certainly be a novel proposition unsupported by any previous authority to lay down at the present time that an alienation for an antecedent debt not otherwise open to objection was invalid because the antecedent debt was incurred on the security of the joint family property. Having regard to their Lordships' express statement that the enunciation of the principle in these terms was intended as a guide to the decision of the controverted question before them, I do not think we should be warranted in extending its application to a case which was not before them and involves considerations which are not referred to in their judgment, especially when such an application of the principle would have the effect of disturbing what has long been regarded as settled law, and would give rise to great uncertainty as to existing titles.

(16) 15 A. 75 (F. B.); A. W. N. (1893) 52; 7 Ind. Dec. (N. s.) 765.

I would answer the first question in the affirmative. It is unnecessary to answer the second question.

OLDFIELD, J.—I entirely agree.

SADASIVA AIYAR, J.—In the reference to the Full Bench I said that their Lordships of the Privy Council in some passages of their judgment in *Sahu Ram Chandra* v. *Bhup Singh* (1) used language which, if widely interpreted, would make a mortgage debt which was *genuinely* antecedent to the alienation in suit not an antecedent debt capable of supporting such an alienation by the father as against the son's share. Having regard, however, (*a*) to the context, (*b*) to the particular question which their Lordships had and intended to decide and (*c*) the language used by them in several passages both before and after the widely worded passages, I was inclined to hold that their Lordships were considering even in these passages only the case where the so called antecedent debt was really and substantially the mortgage debt *sued on*. For instance, in the passage "the exception * * * appears to their Lordships to apply only to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which are joint family property", their Lordships were approving of the exception which allows a decree for sale to be passed in the suit brought for a mortgage-debt of the father if incurred for discharging the father's antecedent debts, and they disapproved its extension to a case where the mortgage-deed *sued on* was executed for a so-called antecedent personal debt which was really incurred on the "credit obtainable" from the family lands and which antecedent debt was, *therefore*, at once or soon afterwards merged in the mortgage alienation sued upon. The question whether genuinely antecedent debts might be or might not be themselves mortgage debts and whether they ought to be only simple debts was not, in my opinion, decided or intended to be decided by their Lordships. I did not and do not think that their Lordships intended to adopt all the reasoning given in Chief Justice Sir John Stanley's judgment in *Chandra Deo Singh* v. *Mata Prasad* (11). They, no doubt, fully approved of the *dicta* of the learned Chief Justice quoted at pages 446 and 449,* but those *dicta* do not deal with the question whether a *really antecedent* mortgage debt was one which could support a later alienation against the sons.

Having heard full arguments again sitting in the Full Bench and having had the advantage of studying the judgment of my Lord the Chief Justice just now pronounced and concurred in by Oldfield, J., I must frankly admit that I have felt much diffidence as to the soundness of my view as to the real meaning of their Lordships' language in the disputed passages. While I had to respectfully differ in my referring order from the opinions of two learned Judges of this Court [Spencer and Krishnan, JJ., in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (8)] as to the interpretation of those passages, I now find that my opinion is also opposed to the opinions of my Lord and Oldfield, J., besides the opinions of two learned Judges of the Allahabad High Court (Tudball and Rafique, JJ.) in *Brij Narain Rai* v. *Mangla Prasad* (12). However, after the best consideration I have been able to give to the question, I shall adhere to the view I have already expressed. I have fortified my mind to arrive at this conclusion by the following further considerations: (*a*) The opinion of Sir John Edge, C. J. [who took part in the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (1)], as found in the judgment in *Badri Prasad* v. *Madan Lal* (16) referred to in my Lord's judgment supports my view of the law: (*b*) since *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj* (10), the uniform course of decisions, so far as I know in all the High Courts, has been to treat a *really antecedent* mortgage debt on the same level with a really antecedent simple debt for the purpose of supporting a subsequent alienation against the son's share: (*c*) their Lordships have omitted in *Sahu Ram Chandra* v. *Bhup Singh* (1) to expressly refer to and overrule this settled law: (*d*) the unsettlement of numerous titles to large estates and the great uncertainty in the law which would result if we decide the question (1) referred to the Full Bench in the negative is also a matter for serious thought: (*e*) the old Hindu Law enacted (see Yagnavalkaya II 50, and Colebrook's Digest, Volume I, page 190, which quotes Katyayana's text) that it was the pious duty of the sons to

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pay their father's debt, (*e*-1) even with interest (but the interest amount should not exceed the principal amount), (*e*-2) even if it was barred by limitation according to modern Statutes (*e* 3) and even if no ancestral assets were inherited by the sons, provided the sons were capable of bearing the burden: [The obligation was restricted afterwards as regards (*e*-2) and (*e*-3) by statutory enactment and judicial decisions, but judicial decisions have explained and expanded the nature and legal results of the obligation as regards (*e*-1) (1) by not restricting the amount of interest allowable to the creditor to the amount of the principal, (2) by making the future pious duty a present legal liability, and (3) by making a voluntary alienation by the father for such antecedent debt binding on the sons' shares under the Mitakshara Law, (under the older Hindu Law of Manu the sons had no interests or shares at all during their father's lifetime) and (4) by making involuntary alienations by Court sales in execution of a decree against the father alone to affect the sons' shares also]: and (*f*) in the old Hindu Law texts relating to the son's pious obligation which form the foundation on which the present law has been broadened from precedent to precedent, *there is no distinction made between a mortgage debt and a personal debt of the father.*

In the result I concur in answering the first question referred to this Full Bench in the affirmative.

COUTTS TROTTER, J.—I have had the advantage of perusing the opinion just pronounced by my Lord, and I entirely concur in it.

SESHAGIRI AIYAR, J.—My answer to the first question is in the affirmative. No cases have been quoted before us in which it has been directly held that a debt secured by a mortgage could not constitute an antecedent debt. Mr. Sitarama Rao naturally relied upon the observations of Lord Shaw at page 447* in *Sahu Ram Chandra* v. *Bhup Singh* (1) which is as follows: "Except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate." With reference to this sentence, it was contended that there was a distinct pronouncement that if a debt was advanced on the security of the property in the possession or control of the manager of a Hindu family, such a debt would have been incurred in breach of trust and that consequently it cannot constitute an antecedent debt. It was further argued that there was an essential difference between a simple loan and a loan charging the family property. The sentence in the judgment, "under his management he can neither obtain money for his own purposes *for it*, nor can he obtain money for his own purposes *upon it*," was relied on for this argument. I cannot say that these contentions are entirely unfounded.

Before dealing with these sentences, I think it expedient to consider the judgment as a whole. The case before the Board was one in which a suit was brought upon a mortgage document. This deed was not a renewal of an old document. The question for consideration before the Board was whether the loan advanced was contemporaneous with or was antecedent to the mortgage sued on. In considering this question their Lordships of the Judicial Committee had before them the rulings of the various High Courts in which they point out "there was a conflict which occurs, not merely between the Courts of one district in India and another, but also between decisions pronounced in Calcutta itself, in Allahabad itself, and in Madras itself." This conflict they wanted to put an end to. If we examine the cases which were cited before them as typical of the conflict, it would be seen that in not one of them was the question, whether a subsequent mortgage superseding an earlier mortgage could constitute an antecedent debt, ever raised or decided. The point at issue in them was whether there should not be a debt really antecedent to the one on which the suit was brought, or whether it was enough if a short time had elapsed between the execution of the document and the granting of the loan. Nor do I find any reference in the argument of the learned Counsel before the Judicial Committee to this point. Under these circumstances I do not think that the language relied on should be regarded as a considered pronouncement upon the matter we have to decide,

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Further, if we analyse the judgment of Lord Shaw it is clear that the proposition contended for by the learned Vakil would be to some extent inconsistent with the general principles enunciated by the noble Lord. The judgment first traces the rights of interdiction of the subordinate members of a Hindu family to the well-known text of Mitakshara (Chapter I, section 1, pl. 27). Then it proceeds to point out that the Mitakshara has enunciated a rule in favour of the managing co-parceners. The reason of the rule is stated to be that wherever there is a family necessity it is "one binding upon the co parceners as a whole and that consequently the consent of all of them can be implied even though they may not be consulted individually." The judgment then considers the exception to the general rule, which is stated to have "arisen from the necessity of protecting the rights of third persons, say, the purchasers of the property who have taken their title for onerous consideration and in good faith." Although in the previous sentence it was stated that "the exception should be very carefully guarded and should not be extended," it is clear that the aim of the exception, in the opinion of the Board, was to safeguard the rights of *bona fide* lenders, and not of the subordinate members of the Hindu family. Then we have a discussion as to how this exception should be worked. The observations of Lord Justice Knight Bruce in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj* (10) are quoted as showing that if "the fact of the advance is proved, the presumption of law is *prima facie* to support the charge and the onus of disproving it rests on the heir." Up to this point there is no discussion as to whether the debt should be a simple debt or a debt secured upon the charge on property. After this, the particular facts of the case are examined and the rules deduced by Sir James Colvile in *Suraj Bursi Koer* v. *Sheo Persad Singh* (9) and *Girdharee Lall* v. *Kantoo Lall* (14) are stated. Then follows an approval of the comment by Sir John Stanley in *Chandra Deo Singh* v. *Mata Prasad* (11) on the above two decisions. If we turn to the judgment of the learned Chief Justice of the Allahabad High Court which has secured the approval of the Judicial Committee, it would be clear that there was no intention in that case to differentiate between simple debts and mortgage debts. On the other hand the sentence at the bottom of page 207* is in favour of holding that a mortgage is as much within the competency of the manager as a simple debt. Then the judgment of the Judicial Committee proceeds to define what an antecedent debt is. It is in this part of the judgment that the observation relied on by Mr. Sitarama Rao occurs. But the quotation from Lord Hobhouse's judgment in *Nanomi Babuasin* v. *Modhun Mohun* (4), on which the rule is based, does not make any distinction between mortgage debts and money debts; and the final deduction of the Board does not warrant any such distinction being drawn between the two classes of debts. The sentences relied on, namely, "In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve", should be read as referring to the creation of the first obligation and not to the merger of the first debt in a subsequent mortgage debt. That was the only matter which was directly discussed, and this and the other observations must be taken to have been made with reference to the enforcibility of a debt which starts with a mortgage and is not subsequently absorbed in any other transaction of a similar or a different kind. The rule finally laid down, namely that "there must be antecedency in time" and "real dissociation in fact", would equally apply to a simple and to a mortgage debt. I have very closely read the judgment of the Board, and in my opinion the particular passage on which so much stress was laid should not be construed in the way in which the learned Vakil asked us to construe. In this connection I may be permitted to draw attention to what Lord Haldane said in *Cornelius* v. *Phillips* (17): "*Dicta* by Judges, however eminent, ought not to be cited as establish-

(17) (1918) A. C. 199 at p. 211; 87 L. J. K. B. 246.

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ing authoritatively propositions of law unless these *dicta* really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding." Mr. Sitarama Rao contended that the Judicial Committee have set to themselves the task of laying down the law and it is not open to us to minimise its effect by saying that the sentences relied on are mere *obiter dicta*. The answer is that their Lordships had not before them this aspect of the case at all. Ever since *Huncomonpersaud Panday* v. *Musammat Babooee Munraj* (10) in which the rule as to antecedent debt was outlined, numerous cases have been decided in this Presidency and elsewhere, where it was assumed as unquestionable that there is no distinction between a simple and a mortgage debt. It would unsettle vested rights and throw open the flood gates of litigation, if their Lordships are to be understood as laying down the law as contended for by the learned Vakil. There must be some semblance of discussion in the judgment appealed against, in the argument of Counsel or in the cases quoted at the Bar to warrant us in imputing such an unexpected departure from accepted notions on the subject to their Lordships. The Judicial Committee are in the habit of cautioning Courts in India to apply the old decisions to transactions founded on an exploded view of law and to suggesting that as and from a particular date the new pronouncement should be accepted as regulating similar transactions In *Pattabiramier's* case and *Thambuswami Pillai's* case relating to the construction of mortgages by conditional sale, this hint was given. Again in dealing with rights of alienation which a co parcener has in respect of his own share, the Board, while saying that the Madras view was not right, refused to interfere with it on the principle of *stare decisis*. There is no indication of such an attitude in the present case. The truth is that their Lordships did not intend to overrule the principle which had gained uncontested currency all these years. I cannot, therefore, but regard the view taken in *Brij Narain Rai* v. *Mangla Prasad* (12) and by Spencer and Krishnan, JJ., in this Court as attempts to be meticulously literal at the expense of the spirit of the pronouncement,

I may draw attention to the fact that the Judicial Committee have held in *Girdharee Lall* v. *Kantoo Lall* (14) that where family property has been sold away under a mortgage decree, the sons can recover it back only on showing that the debt was illegal or immoral. The same conclusion has been stated in cases where the property passed out of the family by sale under a money decree. No distinction is drawn regarding the rights of the sons in these two classes of cases. If it was breach of trust on the part of the manager to have mortgaged the property, why should the suing co-parcener show that there was immorality or illegality ? If the property passed out of the family in violation of a trust, the son should, on pleading without more that the decree under which the sale was held was founded on a mortgage, be decreed possession of at least his share. There is a consideration which is especially applicable to Madras and which would also lead to the same result. In the judgment under consideration, the Board had to consider the rule of Mitakshara as administered in Allahabad. They had not before them the doctrine which has been uniformly accepted in this Presidency that for a debt of the father which is neither illegal nor immoral, his share in the family property would be liable. This view has obtained the sanction of the Judicial Committee on the principle of *stare decisis*. It would follow from this that if a father mortgages property for a debt which is not tainted with illegality or immorality, although not binding on the sons as not being for family benefit or necessity, it would be enforcible against the sons on the doctrine of their pious obligation to discharge their father's debt. This would furnish an additional ground for holding that a mortgage debt, instead of being in a worse position than a simple debt, is in some respects in a more favourable position.

There is one observation in the judgment which I have so largely quoted from, which lends support to my view. Almost the last sentence in the judgment is : " Wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, the Courts will not be slow to deny effect to a mortgage so brought into existence." There is no qualification here that the illusory character would

only affect a simple debt. What the Courts in India are asked to do is to find out whether the previous loan was real or illusory, and not whether it is a simple debt or a mortgage debt. For all these reasons I am of opinion that *Badagala Jogi Naidu* v. *Bendalam Paniah Naidu* (8) was wrongly decided. It is not necessary to express any opinion upon the second question referred to us.

M. C. P.

Answered in the affirmative.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 2127 OF 1915.

February 14, 1919.

Present:—Mr. Justice Shadi Lal and Mr Justice Martineau.

MIRZA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KAHAN SINGH—DEFENDANT—RESPONDENT.

Abandonment of land—Proprietor giving up holding and leaving village, effect of—Shamilat, *share in, abandonment of.*

The fact of a person giving up the whole of his holding and quitting the village for good shows that he has abandoned all the rights he had in the village, including rights in the *shamilat*, and on such abandonment his share in the *shamilat* passes into the possession of the co-sharers, and he and his descendants lose their right to it. [p. 539, col. 2; p. 540, col. 1.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 26th May 1915.

Mr. *Badr ud-Din Kureshi*, for the Appellants.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—Sahibzada, a landowner of Mianwai, left his village a few years before 1884, when he died, and the defendant's adoptive father got possession of his proprietary holding. A suit brought by Sahibzada's sons Khanu and Jallu in 1903 to recover the land was dismissed for default, and a suit brought after their deaths by the present plaintiffs, the heirs of Khanu and Jallu, in 1912 was also dismissed, the defendant being found to have acquired a title to the land by adverse possession.

In the present case the plaintiffs sue for a declaration of their right to the share which Khanu and Jallu would have had in the *shamilat deh* amounting to 63 *kanals*.

The Subordinate Judge held that the plaintiffs had not lost their rights in the *shamilat*, and that the claim was within time, and gave them a decree, but the District Judge on appeal has dismissed the suit being of opinion that Khanu and Jallu, having abandoned their proprietary holding, had no rights in the *shamilat*. The plaintiffs have appealed to this Court.

There is, as the learned District Judge observes, no reported case exactly on all fours with the present one. In *Jalal* v. *Beli Ram* (1), to which he has referred, the original owner of the holding had been deprived of it in pre British times, when rights in *shamilat* were practically non-existent, whereas in the present case Sahibzada abandoned his land in 1881 or thereabouts.

The question is whether Sahibzada or his sons abandoned their rights in the *shamilat*. There is no explicit finding of the learned District Judge on this point, but we think that it is only reasonable to conclude that there was such an abandonment, otherwise Sahibzada and his sons would have retained at least a portion of their proprietary holding. Their giving up the whole of that holding and quitting the village for good shows that they abandoned all the rights they had in the village, including rights in the *shamilat*.

Having once abandoned their rights in the *shamilat*, can they or their heirs, the plaintiffs, now assert their claim to them? The trial Court has been at pains to show that that portion of the *shamilat* which is in the defendant's possession and for which he pays the revenue is not identical with that which was held by Khanu and Jallu but this fact is not material. The case relates not to property of which Khanu and Jallu were the sole owners, but to their undivided share in land which

(1) 9 P. L. R. 1907; 37 P. W. R. 1907.

belonged jointly to the proprietors of the village. On the abandonment by Khanu and Jallu or their father of their share in the *shamilat* that share must be deemed to have passed into the possession of the co-sharers and that being so, the plaintiffs have lost their right to it. The claim, therefore, fails and we dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 228 OF 1917

AND

CIVIL REVISION PETITION No. 533 OF 1917.

October 2, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

PAMIREDDI SAMBAYYA AND OTHERS—PETITIONERS—APPELLANTS

versus

NIMMAGADDA NAGAYYA AND OTHERS—COUNTER-PETITIONERS NOS. 1, 2 AND 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 151—Appeal, dismissal of, without notice to appellant—Irregularity—Remedy of appellant—Inherent powers, exercise of—Revision—High Court power of interference of.

Where a Court dismisses an appeal, of the hearing of which the appellant has no notice whatever, the Court, though in ignorance of the true facts, must be held to have acted with material irregularity and in such a way as to induce a miscarriage of justice, and the High Court would be justified in using not only its inherent powers referred to in section 151 of the Civil Procedure Code, but also its powers under section 115, to set aside the order of dismissal. [p. 541, col. 2.]

Appeal against, and petition under section 115 of Act V of 1908 praying the High Court to revise, the order of the Court of the Subordinate Judge of Bezwada, in Civil Miscellaneous Petition No. 1790 of 1916, for review of the order of dismissal for default of Appeal Suit No. 11 of 1913, on the file of the Court of the Subordinate Judge of Masulipatam.

Mr. *P. Narayanamurthi*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.

AYLING, J.—The circumstances of the case out of which these petitions arise are somewhat extraordinary, and as the course we propose to take is one which we should be sorry to see misquoted as a precedent, I deem it best to set them out in detail. The appellants in Appeal against Order No. 228 of 1917 and petitioners in Civil Revision Petition No. 553 of 1917 (whom we shall henceforward refer to as appellants) were appellants in Appeal Suit No. 11 of 1903 on the file of the Subordinate Judge of Masulipatam. They succeeded, the decree of the Original Court being reversed. The other side preferred a second appeal to this Court (Second Appeal No. 1983 of 1913). This Court set aside the decree of the Sub-Court and remanded the appeal to the Subordinate Judge of Masulipatam for disposal according to law. This was on 5th January 1916. Meantime certain changes had taken place in the Courts of the Kistna District. The Sub-Court of Masulipatam, which had disposed of this appeal, was directed to hold its sittings at Bezwada and its designation altered to the Sub Court of Bezwada. A new Court has been constituted under the title of the Temporary Sub-Court of Masulipatam and was working at Masulipatam when the order of this Court in second appeal was passed.

It is beyond dispute that the effect of this Court's order was to direct restoration of the appeal to the file of the Court sitting at Bezwada which was identical with the Court which originally heard it, although its designation and place of sitting had been altered. The parties, however, fell into the not unnatural error of thinking that the appeal would be heard by the Court of Masulipatam. As far as appellants are concerned, this error is testified to in the affidavits filed which have been accepted by the lower Appellate Court, and which we accept as true in this respect. How natural the error was may be gauged by the fact that it was shared by the office of this Court which sent the records in the first instance to the Temporary Sub-Court of Masulipatam. The latter Court transmitted them to the Bezwada Court.

The Bezwada Court, on receipt of the records, posted the appeal for hearing on 6th March 1916. No notice was sent to the parties, but under rule 16, Civil Rules of Practice, notice of the hearing

was affixed on the Court Notice Board. On the 6th March 1916 neither party appeared. The Court took time till 14th March 1916: and then dismissed the appeal for default of appellants' appearance under Order XLI, rule 17 (1).

The lower Appellate Court says: "There can be no doubt that neither party knew anything about the appeal having been sent to this Court for disposal." In this I entirely agree; though it is only the appellants whose ignorance is material. On 28th November 1916 the appellants, having somehow come to know of this order of dismissal, filed a petition to set it aside. The petition was put in under order XLVII, rule 1, as a review petition since a petition under Order XLI, rule 19, would have been time-barred. There is no reason to suppose that the appellants were guilty of undue delay in preferring this application after they came to know of what had happened.

At the time this petition was filed, Mr. Jivaji Rao, the Sub-Judge who dismissed the appeal for default, was still in charge of the Court. He, however, passed no orders upon it up to the time of his departure on transfer, in the following month. The petition, therefore, came for disposal before his successor, Mr. Raghava Ayyangar. The latter, while finding the facts above set forth in appellants' favour, felt himself constrained to dismiss the petition on the ground that under Order XLVII, rule 2, he had no power to review his predecessor's order, the latter not having directed notice to issue to the other side.

It is against this order of Mr. Raghava Ayyangar that appellants invoke our aid both in appeal and revision: and Mr. Ramadoss, who appears for respondents to oppose them, does so on the ground that, however inequitably things may have worked out, the order of Mr. Raghava Ayyangar is absolutely correct from a legal point of view and that we have no power to interfere.

It is unnecessary to discuss this because, in my opinion, the error goes further back, and has resulted in such a flagrant denial of justice that we are not only justified, but called upon to use the inherent powers referred to in section 151, Civil Procedure Code.

The result of the orders passed subsequent to the remand of the appeal by this Court has been that appellants, though for no fault of their own, have been practically deprived of the right of appeal which they possessed. Their appeal has been dismissed without their having any opportunity of arguing it. The affixing of notice of hearing on the Board of the Bezwada Court might be sufficient notice where the parties were aware of the pendency of the appeal in that Court, and might be expected to watch the Board either by themselves, or by their Pleaders. It could not be in the present case, where, through a natural error (as shown above), they expected the appeal to be heard in another Court, 50 miles away.

It is impossible to conceive that, in these circumstances, Mr. Jivaji Rao would have declined to re-admit the appeal, if the true facts had been brought to his notice in time by a petition under Order XLI, rule 19. That this was not done was also due simply to appellants' ignorance of what was going on. The same officer's failure to pass orders on the review petition before his departure may be explicable on the ground of pressure of work, or inadvertance; but is much to be regretted.

In my opinion the case comes within the spirit of the remarks of their Lordships of the Privy Council in *Debi Bakhsh Singh* v. *Habib Shah* (1). In dismissing an appeal, of the hearing of which the appellants had no notice whatever, the Sub-Court, though in ignorance of the true facts, must be held to have acted with material irregularity and in such a way as to induce miscarriage of justice; and, under sections 115 and 151, Civil Procedure Code, I would set aside the order of dismissal and direct the Sub Judge of Bezwada to restore Appeal No. 11 of 1913 to his file and to dispose of it according to law. Costs in these proceedings should be costs in the cause.

KRISHNAN, J.—The Subordinate Judge is clearly right in holding that the appellants' application, viewed as one under Order XLI

(1) 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 839; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 25 M. L. T. 143; 14 M. L. T. 33; (1913) M. W. N. 566, 16 O. C. 194; 40 I. A. 150 (P. C.).

rule 19, of the Code of Civil Procedure, is barred by limitation under Article 163 and as one for review of judgment, it could not be granted by him as notice had not been ordered by the Judge who originally passed the order of dismissal. But I agree with my learned brother that in the special circumstances of this case described by him the Subordinate Judge should have acted under section 151 of the Code of Civil Procedure and used his inherent powers to set aside the order.

There can be no doubt that, if the order is allowed to stand, the appellants' right of appeal in the main suit will be taken away from them for no default committed by them. It was, therefore, clearly necessary for the ends of justice and to prevent abuse of process of Court to set it aside. I agree with my learned brother that the principle of the decision of the Privy Council in *Debi Bakhsh Singh* v. *Habib Shah* (1) applies to this case, though the facts of that case were somewhat different.

It was contended that section 151 could not be used for extending periods of limitation and overruling legislative provisions, and reliance was placed on the observations in *Vannisami Thevar* v. *Periayaswami Thevar* (2) and *Kanai Lal Ghose* v. *Jatindra Nath Chandra* (3). That, of course, is so; for no inherent power will exist against an express provision of law. But in this case there does not seem to be any such provision against applying section 151. Order XLI, rules 17 and 19, of the Code of Civil Procedure do not properly apply to a case like the present, where the Court in which the appeal was to be heard was changed without the parties being informed or knowing anything about it. Though the appellants could have applied under rule 19 if they had known of the dismissal in time, they were not bound to do so and it cannot be said that that was their only remedy. As for the review filed by them, it is doubtful if that was a proper remedy at all. If it was, the appellants did apply and their failure to get relief was not due to their fault at all. But they were clearly not bound to apply for review. It cannot, therefore, be said that there was any rule of law requiring the appellants to adopt any particular procedure such as that under rule 19 or that by way of review. I think that it was open to them to ask the Court to use its inherent powers and that, I think, was their proper remedy in the circumstances.

That being so, it is open to us under section 115 of the Code of Civil Procedure to revise the order of the Sub Judge, as he failed to exercise the jurisdiction vested in him under section 151 of the Code of Civil Procedure as he might have done.

I agree to the order proposed by my learned brother.

Order set aside.

M. C. P.

(2) 33 Ind. Cas. 993; 19 M. L. T. 192; (1916) 1 M. W. N. 179; 3 L. W. 271.

(3) 42 Ind. Cas. 741; 26 C. L. J. 325; 22 C. W. N. 446; 45 C. 519.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1953 OF 1915.

February 1, 1919.

Present:—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice Martineau.

NIHAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHIB SANT KUMAR—DEFENDANT—RESPONDENT.

Mortgage—Redemption, postponement of—Unconscionable bargain—Redemption, whether permissible before expiry of period—Undue influence—Contract Act (IX of 1872), s. 16.

Where a mortgage-deed provides that redemption shall not take place before the expiry of a term of years, the fact that the terms of the deed are unconscionable will not entitle the mortgagor to avoid the contract and sue for redemption before the expiry of that period, unless he is able to prove that the contract was entered into under undue influence. [p. 543, col. 1.]

Second appeal from the decree of the District Judge, Jhang at Sargodha, dated the 10th May 1915.

Mr. *Nanak Chand*, for the Appellants.

Mehta *Bahadur Chand*, for the Respondent.

JUDGMENT.—The plaintiffs have sued for redemption of land which was mortgaged for Rs. 2,500 to Bawa Shamsher Nath, of whom the defendant is a *chela*, in 1831. The deed recites that the mortgage is for a period of 40 years, and that on Rs. 1,000

out of the mortgage money interest will be payable at the rate of two per cent. per mensem. The plaintiffs alleged that the terms of the mortgage had been entered in the deed in consequence of undue influence exercised by the mortgagee. Their suit has been dismissed, the Courts below concurring in holding that undue influence has not been proved and that the suit is premature. The plaintiffs have filed a second appeal in this Court, and it is contended on their behalf that the terms of the mortgage-deed are unconscionable and that the stipulation that the land could not be redeemed for 40 years should not be held binding.

Assuming, however, that the terms are unconscionable, this fact alone will not entitle the plaintiffs to avoid the contract and sue for redemption before the expiry of the period entered in the deed. Equitable considerations will not avail them, as is clear from the recent ruling of the Privy Council reported as *Balla Mal* v. *Ahad Shah* (1), but in order to succeed they have to prove that the contract was entered into under undue influence. As this has not been proved their case fails, the suit being clearly premature.

We express no opinion as to whether in a suit for redemption brought after the expiry of the period of 40 years, the plaintiffs would be entitled to a reduction in the amount of interest on the ground that the equity of redemption has been clogged.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 16 A. L. J. 905; 23 C. W. N. 233; 25 M. L. T. 55; 189 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R 558 (P. C.).

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 41 AND 42 OF 1918.

July 24, 1919.

Present:—Mr. Justice Das.

Babu RAM NANDAN SAHAY AND OTHERS —PLAINTIFFS—APPELLANTS IN BOTH *versus*

JAI GOBINDA PANDEY AND OTHERS—DEFENDANTS, *Babu* BINDESWARI PROSAD SINHA AND OTHERS—PLAINTIFFS—RESPONDENTS, IN NO. 41.

GOBERDHAN SAHU AND OTHERS—DEFENDANTS AND BABU BINDESWARI PRASAD SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS IN NO. 42.

Joint property—Co-sharers—One co-owner dealing with joint property—Rights of other co-owners—Injury, proof of—Ouster, what constitutes—Joint possession, when can be obtained.

Before a Court will, in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-owners without the consent of the others should be restored to its former condition, the plaintiff must show that he has sustained by the act he complains of some injury which materially affects his position. [p. 544, col. 1.]

Where there is a denial of the title of one co-owner by the other co-owners there is in law an ouster, and where there is an ouster, the co-owner ousted is entitled to a decree for joint possession. [p. 545, col. 1.]

Appeals from a decision of the Sub-Judge, 1st Court, Chapra, dated the 18th September 1917.

IN NO. 41 OF 1918.

Mr. *Jagannath Prasad*, for the Appellants.

Messrs. *B. N. Mitter* for the Respondents.

IN NO. 42 OF 1918.

Mr. *Jagannath Prasad*, for the Appellants.

Messrs. *B. N. Mitter*, and *Bankim Ch. De*, for the Respondents.

JUDGMENT.—These analogous appeals arise out of a suit in ejectment brought by the appellants against defendants Nos. 1 and 2. The appellants are the proprietors of Tauzi No. 3142. Defendant No. 3 is the proprietor of Tauzi No. 3143. Defendants Nos. 1 and 2 have a house on plot No. 342 which admittedly lies in Tauzi No. 3143. They have erected a wall and a *chabutra* on 7 *dhurs* of land in plot No. 341 which adjoins plot No. 342, and it is in respect of this trespass on plot No. 341 that the plaintiffs complain.

The lower Appellate Court has found that plot No. 341 is joint between the plaintiff and defendant No. 3 and that there has undoubtedly been an encroachment by defendants Nos. 1 and 2 on 7 *dhurs* of land in plot No. 341, but that such encroachment has taken place by the leave and license of defendant No. 3. It has also found that the land encroached upon falls far short of the area which defendant No. 3 would be entitled to on partition and that the plaintiffs have not suffered any substantial injury by reason of such encroachment. On these findings the Courts below have given the plaintiffs a decree for joint possession with the defendants but have refused to eject defendants Nos. 1 and 2 from the land.

I am of opinion that the Courts below have taken an entirely correct view of the law on the subject. The authorities, I think, establish the proposition that, before a Court will, in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-owners without the consent of the other should be restored to its former condition, a plaintiff must show that he has sustained, by the act he complains of, some injury which materially affects his position. See *Nocury Lall Chuckerbutty* v. *Bindabun Chendur Chuckerbutty* (1), *Shamnugger Jute Factory Co., Ltd.* v. *Ram Narain Chatterjee* (2), *Joy Chendar Rukhit* v. *Bippro Churn Rukhit* (3), *Brahmamoyee Chaudhurani* v. *Gopi Mohan Rai Chowdhury* (4) and *Paras Ram* v. *Sherjit* (5). It was contended by Mr. Kulwant Sahay on behalf of the appellants that the last mentioned case was virtually overruled by the Full Bench of the Allahabad High Court in the case of *Shadi* v. *Anup Singh* (6). In that case it was found by the final Court of facts that the defendant was building upon land which was in excess of the share that would come to him on partition, and that on partition the plaintiff could not be adequately compensated. Therefore the plaintiff succeeded in establishing that, by the act complained of, he did sustain an injury which materially affected his position. The actual decision, therefore, is consistent with the rule which I have deduced from the cases, and falls within the ambit of that rule, but there are certain observations in the leading judgment of Edge, C. J., which support the arguments put forward on behalf of the appellants. So far as these observations are concerned, all that I say is that they were not necessary for the decision of the case and that, with great respect, I am unable to adopt them for the purposes of this decision. The next case relied upon by Mr. Kulwant Sahay is that of *Shibba Mal* v. *Naurang Mal* (7). That was a suit by the plaintiff for the removal of a balcony which the defendant had built projecting over a considerable width of a passage which was the joint property of the plaintiff and the defendant. Walsh, J., thought that as the plaintiff had failed to show that he had sustained any injury by the act of the defendant, there could not be a mandatory injunction compelling the defendant to remove the balcony. Richards, C. J., and Bannerji, J., took a different view on appeal. In view of the long series of decisions both of the Calcutta High Court and Allahabad High Court, not one of which was considered or even referred to in the judgment delivered by Richards, C. J., I am unable to follow that decision. I am of opinion, therefore, that if the case had arisen between the plaintiffs and defendant No. 3, the plaintiffs could not have asked for a mandatory injunction compelling defendant No. 3 to pull down the erections on 7 *dhurs* of land. In my judgment, it makes no difference that the wall and the *chabutra* have been erected, not by defendant No. 3, but by defendants Nos. 1 and 2 by leave and license of defendant No. 3; for it is well settled that one joint owner "might license the doing of whatever he might do himself—" See *Wilkinson* v. *Haygarth* (8), *Job* v. *Potton* (9), *Jacobs* v. *Sewards* (10), and *Sat Narayan*

(1) 8 C. 708; 4 Ind. Dec. (N. S.) 456.
(2) 14 C. 189; 7 Ind. Dec. (N. S.) 125.
(3) 14 C. 236; 7 Ind. Dec. (N. S.) 156.
(4) 7 Ind. Cas. 124; 15 C. W. N. 188.
(5) 9 A. 661; A. W. N. (1887) 253; 5 Ind. Dec. (N. S.) 878.
(6) 12 A. 436 (F. B.); A. W. N. (1890) 95; 6 Ind. Dec. (N. S.) 1023.
(7) 39 Ind. Cas. 739; 15 A. L. J. 293.
(8) (1847) 12 Q. B. 837; 116 E. R. 1085; 16 L. J. Q. B. 103; 11 Jur. 104.
(9) (1875) 20 Eq. 84; 44 L. J. Ch. 232; 32 L. T. 110.
(10) (1872) 5 H. L. 464; 41 L. J. C. P. 221; 27 L. T. 185.

Singh v. *Anant Prosad* (11).

It is suggested, however, by Mr. Kulwant Sahay that, as there is a denial of the plaintiff's title to plot No. 341, not only by defendants Nos. 1 and 2, but also by defendant No. 3, there is some sort of equity in favour of the plaintiffs which would entitle them to the mandatory injunction asked for. There is, in my judgment, neither principle nor authority in support of this proposition. All that the cases lay down is that where there is a denial of the title of one co-owner by the other co owners there is in law an ouster, and where there is an ouster, the co-owner ousted is entitled to a decree for joint possession. In this case the plaintiffs have got a decree for joint possession. But they go further and the point that has been argued on their behalf is that where a co-owner *A* in denial of the title of co owner *B* allows a stranger *C* to erect a building on the land jointly held by *A* and *B*, *B* is entitled, by reason of the denial of his title, to a mandatory injunction, compelling *C* to demolish the building so erected. In my judgment, the solution of the problem must still depend on whether any substantial injury has been sustained by *B* and the Court will proceed to solve the problem unhampered by any consideration of the denial of the plaintiff's title. In this case, the Courts have concurrently come to the conclusion that the plaintiffs have sustained no injury whatever by the erection of a wall and *chabutra* on 7 *dhurs* of land. On this finding, the plaintiffs' suit for demolition of the wall and *chabutra* must fail.

The only other question that has been argued before me is that the lower Appellate Court erred in setting aside the finding of the Court of first instance on the question of the shares held by the plaintiffs and defendant No. 3 respectively in plot No. 341. For the reasons which have been given by the learned Judge on appeal, I am of opinion that it was not necessary for the Court of first instance to record any finding on that point.

The result is that these analogous appeals fail and must be dismissed with costs.

Appeals dismissed.

(11) 51 Ind. Cas. 31.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1516 OF 1915.

January 30, 1919.

Present:—Sir Henry Rattigan, KT, Chief Judge, and Mr. Justice Martineau.

ANAND BAHADUR—PLAINTIFF—APPELLANT

versus

HARDIL AZIZ—DEFENDANT—RESPONDENT.

*Appeal—Death of parties—Personal action—Right to sue, whether survives—Abatement of appeal—*Res judicata, *doctrine of, applicability of—Court which tried former suit not competent to try subsequent suit—Judgment binding on party in representative capacity, effect of.*

Where both parties to a suit die during the pendency of an appeal by one of them, and the action is a purely personal one, as for instance, a declaration that the defendant is not the lawful wife of the plaintiff, the right to continue the appeal does not survive to the representatives of the deceased parties. [p. 546, col. 1.]

In order to apply the rule of *res judicata*, the Court which decided the former suit must be competent to decide the subsequent suit, and the judgment in the previous suit must be binding on the parties. Where the Court which tried the previous suit was, by reason of the pecuniary limits of its jurisdiction, incompetent to try the subsequent suit, and the judgment in the former suit was binding on the defendant only in a representative capacity, there would be no question of *res judicata*. [p. 546, col. 1.]

Second appeal from the decree of the Additional District Judge, Lahore, dated the 28th February 1915.

Mr. *Fazal Din* and Lala *Hukam Chand*, for the Appellant.

Dewan *Mehr Chand*, for the Respondent.

JUDGMENT.—The defendant Prem Kaur having obtained a maintenance order from a Magistrate against the plaintiff Tegh Bahadur, the latter sued for a declaration that the defendant was not his lawful wife. The Courts below gave judgment against him, and he then filed the present appeal in this Court. During the pendency of the appeal both parties died. The plaintiff's son Anand Bahadur has been impleaded as appellant in place of his father, and the defendant's son Hardil Aziz as respondent, as representative of his mother. It is, however, contended for the respondent that having regard to the nature of the case, as the original parties are dead, there is nothing to be gained by proceeding with the appeal, which should be dismissed, and reliance is placed on *Musamma*

Sat Bharai v. *Musammat Sat Bharai* (1).

The case cited is not exactly in point as the claim was one of a different nature from the claim in the present case, but we agree that in the circumstances it would be useless to go on with the appeal. In fact it appears to us that the plaintiff and the defendant having both died, the right to appeal does not survive, as the action was a purely personal one.

Counsel for the appellant informs us that a suit by Hardil Aziz to establish his right to the "*gaddi*" of which the deceased Tegh Bahadur was *mahant*, on the ground of his being the deceased's son, is pending in the Court of the Subordinate Judge, and that the proceedings have been stayed on account of this appeal. But it is clear that our decision could not operate as *res judicata* in that case. In the first place, the Munsif who tried the suit in the present case would not have been competent to try the suit now pending before the Subordinate Judge, which is said to be of a value of Rs. 15,000 or more. In the second place, our judgment would not be binding on Hardil Aziz except in his capacity as a representative of his mother, in whose place he has been impleaded.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 18 Ind. Cas. 329; 65 P. R 1913; 46 P. L. R. 1913; 24 P. W. R. 1913.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 38 OF 1918.

March 31, 1919.

Present:—Sir Basil Scott, KT, Chief Justice, and Mr. Justice Hayward.

SHRINIVASDAS LAKSHMINARAYAN—PLAINTIFF—APPELLANT

versus

RAMCHANDRA RAMRATTANDAS—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 23—Public policy—Speculative dealing in gold currency, whether opposed to public policy.

Plaintiff was employed as a commission agent by the defendant for the purchase and sale of sovereigns. He entered into several contracts on behalf of the defendant for this purpose, and the defendant became liable to him for a specific sum. The defendant paid a portion of this and refused to pay the balance, whereupon the plaintiff brought the present suit to recover that balance. The defendant contended, *inter alia*, that the transactions were against law and public policy and that the plaintiff was not entitled to sue in respect thereof. The trial Court dismissed the suit, on the ground that the contracts were opposed to public policy as tending to defeat the whole scheme of the Government finance. The plaintiff appealed, and the main contention for the defence was that the contracts were contrary to public policy:

Held, that the contracts did not offend against any clear general head of public policy to warrant the conclusion that, on that ground, they were unlawful; and that the plaintiff was entitled to a decree for the amount claimed by him. [p 554, col. 2.]

Appeal against the following judgment of

BEAMAN, J.—The single question of importance I have to answer in this suit is whether speculative forward dealings in the gold currency of the country are opposed to public policy. It is a question the answer to which may have very far reaching, even disturbing, consequences, and if the war is likely to be protracted it would be of the first importance that it should be decided once and for all at the earliest possible moment. Probably other considerations will come into play after the war, which will considerably diminish the practical importance of the point now in issue. It has been pointed out by the Hon'ble and learned Advocate General this morning, admittedly a consideration rather outside the strict province of the law, that if I decide this suit against his clients, it may cause a very widespread disturbance of the money market and entail a great deal of confusion and inconvenience upon many Banks and other money distributing agencies. I do not anticipate quite such appalling consequences, but even if I did, I should feel myself still bound to decide according to the law as I understand it. In saying that, I am, of course, keenly alive to the peculiar character of the question I have to answer. That has been very fully and very ably argued by the Advocate-General in all its strictly legal connections. Everybody knows who has any practical acquaintance with this subject that "public policy" is very elastic. I should certainly be the last to desire to see it

made the plaything of sentiment or prejudice. And did the matter here go no further than that, if the definitions suggested by the Advocate-General really exhausted the whole subject, I should have had very little difficulty in disposing of this defence. But I am by no means satisfied that the analogies, for they are little better, imported from the English Courts are strictly in point, while I am quite certain that the conditions, under which this branch of the law has grown up organically so to speak with the growth of the people in a country like England, do not exist at all in India. Many of the *dicta*, therefore, of our greatest English Judges, while very informing and appropriate in England, have to be regarded with some caution before they can be adopted in a case of this kind in India. I have felt from the first, and I have said so more than once during the conduct of the trial in order to obtain the utmost assistance I could from the Hon'ble and learned Advocate-General on the other side, that this trafficking in one branch of the currency, while the great war was in progress, was in its very essence opposed to public policy and I am still of the same opinion. It may not be easy to give a convincing, logical and theoretical reason which will put that conclusion beyond dispute. But when we turn to the decisions of the English Judges, it is very easy to distinguish the grounds of those decisions from any ground that can be taken and felt to be equally secure in this country. For example, the principle is summed up, and no doubt very correctly summed up, by Lord Halsbury when he says that while the rule is permanent, its application fluctuates and depends upon the principles from time to time guiding public opinion; and again there is a *dictum* of Baron Alderson confined to a rather narrower aspect of the point under consideration that contracts against public policy do not mean contracts to do that which may legally be possible to be done but which in the opinion of sensible men it is inexpedient to do. A mere consideration of these two *dicta* will, I think, open up many of the difficulties with which I have been oppressed during this trial. In the first place, in a country whose history has been like that of England in which party politics have developed to such an extent that the whole machinery of the Government is practically regulated by the interplay of parties constantly changing place with each other and only that for the time being in power representing public opinion, is a history to which no parallel whatever can be found in India from the time of our connection with it. For all practical purposes, and taking India as a whole, it is no exaggeration, I think, to say that there is no public opinion at all in the mass and most certainly there is no public opinion one way or the other, about the morality or expediency of such a transaction as that I am considering. Moreover, I do not agree that the definition of "public policy" is exhausted by saying that only that can be said in the eye of the law to be against public policy which is either penal or unrecognized by the Statute or Common Law. No doubt that would cover the vast majority of ordinary contracts. But "public policy" is a much wider term and in its turn capable of sudden extensions under abnormal and temporary conditions. I suppose it will not seriously be denied that that which might pass well enough as not being contrary or opposed to public policy in times of peace might be as plainly against public policy in times of war. It is very true that exceptional cases of that kind are either of so obvious a character as hardly to give rise to discussion at all, or if more ambiguous are likely to be provided for by special war legislation. Nevertheless, a consideration of all these nice distinctions has forced me to the conclusion that the question I have to answer cannot be answered upon the very simple lines to be found in some of the English judgments. In almost all those it seems to me that the learned Judges responsible for them had an eye principally to the actual facts of the case before them, and it is plain that trafficking in coinage could hardly have come within the purview of the Courts in this connection in England. It is doubtful whether such a situation as that created by wild gambling on the part of a very small body of purely selfish speculators in Bombay could possibly exist except under a bimetallic system. In India at present it appears that we have a silver and a gold currency

between which the Government has endeavoured to fix a definite ratio. But the effect of this gambling in the gold coinage admittedly has been to disturb that ratio and give gold a very much higher relative value to silver than merely as one branch of the currency it ought to have. Again, it seems to me that trafficking in coinage is a question apart from all general contracts of the kind which are usually discussed when they are said to be opposed to public policy. Certainly it would be ridiculous to say that a contract was against public policy if it was both legal and possibly moral because in the opinion of a sensible man it was inexpedient. For if so absurd and lax a proposition was admitted for a moment, it would very soon come to the sensible man being reduced to a single Judge, and any Judge might give rein to his religious or moral fads and whims in interfering with the frequent contractual relations of the public as a whole. No one, I say, could possibly be more reluctant than I to impose any moral view of my own under such conditions upon the moral views of the public so long as they kept within the letter of the law. Nor indeed, as it seems to me, is this a question of morality at all. I have already said that in dealing with contracts void as being against public policy the Courts in England have condemned a large majority of them on the ground that they contravene public sentiments of religion, morality or social propriety. That can hardly apply to a case where the decisive factor is one relating to the maintenance at a very critical moment of the efficiency of the Government. If it be conceded that finance is one of the most vitally important factors of an efficient Government in this country during this crisis, and this indeed will be conceded, I think, by every one, then the conduct of private individuals, if again it can be shown that that conduct tends to defeat and embarrass the whole scheme of the Government finance, will have to be admitted to be fundamentally opposed to public policy. This, again, could hardly be denied as an abstract proposition. The Advocate-General, arguing the case for the plaintiffs, put it at first upon the most general legal grounds, pointing out that money was only moveable property, but there was nothing either in the Indian Contract Act or the Indian Coinage Act to take it out of that common category, and, therefore, speculating in money could not possibly be any more opposed to public policy than making a corner in the sale of much needed goods. Now, in the first place, I think that argument is defective, because it is very clear that money, apart from the metal of which it is made, is never intended for the purpose of sale. Ordinarily, then, it ought not to be a medium of gambling speculations. I use the word 'gambling' here in the widest possible sense, for all commercial forward transactions on a large scale have an element of gambling in them. In England, we know money is expressly excluded from the category of goods. The precious metal from which coins are made is as much a commodity as piece goods or dyes or any other staple commodity. But once it has been converted into coins and put in circulation, it has a peculiar public function to discharge, and where there is a double coinage of gold and silver with a fixed ratio governing the relation of one of these coins to the other, that function cannot be properly discharged if speculating in one or the other of the branches of the currency materially alters the ratio which the financial operations of the Government require to be made and to continue permanent. It was also urged that no one could possibly say that there was anything illegal, in the sense of being either punishable by law or unrecognized by law, in buying sovereigns before the Government Notification of August 1918. Again, I merely point to the abnormal conditions which exist during the progress of a great war. In a country like India particularly, the Government of which is carried on under conditions without a parallel, as far as I know, in the world's history, its responsibilities have been enormous, and not the least amongst them has been financing great war operations as well as the internal administration of the country. In order to do this, rightly or wrongly, a point with which I have no concern and upon which I am not competent to speak, a very considerable mass of gold currency was thrown into circulation. What immediately happened showed that the insatiable desire of the

people of this country to obtain gold, not for currency purposes at all but for adornment or hoarding, was withdrawing the whole of this gold currency from circulation and so defeating the Government's object. Now, in ordinary times, possibly in view of what was then happening, probably what will always happen in a country like India, habituated to silver currency and probably the masses of the whole country regarding that as the only real currency, the attempt to maintain a bimetallic currency would have been abandoned. It will probably be found, no matter what penalties are imposed, no matter what impediments are thrown in the way of purchasing gold for other than currency uses, that this country will absorb any amount of gold currency set in circulation much as a sponge absorbs water. But at any rate in periods of emergency and crisis, the Government has a right to expect that the mere greed and selfishness of gamblers in money shall not be given free play so as to disorganise its carefully conceived financial policy. Now, it is very clear that keeping our eye upon the transaction with which I am dealing, there is no real question of public policy in the sense of widespread public opinion one way or the other. Speculators in the gold currency are for the most part, I suppose, that small body of extremely wealthy men who are gathered together in our great cities and have no other than their own selfish interests of making money in any and every way they can. It would be absurd to suppose that the millions and millions of people, many of whom have never seen a gold coin in their lives, could possibly have any opinion one way or the other on the policy of such conduct as this and even if it really affected them most injuriously, as doubtless by frustrating *pro tanto* the Government's intentions and defeating its financial scheme it would do, they would still be quite ignorant of the true cause. The plain truth is that in India public policy at any rate for the present is defined by and coincides with the measures of the Government, which we must assume, and which I do most cheerfully assume, are conceived in the broadest and most enlightened spirit and desire to carry on the Government as efficiently and beneficially as possible in the interest of the entire population. So probably in a very peculiar case of this kind it would be difficult to get a clearer indication of what is or what is not opposed to public policy than the Government declaration on the subject. Policy might, of course, be mistaken, policy might be unwise, but it being common ground that no ascription of improper motives is within the scope of the argument, that which is undertaken by a responsible Government as part of its policy and which cannot be criticised by the vast majority of those directly or indirectly affected by it must, I suppose, in all our Municipal Courts, be regarded as for the time being public policy, and acts declared by the Government as likely to frustrate the beneficial maintenance or operations of that policy would ordinarily be taken to fall with the general category of acts contrary to public policy.

Now, in 1917 we get a very clear indication of the dangers which the Government apprehended if the gold currency were left wholly unprotected. That notification prohibited breaking up gold coin, melting it down or using it for any other purposes than currency, but that, of course, would not extend to contracts for buying or selling gold coins regardless of what was going to be done with them after they had been bought or sold. Thus between the issue of that notification at the end of June 1917 and the notification of August 1918 there was an enormous amount of speculation forward in gold sovereigns, and the particular transactions with which I am dealing ended before the peremptory prohibitions of August 1918. It was frankly conceded that after that notification no transactions of this kind could possibly be recognised in any Municipal Court. But it was said that that was because they were made contrary to public policy, made indeed actually penal for the first time in August 1918. I think that this is not quite a correct statement. If what the Government finds it necessary to penalise because it was contrary to public policy in August 1918 was from that moment contrary to public policy, it is difficult to see how it could have been other than contrary to public policy a month or two earlier. The truth is that such notifications do not make a thing to

be contrary to public policy. They merely declare what was long felt that it was contrary to public policy, and if it was contrary to public policy in August 1918 it is difficult to see how it could help having been so in June. Nothing had occurred in the meantime to give it an entirely new character and complexion, and the general tenor of the notification showed clearly that in the opinion of the Government any trafficking in gold coinage, any use whatever of gold coin for any other purposes than currency, was opposed to the general interests of the country. So that the speculators in gold in the intervening period may very well have known that although they were within the letter of the notification of 1917 they were running counter to its spirit. But what is the result of all this? We find a small ring of Bombay speculators greedily bulling and bearing the gold market, some selling and some buying with no other object than either to depress or raise the value of the sovereign relatively to the rupee. The bulls appear to have had it all their own way with the result that the sovereign rose in value to something over Rs. 19. Some three or four million sovereigns at least appear to have been nominally bought and sold between these bulls and bears. Of course there are many cases in which buying a large quantity of sovereigns may be perfectly legitimate and even necessary in the interests of trade, but dealings of the kind I have before me certainly had no other object in view than changing the relative values of the rupee and sovereign either to the appreciation or depreciation of the sovereign according as the bulls or the bears proved successful. Obviously then, gold sovereigns, whose relative value had been forced up from Rs. 15 to over Rs. 19, would, to all intents and purposes, be put out of circulation altogether. And that is precisely what the financial policy of the Government felt to be the danger against which the Government had endeavoured to protect itself. How then can it be said that this kind of transaction, a transaction for which there is no conceivable need, the only motive for which is pure greed of selfish speculators, the result of which must inevitably be a complete dislocation of the coinage, is not against public policy in the only sense in which that term can have practical meaning to-day in this country?

It seems to me that this question can only be answered in one way. No one pretends that these buyers wanted these sovereigns for currency. No one pretends that if they were bought at all they would be put into ordinary circulation at the Mint rate one sovereign for Rs. 15. What then is the true underlying meaning of all this reckless speculation and what have been its consequences? I think the answers are obvious, so obvious that I need not give them. And it appears to me that for the reasons I have endeavoured to set forth, no sentimental reasons at all, involving as far as I can see no question of morality in the ordinary sense but referable only to one criterion, whether Government have a right to insist upon its financial policy being left undisturbed, thereby maintaining that policy for its contemplated purposes at a height of efficiency, these transactions do stand self condemned as opposed to public policy. In my opinion they must clearly do so, and it is upon that ground alone that I propose to dismiss the plaintiff's suit.

I need only add that if my view is wrong and if these transactions were not against public policy, there is no other substantial defence. The plaintiffs would, if the first question were answered in their favour, in my judgment, be entitled at once to a decree for the full amount they claim. As it is, however, holding so strongly the opinion I do, I must declare the transactions void on the ground of being opposed to public policy and so dismiss the plaintiffs' suit.

Each party must bear his own costs.

Messrs. *Kanga* and *R. D. N. Wadia*, for the Appellant.

Messrs. *Jayakar* and *Makanki Mehta*, for the Respondent.

JUDGMENT.

SCOTT, C. J.—This is an appeal from a judgment of Mr. Justice Beaman dismissing the plaintiff's suit.

The plaintiff sues for damages occasioned by his upcountry constituent failing to perform contracts for the purchase of sovereigns entered into for him by the plaintiff for the Vaishakh and Jeth Vaidas of 1 18.

The damages claimed were assessed as of the 1st of July 1918 and no objection is taken to this date.

On the 22nd of August 1918 a notifica-

tion under the Defence of India Act (IV of 1915) was issued as follows:—

"No person shall sell or purchase or offer to sell or purchase any coin for an amount exceeding the face value of such coin or shall accept or offer to accept any such coin in payment of a debt or otherwise for an amount exceeding its face value."

By the same notification 'coin' was defined as coin which is legal tender under any enactment for the time being in force in British India.

Under the Indian Coinage Act, 1906, a sovereign is legal tender for Rs. 15. The explanation to the notification says that for the purposes of the rule the face value of the sovereign shall be deemed to be Rs. 15.

The contract having come to an end by the defendant's breach which is not disputed, the subsequent notification does not operate so as to make it an illegal contract under the rule stated in *Brewster* v. *Kitchell* (1) "that if *H* covenants to do a thing which is lawful and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed."

It is, however, contended that the contracts were illegal in their inception under a previous notification of 9th July 1917 in the following terms:—"No person shall melt, break up or use otherwise than as currency any current gold or silver coin." But a contract to purchase sovereigns is not in itself a user of the coins to be purchased, nor is there any evidence to establish that the ultimate buyer would use the sovereigns purchased otherwise than as a store of currency to be available in the event of the silver or paper token currency losing its purchasing power.

There remains, therefore, for the defence the main contention on which the lower Court held against the plaintiff, *viz.*, that the contracts for breach of which damages are claimed were contrary to public policy.

It is no doubt open to the Court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the Court regards as public policy. This is laid down in section 23 of the Indian Contract Act and in India, therefore, it cannot be affirmed as a matter of law, as was affirmed by Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines, Limited* (2), that no Court can invent a new head of public policy, but the *dictum* of Lord Davey in the same case that "public policy is always an unsafe and treacherous ground for legal decision" may be accepted as a sound cautionary maxim in considering the reasons assigned by the learned Judge for his decision.

The following is, I think, a fair analysis of the reasons given by the learned Judge in the form of numbered propositions.

1. The definition of "public policy" is not exhausted by saying that only that can be said in the eye of the law to be against public policy which is either penal or unrecognised by Statute or Common Law.

2. Public policy is a much wider term and in its turn capable of sudden extensions under abnormal and temporary conditions.

3. It is doubtful whether such a situation as that created by wild gambling on the part of a very small body of purely selfish speculators in Bombay could possibly exist except under a bimetallic system.

4. In India we have a silver and a gold currency between which the Government has endeavoured to fix a definite ratio.

5. The effect of gambling in the gold coinage has been to disturb that ratio and give gold a very much higher relative value to silver than merely as one branch of the currency it ought to have.

6. It is not a question of morality as have been the majority of cases where in England public policy has been the *ratio decidendi*.

7. Morality cannot apply to a case where the decisive factor is the maintenance at a very critical moment of the efficiency of the Government.

8. Conduct of private individuals tending to defeat and embarrass the whole scheme of Government finance must be opposed to public policy.

9. Money, apart from the metal of which it is made, is never intended for purposes of sale.

10. Therefore it ought not to be a medium of gambling speculation.

11. Under a bimetallic system its public function cannot be properly discharged if speculating in one or other of the branches of the currency materially alters the ratio

(1) (1698) 1 Salk 198; 91 E. R. 177

(2) (1902) A. C. 484 at pp. 491, 492; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268; 18 T. L. R. 796.

which the financial operations of the Government require to be made permanent.

12. In order to finance great war operations and for internal administration a very considerable mass of gold currency was thrown into circulation.

13. What immediately happened showed that the desire for gold not for currency but for adornment or hoarding was withdrawing the whole of this gold currency from circulation and so defeating the Government's object.

14. In periods of emergency and crisis Government has the right to expect that the greed of gamblers shall not be given free play so as to disorganise financial policy.

15. In India public policy is at present defined by and coincides with the measures of Government.

16. Therefore in a peculiar case like this it would be difficult to get a clearer indication of what is opposed to public policy than the Government notification on the subject.

17. It is not correct to say that transactions in sovereigns at a price above the face value were made contrary to public policy in August 1918.

18. They must have been contrary to public policy already. The notification merely declares what was long felt, that it was contrary to public policy.

19. If contrary in August it must have been so in June.

20. The general tenor of the notification of June 1917 showed that in the opinion of Government any trafficking in gold coinage was opposed to the general interest of the country. So the speculators may very well have known that though within the letter of the 1917 notification they were running counter to its spirit.

21. In many cases buying a large quantity of sovereigns may be legitimate and even necessary, but dealings of the kind in suit certainly had no other object in view than changing the relative values of rupee or sovereign as the bulls or bears proved successful.

Substantially the judgment comes to this:

A. Courts in India are not to be limited by English decisions in deciding what is and what is not contrary to public policy, for public policy is capable of sudden extensions under abnormal and temporary conditions.

B. The question of the maintenance of a bimetallic currency system is one which does not arise in England. Speculators are able to disturb the equilibrium of such a system and this is contrary to the public interest here in times of crisis such as the recent war.

C. In India public policy is defined by and coincides with the measures of Government. The notification of July 1917 showed Government wished to prohibit the use of gold coins except for the purpose of currency. The notification of August 1918 shows that trafficking in such coins had for sometime theretofore been contrary to public policy and speculators should have known that though not transgressing the letter of the notification of 1917, they were running contrary to its spirit in offering for sovereigns a price higher than the face value as fixed by Indian enactments.

The objection to accepting such a proposition as *A* is forcibly stated in the passage from Marshall on Insurance cited by Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines, Limited* (2), at p. 491:

"To avow or insinuate that it might, in any case, be proper for a Judge to prevent a party from availing himself of an indisputable principle of law, in a Court of Justice, upon the ground of some notion of fancied policy or expedience is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws or suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a Judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day; or to apply the same decisions to

different, or different decisions to the same circumstances, as his notions of expedience might dictate."

The remarks which I have grouped together under the head *B* are general observations on a technical and very intricate matter which has been considered in 1913-1914 by the Royal Commission on Indian Finance and Currency. In their Report, dated the 24th of February 1914, the Commissioners say:

"The system actually in operation has ...never been deliberately adopted as a consistent whole, nor do the authorities themselves appear always to have had a clear idea of the final object to be attained. To a great extent this system is the result of a series of experiments."

In paragraphs 67 and 68 the Commissioners express the following opinion:

67. "With the argument that India should be encouraged to absorb gold for the benefit of the world in general we do not propose to deal. The extent to which India should use gold must, in our opinion, be decided solely in accordance with India's own needs and wishes and it appears to us to be as unjust to force gold coins into circulation in India on the ground that such action will benefit the gold using countries of the rest of the world as it would be to attempt to refuse to India facilities for obtaining gold in order to prevent what adherents of the opposite school have called the drain of gold to India. In any case these arguments (which it will be noted are mutually destructive) are irrelevant to the enquiry which we were directed to make and to the terms of reference, which confine us to a report on what is 'conductive to the interests of India.' They raise vast controversies upon subjects which are beyond our scope, while giving no reason for the adoption of either policy in India's own interest.

68. "We conclude, therefore, that it would not be to India's advantage to encourage an increased use of gold in the internal circulation."

So much for general considerations connected with the currency system. They did not apparently demand before the outbreak of the war the continuance of sovereigns as part of the Indian currency.

The learned Judge refers (paragraph 1 *supra*) to a very considerable mass of gold currency being thrown into circulation during the war. I can find no reference to this in the recorded evidence. The learned Judge probably refers to the issue of gold for the financing of wheat stated by the Finance Minister to have been

	Rs.
1917—1918	92,177,040
1918—1919	18,385,740

(see proceedings of the Legislative Council of the Governor-General of the 26th February 1919). It is referred to in the narrative of the Finance Minister introducing the financial statement for 1919—1920 (clause 15) in connection with the silver crisis of 1918 in these words: "Our thin line of rupees had been precariously supplemented by an issue of sovereigns in parts of India where gold is freely taken in payment for the crops; but the benefit of this expedient was transient and its continuance unjustifiable"; also in clause 14 it is said: "To coin and issue our relatively small stock of gold would have been wasteful to a degree; the premium upon the metal would have driven, and did in fact drive, any coined gold out of circulation immediately; it was an emergency ration rather than a currency medium" (see Proceedings of the Legislative Council of the Governor-General for 1st March 1919). This narrative introducing the financial statement was referred to in the argument of this appeal, and I propose to refer to it again as a public document containing an authoritative statement of the financial position of the Government in 1918 when the notification of August was issued from which inferences may be drawn as to the policy of the Government in issuing it.

In clause 21 I find that from the beginning of 1916 silver rose greatly in value and the rupee slowly followed it: "It was impossible to face a position in which Government would be turning out rupees at a loss and placing a permanent premium on the export of its silver currency. It thus became necessary to fix a sterling exchange value for the rupee which would ensure that our coinage would not be liable to be smuggled out of India in indefinite quantities,

Accordingly, with effect from the 12th April, the rate for Council drafts was fixed on a basis of 1*s.* 6*d.* per rupee for immediate telegraphic transfers...There was believed to be a considerable accumulation of funds (in India) seeking temporary investment in India for various reasons—taxation was heavier in England than here: hopes had been entertained of a further right in exchange: money was being kept handy for *post bellum* developments: and there was always the uncertainty about being able to recall spare money from England with the same promptitude as in former years."

I think it is fairly obvious that with exchange rising substantially above 1*s.* 4*d.* per rupee it was to one's advantage, other things being equal, to buy sovereigns, for the holder of sovereigns could still convert each sovereign for Rs. 15 which would be worth for foreign remittances much more than 1*s.* 4*d.* each. Other things, however, were not equal, for the prohibition of the import of gold, for which there is always a strong demand in India, had driven that metal to a premium and drove coined gold out of circulation immediately. One effect of the notification of August 1918, if it was effective, would be to practically prohibit the sale of sovereigns and give their possessors the benefit of the rise of the rupee only upon exchange of sovereigns for rupees at the treasuries: thus the gold which disappeared from circulation after the wheat purchases of 1917-1918 might be brought back to the treasuries. This seems to me a possible explanation of the notification.

The evidence in the case, in my judgment, throws no light on the question of public policy raised for the defence.

There is evidence of a number of contracts for the sale of sovereigns held by Banks in China and Japan in 1916 and 1917, not of sovereigns in circulation in India. Such contracts were anterior to the prohibition of gold imports.

The proved contracts of 1918 were for small amounts which were all closed by cross-contracts before the Vaida days.

In the judgment of the lower Court it is said; "We find a small ring of Bombay speculators greedily bulling and bearing the gold market, some selling and some buying with no other object than either to depress or raise the value of the sovereign relatively to the rupee—some three or four million sovereigns at least appear to have been nominally bought and sold between these bulls and bears. Of course there are many cases in which buying a large quantity of sovereigns may be perfectly legitimate and even necessary in the interests of trade, but dealings of the kind I have before me certainly had no other object in view than changing the relative values of the rupee and sovereign according as the bulls or bears proved successful." I do not find anything to support these conclusions in the recorded evidence. Out of four witnesses examined Ramdas the plaintiff, in answer to the question "Instead of buying gold people used to buy sovereigns and melt them down into ornaments?" said "I don't know, I can't say. They certainly hoarded sovereigns just like gold and other precious stones and metals. The piecegoods merchants made large profits as they bought sovereigns and stored them."

Chhotalal, when asked "What did your master want all these sovereigns for?" (*i.e.*, those imported from China and Japan) said: "The people in the bazaar wanted them, so we bought and sold to them. How can I say for what the people in the bazaar wanted them? I have never seen any sovereigns broken up and melted."

Narandas, to the question "People buy them, break them up or melt them?" said: "How can I possibly know that?"

P. M. Dalal, while admitting that some sovereigns were broken up and melted, said purchased sovereigns were also used for hoarding. They needed gold after the prohibition of import and got it by buying sovereigns. The premium on gold did not affect the purchasing value of the rupee or any note. The exchange value of the rupee had in fact gone up considerably.

The conclusion must, I think, be that no clear general head of public policy can be evolved which would justify the Court in holding the contracts in suit unlawful on that ground.

This is apparently the conclusion to which the learned Judge himself is driven when he falls back in the last part of his judgment on the notifications of June 1917 and

August 1918 as *indicia* of what is contrary to public policy in connection with the gold currency.

But if the case is to be decided on the notifications, the contracts must be shown to be forbidden by law and would then fall under the first head of section 23 of the Indian Contract Act and any reference to public policy would be irrelevant.

I have already stated why, in my opinion, the contracts are not obnoxious to the notification of June 1917 and why they are untouched by the notification of August 1918.

These notifications were, so far as I can judge, emergency measures: the first aimed at the prevention of melting or other misuse of current gold coins; the second was perhaps devised to tempt back hoarded gold coins to the treasuries.

We set aside the decree and pass a decree for the plaintiffs for Rs. 6,755-13-0 with interest from the 1st July 1918 to this date. Costs and interest on judgment at six per cent.

HAYWARD, J.—I concur, but desire to add some remarks on the general proposition.

The Coinage Act III of 1906 made gold coins legal tender at the rate of Rs. 15 to the sovereign. But it did not prohibit their use otherwise than as currency. The Defence of India Act Notification of the 29th June 1917 prohibited their use otherwise than as currency. The parties to these proceedings entered into transactions for the sale and purchase of gold sovereigns not at currency but at bullion rates for deliveries in May and June 1918. The Defence of India Act Notification of the 22nd August 1918 prohibited sales and purchases of sovereigns at mere bullion rates. The substantial dispute between the parties was whether their transactions were thus void as contrary to law and public policy within the meaning of section 23 of the Indian Contract Act.

It was conceded by the learned Judge at the trial that the transactions were not void as contrary to law, as the evidence did not establish any intention to use the sovereigns otherwise than as currency contrary to the notification of the 29th June 1917 and as they took place before the notification of the 22nd August 1918 making the sales and purchases of sovereigns at mere bullion rates unlawful. But it was held that the transactions were void as contrary to public policy as deducible from the subsequent notification of the 22nd August 1918, which, it was held, rendered unlawful "this trafficking in one branch of the currency during the great war." It was conceded by the learned Judge that the transactions would not have been void as contrary to public policy in the sense of the principles guiding public opinion as understood by English Judges and that it would be difficult "to give a convincing, logical and theoretical reason" for holding them opposed to public policy; but he did nevertheless so hold them and observed, "that keeping our eye on the transactions with which I am dealing, there is no question of real public policy in the sense of widespread public opinion one way or the other...It would be absurd to suppose that the millions and millions of people, many of whom have never seen a gold coin in their lives, could possibly have any opinion one way or the other as to the policy of such conduct...so probably in a very peculiar case of this kind it would be difficult to get a clearer indication of what is or what is not opposed to public policy than the Government declaration on the subject. Policy might, of course, be mistaken, policy might be unwise, but... that which is undertaken by a responsible Government as part of its policy and which cannot be criticised by the vast majority of those directly or indirectly affected by it must...be regarded as for the time being public policy, and acts declared by the Government as likely to frustrate the beneficial maintenance or operations of that policy would ordinarily be taken to fall within the general category of acts contrary to public policy...The plain truth is that in India public policy, at any rate for the present, is defined by and coincides with the measures of Government." It has been urged before us on this appeal that the learned Judge ought to have been guided by the *dicta* of the English Judges, and not to have extended the law of public policy under section 23 of the Indian Contract Act so as to comprehend all the political policies from time to time of the Government in India.

It behoves us, therefore, to examine in some detail the *dicta* of the English Judges. It is true that assertions of the wide discretion vested in the judiciary to determine public policy were made by Pollock, C. B., in the leading case of *Egerton* v. *Earl Brownlow* (3). But distinctions between the public good and political policies were drawn by Alderson and Parke, BB., who expressed the preference for leaving extensions of the law in the matter of public policy to the Legislature. This case has been considered in detail by Sir Frederick Pollock at pages 315 to 318 of the Seventh Edition of his Principles of Contract and he came to the conclusion that the final decision of the House of Lords depended not upon any extension of the law but upon the ground that the particular limitations in the will of the Earl of Bridgewater had a manifest tendency to the prejudice f good government and the administration of public affairs and that this tendency had already been perfectly well recognised as contrary to public policy as understood by the Courts. It was said by Sir James Colvile in the case of *Evanturel* v. *Evanturel* (4) "that the determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time...that the rule remains, but its application varies with the principles which for the time being guide public opinion," but Jessel, M R., observed in the case of *Printing and Numerical Registering Company* v. *Sampson* (5) that "you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that...contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice." It was also said by Lord Bramwell that "Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy" in his remarks against the extension of this branch of the law in *Mogul Steamship Company* v. *McGregor, Gow & Co.* (6); and Lord Halsbury stated that "it is inevitable that the particular case must be decided by a Judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles ... that is, a principle of public policy recognised by the law", when denying that a new head of public policy could be invented by a Court in the case of *Janson* v. *Driefontein Consolidated Mines, Limited* (2). There is finally the *dictum* of Farwell, L. J., in the case of *Hyams* v. *Stuart King* (7) that "the doctrine of public policy is regarded now-a-days as one rather for the Legislature than the Courts." It seems to me that those *dicta* apply with peculiar force here. The present transactions were not immoral and were not manifestly opposed to the public good or to good government. They were not proscribed by public opinion for there was no public opinion. They were at the time permitted by the Government. It was indeed impossible to give any "convincing, logical or theoretical reason" for holding them opposed to public policy. It was, however, felt that they amounted to "trafficking in one branch of the currency during the great war" and that they, therefore, must have been opposed to the public financial policy, which "might be mistaken or might be unwise" and wherein experts notoriously differ, because that trafficking was subsequently prohibited by the Government. These were surely strong reasons for applying the *dicta* of the English Judges and for leaving the exposition and protection of the public financial policy to the Executive Government and the Legislature. There was, in my opinion, no substantial justification for holding that those *dicta* should be disregarded by Judges in India and that public policy should be interpreted under section 23 of the Indian Contract Act as comprehending all the political policies from time to time of the Government of India.

Appeal accepted.

(3) (1853) 4 H. L. Cas. 1; 23 L. J. Ch. 348; 18 Jur. 71; 94 R. R. 1; 8 St. Tr. (N. S.) 196; 10 E. R. 359.

(4) (1874) 6 P. C. 1 at p. 29; 43 L. J. P. C. 58; 31 L T. 105; 23 W. R. 32.

(5) (1875) 19 Eq. 462 at p. 465; 44 L. J. Ch. 705; 32 L. T. 354; 23 W. R. 463.

(6) (1892) A. C. 25 at p. 45; 61 L. J. Q. B. 295; 66 L. T. 1; 40 W. R. 337; 7 Asp. M. C. 120; 55 J. P. 101.

(7) (1908) 2 K. B. 696 at p. 727; 77 L. J. K. B. 794; 99 L. T. 424; 24 T. L. R. 675.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1708 OF 1918.

January 28, 1919.

Present:—Mr. Justice Scott Smith.

HIRA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BANSI LAL AND ANOHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Vendee, co-sharer in land purchased by virtue of previous sale—Previous sale set aside, effect of—Priority.

The question of priority as between a pre-emptor and the vendee must be decided with relation to the state of things existing at the time of the sale, and not at any later period. Thus, where a vendee at the time of a sale is a co-sharer in the land purchased by him by virtue of a previous sale and has, therefore, a right of pre-emption, that right cannot be affected by the fact that the sons of the vendor in the previous sale subsequently sue and avoid that sale. [p. 558, col. 1.]

Second appeal from the decree of the District Judge, Karnal, dated the 5th March 1918.

Mr. *R. Obbard*, for the Appellants.

Messrs. *H. A. Herbert* and *Anant Ram*, for the Respondents.

JUDGMENT.—This suit by the plaintiffs appellants for pre-emption has been dismissed by the lower Courts on the ground that their right to pre-empt the land in suit is not superior to that of the vendee, the latter being a co-sharer in the land in suit at the time of the sale. The plaintiffs have filed a second appeal to this Court, on the ground that at the time when they brought their suit the share owned by the vendee in the joint holding, in virtue of which he had a right of pre-emption, had passed out of his hands owing to a decree of Court.

The facts briefly are as follows:—

Bansi Lal, vendee-defendant-respondent, bought some land on 4th July 1913 from *Musammat* Bakhtawari in her capacity as guardian of her minor sons. The land in suit, which is in the same holding as that bought by Bansi Lal, was sold to him on the 23th May 1916. On the 16th July 1917, the minor sons of *Musammat* Bakhtawari brought a suit for possession of the land sold to Bansi Lal on the 4th July 1913, on the ground that their mother had no right to make the sale and that it was not for their benefit. On the 21st March 1917, they were given a decree to the effect that they should get possession of the land on payment of Rs. 175, which was held to be a valid charge thereon. The plaintiffs brought the present suit on the 26th March 1917, *i.e.*, after it had been held that the sale to Bansi Lal of the 4th July 19.3 was not a valid one. Mr. Obbard on behalf of the appellants relies on *Kehr Singh* v. *Mahaman Singh* (1), in which it was held that the vendee, who by reason of a prior purchase had become a landholder in the village, and as such was competent to resist the claim of a pre-emptor with respect to a subsequent purchase, cannot, if in a pre-emption suit he loses the first bargain, retain the subject-matter of the second bargain. Mr. Obbard argues that the same principle should be applied here. The vendee having lost the land which he obtained by the first bargain cannot, it is alleged, retain the subject-matter of the second bargain. Mr. Herbert on behalf of the respondent contends that that case is distinguishable. He points out that the decision in *Kehr Singh* v. *Mahman Singh* (1) was based upon a ruling, *Bhupa* v. *Kori Mal* (2), from which a quotation will be found at page 143 of the Punjab Record of 1908 [*Kehr Singh* v. *Mahman Singh* (1)]. At the bottom of this page the following passage occurs:—

"I think the effect of a pre emption decree is to vest the proprietary right in the pre-emptor from the date of the sale, which was a transaction voidable at the option of the pre-emptor. When the option is exercised, the sale as regards the original purchaser becomes void *ab initio*."

Mr. Herbert argues that the sale by *Musammat* Bakhtawari to Bansi Lal was not void *ab initio*, but was only voidable at the instance of her minor sons and that it was a good sale until it was set aside by them, *i.e.*, until the date of the decree, *viz.*, 21st March 1917. Mr. Herbert also referred to numerous passages in *Sanwal Das* v. *Gur Parshad* (3) and *Dhanna Singh* v. *Gurbakhsh Singh* (4), in which

(1) 25 P. R. 1908; 51 P. W. R. 1908; 128 P. L. R. 1908.

(2) 30 P. R. 1893 *note*.

(3) 4 Ind. Cas. 179; 90 P. R. 1909; 159 P. W. R. 1909; 147 P. L. R. 1909.

(4) 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. L. R. 1909.

it was laid down that the question of priority as between the pre-emptor and the vendee must be decided in advertence to the state of things existing at the time of sale and not at any later period - see *Sanwal Das* v. *Gur Parshad* (3) page 431* penultimate paragraph, see also page 447* where the following passage occurs:—"We have a perfectly clear position if we look to the date of sale, and to that alone, as determining the rights of the parties." *See* also page 453* where the following passage occurs:—"Under the Punjab Pre-emption Act, a pre-emptor's cause of action arises when a sale is made in violation of his rights, and it appears to me that in all cases in which a cause of action is well founded under the Act, with reference to the state of things which existed at the time of sale, that cause of action, viewed as a valid ground of claim, cannot be lost or affected by reason of a new circumstance coming into existence after the sale." There are other similar passages in this ruling, but it is unnecessary to quote any more of them. It is, therefore, well established that the question of priority as between the pre-emptor and the vendee must be decided with relation to the state of things existing at the time of sale and not at any later period. Applying the principle to the present case we find that the vendee at the time of the sale in dispute was a co-sharer in the land sold, and, therefore, had a right of pre-emption. This right of his cannot be affected by the fact that subsequently the minors sued and avoided the sale in virtue of which he had a right of pre-emption. The case reported as *Kehr Singh* v. *Mahman Singh* (1) is certainly distinguishable, in which the vendee lost the land, under which he claimed, by reason of a pre emption suit by which the pre-emptor was substituted for him as from the date of the original sale. Even if this decision be considered as opposed to the principle subsequently enunciated in *Sanwal Das* v. *Gur Parshad* (3), I am not prepared to hold that the *ratio decidendi* should be applied in the present case. As pointed out by Robertson, J., at page 375 of P. R. 1909 [*Sanwal Das* v. *Gur Parshad* (3)], "A right of pre-emption is not one which is to be held sacrosanct and if we are to lean one way or the other—other things being equal—we should lean rather against the interference with the general rights of free contract by a vendor than in favour of such interference on a claim set up by a plaintiff." I am, therefore, of opinion that the decision of the Courts below is correct and I dismiss the appeal with costs.

Appeal dismissed.

*Pages of P. R. 1909—*Ed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2972 OF 1916.

June 13, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.

Sheikh HUSHMAT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sheikh JAMIR—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 54, 58—Mortgage, usufructuary—Sale of portion of equity of redemption in favour of mortgagee, effect of—Registration, whether necessary—Unregistered deed, admissibility of.

J., the predecessor-in-interest of the plaintiffs, mortgaged two plots of land to the defendant, the arrangement being that the defendant should hold possession of both the plots for a certain period in full satisfaction of the debt and interest. Before the expiry of the term, the parties came to an arrangement whereby *J.*, by an unregistered conveyance, sold one of the plots to the defendant-mortgagee and took back the other plot, the mortgage being thus paid off. The plaintiffs then brought this suit for recovery of possession of the plot sold to the defendant:

Held, (1) that the thing sold was merely a right in the immoveable property, the property being in the actual possession of the mortgagee, and that the sale, being thus of an intangible thing, could be made only by a registered instrument as provided in section 54 of the Transfer of Property Act; [p. 559, cols. 1 & 2.]

Ramasami Pattar v. *Chinnan Asari*, 24 M. 449, relied on.

(2) that the unregistered conveyance was inadmissible in evidence to prove the sale or the satisfaction of the debt. [p. 559, col. 2.]

Per *Chitty, J.*—Enjoyment of the mortgaged property for a fixed term in lieu of principal and interest satisfies the debt automatically after the expiry of the term. [p. 559, col. 2.]

HUSMAT v. JAMIR.

Appeal against the decree of the Additional Subordinate Judge, Mymensingh, dated the 11th September 1916, reversing that of the Munsif, 2nd Court at Netrakona, dated the 18th January 1915.

Babu *Birendra Kumar De*, for the Appellants.

Babu *Gobinda Chandra Dey Roy*, for the Respondent.

JUDGMENT.

CHITTY, J.—In this case the plaintiffs seek to recover from the defendant possession of a plot of land measuring 10 *cottas* under the following circumstances. In 1304 Jaru, the predecessor-in-interest of the plaintiffs, borrowed Rs. 100 from the defendant and by way of security mortgaged two plots of land measuring 6 *cottas* and 10 *cottas* respectively. The arrangement was that the defendant should hold possession of both plots for 8 years, *i.e.*, until 1313 in full satisfaction of the debt and interest. The defendant's case was that in 1306 the parties came to an arrangement, whereby Jaru sold to the defendant the 10 *cotta* plot for Rs. 98 and took back the 6 *cotta* plot, the mortgage being thus paid off. The conveyance of the 10 *cotta* plot to the defendant was by an unregistered *kobala*. The Munsif declined to regard this document as evidence and decreed the plaintiffs' suit, which was filed on the 8th January 1914 (1320) within 12 years from 1312, the original date fixed for the termination of the mortgage. This decision has been reversed by the Subordinate Judge who finds the *kobala* to be a genuine document, and while holding it to be inadmissible to prove the sale, has accepted it as evidence of the satisfaction of the mortgage debt. He accordingly held that the mortgage came to an end in 1306 by the sale and dismissed the plaintiffs' suit. The plaintiffs have appealed. In my opinion the judgment of the lower Appellate Court cannot stand. The alleged sale in 1306 was of the equity of redemption in the 10 *cotta* plot, the consideration being the balance of the mortgage-money then due plus Rs. 35-8-0 in cash. The thing sold was merely a right in immoveable property, the property being in the actual possession of the mortgagee. The sale, thus being of an intangible thing, could be made only by a registered instrument [see section 54 of the Transfer of Property Act and *Ramasami Pattar* v. *Chinnan Asari* (1)] and as the document was unregistered, no sale was effected. I agree with the learned Subordinate Judge when he held the document to be inadmissible to prove the sale. He was, however, in my opinion, in error in holding that it was admissible to show when and how the mortgage was satisfied by Jaru. This would be to make it evidence of a transaction affecting the property, an use expressly forbidden by section 49 of the Registration Act.

If there was no sale or no such sale as could be proved, the mortgage must be deemed to have continued until 1312 when, by the agreement of the parties, it was satisfied automatically.

The plaintiffs are, therefore, entitled to recover back so much of the mortgaged property as has not been returned to them, that is to say, the 10 *cotta* plot now in suit.

It was urged on behalf of the defendant that it would be a hardship upon him, as he would lose the Rs. 35-8-0 paid by him in cash in 1306. As he has retained possession of this plot for some 12 years after he should have given it up under the original agreement, there can be no question of hardship.

I would allow the appeal, set aside the decree of the lower Appellate Court, and restore that of the Munsif with costs to the plaintiffs in both Courts.

WALMSLEY, J.—The plaintiffs, who prefer this appeal, sued to recover possession of of a piece of land measuring 10 *cottas*, on a declaration of their title. Their case was that their predecessor Jaru borrowed Rs. 100 from the defendant in 1304 B. S. and put him in possession of two plots of land, namely, the plot in suit and another plot measuring 6 *cottas*, on the understanding that the two plots should be restored at the end of 8 years with the debt, principal and interest, wiped out by the profits accruing from the occupation of the two plots. They say that the smaller plot was restored to them in 1312 B. S, but not the plot

(1) 24 M. 449 at p. 463.

in suit. They filed their suit on 8th January 1914, *i.e.*, in 1320 B. S.

The defendant's case is that two years after the loan, the smaller plot was restored to Jaru, while the larger plot, the one now in suit, was sold by him to the defendant.

The first Court found that the evidence of the sale alleged by the defendant was very unsatisfactory, and refused to accept an unregistered *kobala*. The suit was decreed and the defendant preferred an appeal.

The learned Subordinate Judge held that the *kobala* was inadmissible as evidence of sale, but that it could be admitted and used as evidence to show how and when Jaru satisfied the mortgage. Using the document to that extent he found that the mortgage came to an end in the manner described by defendant. He also referred to a measurement made by the landlord somewhere about 1312, and the *kabuliyats* executed by the defendant and the 1st plaintiff in 1312 and pointed out that the plaintiff's *kabuliyat* did not cover the land in suit, while the defendant's did. The result was that he decreed the appeal.

For the plaintiffs it is now urged that the *kobala* of 1306 is not admissible at all, and reliance is placed upon section 54 of the Transfer of Property Act. The argument is that what was sold was the equity of redemption and that that right is an "intangible thing" within the meaning of the second clause of section 54.

Now if the document was a conveyance of the land, it did not need registration, for the purchase money is mentioned as Rs. 98 only. The first question, therefore, is whether the transaction is to be regarded as a sale of the land or as a sale of the equity of redemption. The document recites that Jaru was in need of money, that he agreed to sell the land for Rs. 98, that by reason of the defendant's possession for nearly three years out of the eight years, the mortgage-debt had been reduced to Rs. 62-8-0 and that Jaru, therefore, accepted Rs. 35-8-0 in cash as full payment for the sale. It is true that the document does not say that the mortgage was extinguished or mention anything about the other plot, but I think the meaning of the parties is plain from the way in which the amount to be paid in cash was calculated. The reckoning is unintelligible unless they intended that the mortgage should be extinguished, for credit is given for the proportionate profits of both plots, and the whole of the balance is deducted from the purchase money, with the result that nothing is left due under the mortgage of 1304 B. S.

This view, that the sale was not of the equity of redemption, hardly puts the defendant in a better position, however, because under section 54 of the Transfer of Property Act delivery of possession is essential where the document is not registered, and he was already in possession. It does not appear to be necessary to decide whether his possession was that of a mortgagee or of a lessee, for in either case it was a possession that was to come to an end in a definite period when the plaintiffs' predecessor would have a right to resume possession. In the case of *Sibendrapada Banerjee* v. *Secretary of State* (2) it was said that the essence of a transfer by delivery is that possession is changed. In another case, Appeal from Order No. 48 of 1899, of which a brief report is given in *Fatik Karikar* v. *Rajendra Nath Chaudhuri* (3), Banerji, J., held that in circumstances similar to those of this suit, it would not be necessary for the parties to go through the form of restoring the property to the mortgagor-vendor and then again delivering to the mortgagee-purchaser, but that it would be enough if the mortgagee took the property as purchaser and the mortgagor admitted that from that moment the purchaser held the property as purchaser and not as mortgagee.

At first sight it seems that there ought to be a remand for the lower Court to determine whether there was such a transfer as is suggested by Banerji, J. But I do not think this is necessary. The fate of the second plot affords the best test on the question whether there was a delivery of possession. If the defendant had restored possession of that plot and retained possession of the other, then I think it might fairly be said that there was delivery of possession in regard to the larger plot but the evidence to show that this was done is wanting, in fact such evidence as there is shows that defendant continued to hold

(2) 34 C. 207; 5 C. L. J. 390.
(3) 4 C. W. N. cxlii (142).

it. No useful purpose would be served by a remand.

It is suggested that, at any rate, the defendant should have a decree for the re-payment of the cash payment mentioned in the *kobala*, but as it appears that he did not give up possession of the smaller plot for several years he is not entitled to such an order.

I think the appeal should be allowed, the decree of the lower Appellate Court set aside, and the decree of the first Court restored.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 218 OF 1917.

January 21, 1919.

Present:—Mr. Justice Scott Smith.

NAZIM KHAN—DEFENDANT—PETITIONER

versus

ALAM KHAN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 14—Extension of time—Plaintiff in subsequent suit who was defendant in previous suit, whether can claim extension.

An extension of time, under section 14 of the Limitation Act, can only be claimed if the plaintiff in the subsequent suit was the plaintiff in the previous suit; if he was the defendant, it cannot be said that he had prosecuted with due diligence another civil proceeding within the meaning of the section. [p. 561, col. 2; p. 562, col. 1.]

Revision from the order of the District Judge, Mianwali, dated the 3rd February 1917.

Mr. *Badri Nath Kapur*, for the Petitioner.

Mr. *Raghunath Rai*, for the Respondent.

JUDGMENT.—On the 11th of August 1915 Nazim Khan, defendant petitioner, brought a complaint against Alam Khan, plaintiff-respondent, and another under section 406, Indian Penal Code. This complaint was dismissed and complainant was referred to a civil suit on the 28th September 1915. Prior to that on the 22nd September the parties had referred their dispute to arbitration and on the 23rd September an award was given in favour of Alam Khan. On the 3rd January 1916 Nazim Khan brought a suit against Alam Khan for Rs. 817 on the basis of a receipt which he held, altogether ignoring the award. Alam Khan objected, putting forward the award as a bar to the suit. On the 6th of April 1916 the Court disallowed the defendant's objections and said that if he wished to get the award carried into effect, he should make an application to have it made a rule of Court. Upon this Alam Khan instituted the present proceedings, applying that the award should be filed in Court. The first Court rejected the application, holding that it was barred by time and also on the ground that the award was invalid, as it had the effect of compounding a non-compoundable criminal offence. The lower Appellate Court accepted the appeal and gave the plaintiff a declaratory decree to the effect that the award was a good one and should be acted upon.

Defendant has filed an application for revision to this Court, and it is contended on his behalf that the application for filing the award was barred by time, having been made after the expiration of the statutory period of six months. The lower Appellate Court held that though the application had been filed in Court after the statutory period, yet the plaintiff was entitled to the benefit of section 14 of the Limitation Act. In *Kalu* v. *Mehru Mal* (1) it was held that a person claiming under section 14 of the Limitation Act an exclusion of time during which a former proceeding was pending must prove two things—first, that he had prosecuted the former proceeding with due diligence, and secondly, that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature. Now it cannot be said that the plaintiff in the present case had prosecuted with due diligence another civil proceeding within the meaning of section 14 of the Limitation Act. The previous case was brought by the present defendant and the present plaintiff as the defendant in that case merely defended the suit. It was held in *Rajah Barodakant Roy* v. *Sookmoy Mookerjee Dabee* (2) that the previous suit ought to have been brought by the plaintiff in the

(1) 32 Ind. Cas. 497; 41 P. R. 1916; 33 P. W. R. 1916.

(2) 1 W. R 29.

second suit or some person through whom he claims. Moreover, it cannot be said that the Court in which the previous suit was instituted was unable for defective jurisdiction or other cause of the like nature to entertain it. The Court was certainly able to entertain that suit. All that was held was that the defendant could not put forward a particular defence and that he should establish that defence by bringing a separate suit. Counsel for the petitioner also cites *Ooday Monee Dabee* v. *Bishonath Dutt* (3) and *Ram Ugrah* v. *Achraj Nath* (4), which support his contention. *Maharajah Jugutendur* v. *Din Dyal Chatterjee* (5) is distinguishable, because in that case the defendant in the suit claimed a set off on a full Court fee. *Lakhan Chunder* v. *Madhusudan* (6), which is cited by respondent's Pleader, is also obviously distinguishable. I hold that section 14 of the Limitation Act in terms does not apply to the present case and that the plaintiff is not entitled to any deduction of time thereunder. His application is clearly barred by time.

I, therefore, allow the revision and setting aside the order of the lower Appellate Court restore that of the first Court; but as the proceedings were instituted in accordance with the Court's mistaken view of the law, I leave the parties to bear their own costs throughout.

Revision allowed.

(3) 9 W. R. 455.
(4) 31 Ind. Cas. 899; 38 A. 85; 13 A. L. J. 1115.
(5) 1 W. R. 310.
(6) 35 C. 209; 7 C. L. J. 59; 3 M. L. T. 90; 12 C. W. N. 326.

CALCUTTA HIGH COURT.
CIVIL RULE No. 575 OF 1918.
March 21, 1919.
Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Walmsley.
Srimatya BARODA DASI—PLAINTIFF —PETITIONER
versus
UPENDRANATH MANDAL AND OTHERS —DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1, O. XXXIII, rr. 5, 7, 15—Application or leave to sue as pauper—Application to withdraw application, dismissal of—Subsequent application for leave, maintainability of—Revision—High Court, power of interference of.

Where, upon the dismissal of an application to withdraw an application for leave to sue as a pauper, the applicant declines to proceed, and his application is, in consequence, dismissed, such dismissal operates to bar a subsequent application for leave to sue as a pauper, though it is open to the applicant to file a suit in the usual way on payment of fees. [p. 563, cols. 1 & 2.]

Quære.—Whether an order of dismissal such as the foregoing is open to revision by the High Court, under section 115, Civil Procedure Code.

Rule against the order of the Sub-Judge, Midnapore, in Pauper Case Suit No. 2 of 1918.

FACTS appear from the judgment.

Babu *Sarada Charan Maity*, for the Petitioner, contended that the Court below acted without jurisdiction in refusing to the petitioner leave to sue as a pauper. The Subordinate Judge has erred in holding that the dismissal of the previous application for leave to sue as a pauper operated as a bar to any fresh application. Order XXXIII, rule 15, Civil Procedure Code, could apply when the application was dismissed on the merits and, therefore, rule 15 could have no application to this case. The provisions of Order IX, rule 1, and of Order XXIII, rule 1, could have no application to the facts of this case because there was no suit before the Court. Order XXXIII, rule 15, provided that an order refusing the applicant permission to sue as a pauper would operate as bar to any subsequent application of a like nature by him in respect of the same right to sue. The case of *Ranchod Morar* v. *Bezanji Edulji* (1) relied on by the lower Court was not correctly decided. Unless the application was refused on the merits a fresh application could be maintained. Even if it was held that the application for leave to sue as a pauper was not maintainable, it could be treated as one under Order IX, rule 9, of the Civil Procedure Code.

Babu *Jyotish Chandra Hazra*, for the Opposite Party, urged that the order of the lower Court could not be revised under section 115 because there was no question of jurisdiction involved in the case. The lower Court had jurisdiction to decide whether or not the application

(1) 20 B. 86; 10 Ind. Dec. (N. S.) 616.

was competent, and rightly or wrongly it had come to a decision, which, therefore, could not be interfered with under section 115.

The lower Court has rightly found that having regard to the provisions of Order XXXIII, rules 5, 7 and 15, the present application was barred. If that were not so, there would be no end of such applications.

Babu *Sarada Charan Maity* briefly replied.

JUDGMENT.

CHITTY, J.—This is a Rule issued at the instance of Baroda Dasi, whose application to sue *in forma pauperis* has been refused by the Subordinate Judge. I feel some doubt whether the case comes within the provisions of section 115, Civil Procedure Code, but, apart from that difficulty, I do not think that the application should be granted. It appears that on 17th September 1917 the petitioner made a similar application before the Subordinate Judge which was registered, and notices were issued to the Collector and the opposite party. The case was adjourned on several occasions. On the 15th December 1917 the Government Pleader submitted a report after enquiry to the effect that the petitioner was not a pauper. The case was then further adjourned and ultimately came on for hearing on 23rd February 1918. On that occasion the petitioner applied for permission to withdraw from her application. The learned Judge thought that Order XXIII, rule 1, Civil Procedure Code, relating to withdrawal of suits did not apply to this application and declined to allow her to withdraw. The petitioner thereupon refused to prosecute her application further and it was accordingly dismissed with costs to the opposite party. On 27th February 1918 she filed the present application, which is similar to the previous application, namely, to be allowed to sue *in forma pauperis*. The learned Subordinate Judge has thrown out her application, holding that her previous application having been rejected she could not present another one. The question turns on the interpretation to be put on Order XXXIII, rules 5, 7 and 15. Rule 15 is clear that an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of a like nature by him in respect of the same right to sue, but, of course, the applicant may file a suit in the usual way on payment of fees. This is not a case of an application being dismissed for want of appearance. The petitioner was in Court with her Pleader, but under the circumstances, declined to proceed. It is now suggested that we might allow her to withdraw this and the previous application and to begin again with a third application. That we cannot possibly do. This appears to be an order refusing to allow her to sue as a pauper, and the fact that no evidence was taken was due to the refusal of the petitioner herself to proceed. In the circumstances we are not disposed to exercise our revisional powers, even if the matter comes within section 115, Civil Procedure Code. The Rule must, therefore, be discharged. We make no order as to costs.

WALMSLEY, J.—I agree.

Rule discharged.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1439 OF 1915.

January 30, 1919.

Present :—Mr. Justice LeRossignol and Mr. Justice Wilberforce.

KAJU MAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SALIG RAM—PLAINTIFF—RESPONDENT.

Punjab Pre-emption Act (II of 1905), s. 3 (1), (2)—Tea factory, whether agricultural land or village immoveable property—Forest, whether agricultural land—Tea garden, whether agricultural land—Government notification, whether has retrospective effect—Waiver of right, proof of—Omission to include fixtures in claim, effect of—Pre-emption, right of, limitations on—Plaintiff, duty of.

A tea factory built outside the limits of a village site is not liable to pre-emption either as agricultural land or as village immoveable property. [p. 565, col. 2.]

A stretch of natural forest which does not lie within the village site is also exempt from pre-emption, as it is not agricultural land nor land used for purposes subservient to agriculture. [p. 566, col. 1.

KAJU MAL *v.* SALIG RAM.

A garden is a plot of land devoted to the production of herbs, fruits, flowers and vegetables, and as tea does not fall under any of these heads, a tea garden is not a garden but is agricultural land and is liable to pre-emption. [p. 566, col. 1.]

Where a person, having a right of pre-emption, congratulates a vendee upon his purchase and joins in an entertainment given by the vendee on that occasion, such conduct does not amount to a waiver by that person of his right. [p. 566, col. 2.]

A notification of the Government restricting the right of pre-emption in a certain area cannot be regarded as having retrospective effect, so as to deprive a person of the right to pre-empt which he possessed prior to the issue of the notification but which from the date of the notification is taken away. [p. 566, col. 2.]

Where a plaintiff claims to assert a right to pre-empt a building used as a factory, he is not at liberty to omit to sue for the machinery therein as these are fixtures and form an integral part of the factory. A deliberate exclusion of the machinery fixtures would involve a dismissal of the suit. [p. 568, col. 2.]

The right of pre-emption is a very invidious right which constitutes an invasion of the principle of free contract, and the party who comes into Court to enforce that right must be careful to observe all the restrictions within which that right is hedged. [p. 568, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Kangra, dated the 26th February 1915.

Messrs. *Peechey* and *Santanam*, the Hon'ble Bakhshi *Sohan Lal* and Bhagat *Govind Das*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, Bakhshi *Tek Chand*, Mr. *Brij Lal* and Diwan *Mehr Chand*, for the Respondent.

JUDGMENT.—The property with which this pre-emption suit is concerned is a part of the Gopalpur Tea Estate, which was formerly owned by the Kangra Valley Tea Company. In 1912 after some dispute between Kaju Mal and Diwan Daya Kishen Kaul, who were rival purchasers, the Gopalpur Tea Estate was sold to Kaju Mal, defendant, for Rs. 97,000 and on the 1st October of that year the plaintiff, who is a Brahmin agriculturist of Jia, instituted the present suit for pre-emption of a portion of the estate sold, namely, an area of 10,524 *kanals* 8 *marlas* situate in *Mauzas* Gopalpur, Jia and Dadh Uparla as well as buildings situate in *Mauza* Gopalpur on payment of Rs. 50,000 or any other price that might be fixed by the Court. The residue of the area included in the sale was not included in the suit, inasmuch as plaintiff had no right of pre-emption in respect of those areas but in order to meet any objection on the part of the vendee that the residue of the tea areas by themselves would be of no value, the plaintiff offered to take over the whole of the area sold—an offer which was not accepted by the vendee. The Senior Subordinate Judge granted the plaintiff a decree for possession of the area in suit on payment of Rs. 75,000, holding that the property in suit was either agricultural land or village immoveable property within the meaning of section 3 of the Pre-emption Act II of 1905, that the plaintiff had not acquiesced in the sale to the vendee to a degree that amounted to waiver of his right to pre-empt and finally that the plaintiff had from the first included in his claim the fixed machinery of the tea factory.

The defendant vendee has appealed to this Court and on his behalf the points urged before us have been:—

Firstly, that the suit could not proceed, inasmuch as the plaintiff excluded from his claim the working machinery of the factory which must be regarded as a fixture;

Secondly, that a tea garden is not agricultural land;

Thirdly, that a portion of the area included in the sale was a natural forest, namely, the Ban Jia forest, which cannot be classed as agricultural land;

Fourthly, that the factory buildings are not village immoveable property inasmuch as they do not stand on the village site.

Fifthly, that the plaintiff had waived his right to pre-empt;

Sixthly, that by the Punjab Government Notification No. 4662, dated the 6th March 1916, the right to pre-empt in the Kangra District had been confined to the lineal heirs and collateral heirs of the vendor and, therefore, plaintiff had no right to pre-empt; and

Finally, that the Senior Subordinate Judge had made a serious mistake in calculating the value of the area in suit and that if a decree in favour of plaintiff was to be maintained, the price to be paid by him should be not less than Rs. 85,000.

We shall deal first with the argument that the property in suit is not liable to pre-emption, and in this connection it must be borne in mind that the law applicable to the case is not the present Pre-emption Act of 1913 but the Punjab Act II o

1905, which was the law in force at the time of the sale to the vandee defendant. Prior to 1905 the law of pre-emption was contained in Act IV of 1872 and under that Act the right of pre-emption extended, if the property concerned lay within a village, to the village site, to the houses built upon the village site and to all lands within the village boundary. It is not clear that the right of pre emption under that Act extended to buildings erected upon lands within the village boundary but not on the village site, although no doubt the sites of such buildings would have been liable to pre-emption. In the Act of 1905 it was laid down that the right of pre emption should mean the right to acquire agricultural land or village immoveable property in cases affecting sales in a village, and definitions were given in the Act of the terms "agricultural land" 'and village immoveable property." Agricultural land was defined to be "land" as defined in the Punjab Alienation of Land Act, 1900, whilst village immoveable property was defined as immoveable property within the limits of the village site other than agricultural land. Now, the definition of land in the Panjab Alienation of Land Act, 1900, is as follows:—"'Land' means land which is not occupied as the site of any buildings in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes the sites of buildings and other structures on such land." The framers of the Act of 1905 appear to have been under the impression that the categories "agricultural land" and "village immoveable property" exhausted all possible forms of property in a village, *i.e*, that there could be in a village only village immoveable property and agricultural land, but they failed apparently to perceive that buildings erected outside the limits of a village site on land not occupied for agricultural purposes would not fall within either definition. Consequently on behalf of the appellant it has been urged that the factory buildings are admittedly not within the village site. They are not erected on agricultural land or on land occupied for purposes subservient to agriculture or for pasture and, therefore, they are not liable to be pre empted. For the respondent-plaintiff it has been argued that the meaning of "village site" in the Pre emption Act of 1905 is not the village *abadi* but the superficial area of the whole village including its lands. In other words, the contention is that in section 3, sub section (2), of the Punjab Pre-emption Act of 1905 the expression "within the limits of village site" has been employed as synonymous with "within the village boundary." If that were true, it would be strange that the Legislature in 1905 should have used the term "the village site" in a sense different from that in which it is used in the Act of 1872 which was at that time under revision, and that they should have discarded the term "village boundary" which already existed in the Punjab Laws Act of 1872 and was ready to their hands. The term "village site" in the Punjab is a very well known expression of frequent occurrence denoting that portion of the village area which is not used for agricultural purposes but on which the habitations of the villagers are placed. In the Punjab there are as a rule no homesteads as in European countries, but from time immemorial, no doubt, for purposes of protection, villagers have congregated on one central spot within the village boundary and have there constructed a compact village generally of a rectangular or roughly circular shape, the doors of the houses of which rarely, if ever, open upon the outside wall. The Legislature in 1905 in defining the property in a village which was pre-emptible may have made a mistake, but with the intention of the Legislature we are not concerned. We have to administer the law as we find it and in the present case we hold that the factory, whether it constitutes a *casus omissus* or whether such property was deliberately excepted from the operations of the Act, is not liable to pre emption as village immoveable property.

The next point is whether the land under the factory can be said to be employed for purposes subservient to agriculture. Although fields planted with tea bushes are, we have no doubt, fields used for agricultural purposes, we cannot hold that a factory in which the produce of those fields is subjected to certain processes which fit it for human consumption and the markets of the world can be said to be subservient to agriculture. The building or land can be correctly

said to be subservient to agriculture when it directly promotes agriculture, *e. g.*, a building in which agricultural cattle or agricultural implements or stores are sheltered is directly subservient to agriculture because the property it shelters is used in the actual operations of agriculture; but a tea factory merely deals with the product of agriculture and is no more subservient to the production of tea than a whisky distillery in Aberdeen is subservient to agriculture, say, in Canada which produces the barley from which the whisky is distilled. From this it follows that the factory we are now dealing with is not pre-emptible either as agricultural land or as village immoveable property. It is true that intermingled with the other factory buildings there must be some huts used by the labourers who actually work in the tea fields or garden ; but the point has not been urged before us, nor is there anything on the record to indicate which of the buildings included in the suit are factory buildings proper and which are the buildings inhabited by the workers on the land, and we are unable to discriminate between the two categories.

Included in the area in suit is a stretch of natural forest land known as Ban Jia. That area also we hold to be exempt from pre-emption, for it does not lie within the village site and it is not agricultural land nor land used for purposes subservient to agriculture or for pasture. It is forest land and the wood derived from it, it is admitted before us, has been used by ths factory for fuel and for the manufacture of tea chests, whilst a small portion of its area consists of a slate quarry. With regard to the fields in suit in which tea is grown, it has been argued on behalf of the appellants that they are not agricultural land inasmuch as tea is grown not in fields but in a garden, but we do not think that because in general parlance a tea plantation is generally spoken of as a tea garden, it is not, therefore, agricultural land. A tea garden is, strictly speaking, not a garden, for a garden is a plot of land devoted to the production of herbs, flowers, fruits and vegetables, and tea falls under none of these heads. The term "agricultural land" is used in the Act of 1905 in its widest sense to denote all land which is tilled. Consequently if the plaintiff is to succeed, from his decree we must excise the factory buildings and the land under them and also the Ban Jia forest.

The appellant's contention that the plaintiff had waived his right to pre empt was dealt with before us very briefly and lukewarmly and the arguments adduced amounted at most to this that the plaintiff had congratulated the vendee upon his purchase and had joined in the entertainment which the vendee gave on that occasion, and we have no difficulty in agreeing with the Court below that this conduct on the part of the plaintiff does not amount to waiver.

The next point was with reference to the Punjab Government Notification No. 4662, dated the 6th of March 1916, which, it was urged, had a retrospective effect.

In support of this Counsel referred to *Bishan Singh* v. *Ganda Singh* (1). That ruling was to the effect that a notification modifying the law of pre-emption, published after the date of the sale on which the right of pre-emptor accrued, annihilated that right. With all deference we are unable to follow that ruling, which not only attributes to a notification greater force than to a repealing Act, but proceeds upon the principle that in the absence of a provision to the contrary a notification has retroactivity.

The next point taken was that in calculating the value of the property decreed, the learned Senior Subordinate Judge committed a serious mistake by failing to observe that the Lahla and Chachian lands for which the plaintiff did not sue are very inferior lands, further, that in making his calculations the Senior Subordinate Judge had compared the tea lands in suit with the whole of the land excluded from the suit which comprised a large area of *banjar qadim* or waste land. The Senior Subordinate Judge appears to have had considerable difficulty in deciding this question, for we note that his decision is based mainly on conjecture and we are surprised that he did not adopt the method of comparing the revenue assessed on the areas included in the suit and that on the areas excluded from it. In this respect this

(1) 16 Ind. Cas. 959; 10 P. R. 1913; 5 P. L. R. 1913; 264 P. W. R. 1912.

Court has received very little aid from Counsel; the respondent, however, expressed his indifference if the price to be paid by the plaintiff were enhanced from Rs. 75,000 to Rs. 77,000, whilst the appellant pressed for Rs. 85,000.

After exclusion of the Ban Jia forest we find that the land in suit is as nearly as possible $\frac{2}{3}$rds of the whole area sold whilst the residue is of course $\frac{1}{3}$rd, but it will be observed that whilst the waste in the area in suit is only 1,180 *kanals*, in the area not in suit it amounts to 1,860 *kanals*.

It is unfortunate that we do not know the assessment of the areas not comprised in the suit, but we do not think we should remand on that account only.

The appraisement of buildings and machinery at Rs. 17,000 and of the Ban Jia forest at Rs. 14,000 has not been challenged in this Court, so that Rs. 66,000 as decided by the trial Court may be taken as the price of the lands sold and if the $\frac{2}{3}$rd and $\frac{1}{3}$rd proportion be applied, the price payable by plaintiff will be Rs. 44,000 but whilst retaining that proportion as a rough guide, we think that there should be some enhancement in view of the unrebutted evidence that the Lahla and Chachian tea lands are inferior, of the fact that the waste in the excluded area instead of being in the proportion of 1 to 2, is in the proportion of about $1\frac{1}{2}$ to 1, and of the principle that nothing should be presumed in favour of the pre-emptor, and we hold that Rs. 49,000 is a fair price for the lands in suit.

The last point in the case is whether the plaintiff's suit deserves to fail because he refused to sue for the pieces of machinery which were fixtures in the factory, although he asserted a right to pre-empt the factory and therefore failed to claim the whole bargain up to the limit of his right to pre-empt. In this connection it will be necessary to refer to the plaint and pleadings in the case. The plaint opens with a table giving the areas of the lands in suit and under items Nos. 13 and 14 are shown two engine houses and the question for decision is, whether in suing for those engine houses the plaintiff intended to sue for the engines and machinery set up in them. In clause 2 (*a*) of the plaint the property in suit is described as situated in certain villages and its detail is said to be given in certain lists. In clause 2 (*b*) of the plaint it was alleged that the above property mentioned in clause 2 (*a*) as also machinery, implements and other moveable articles were the property of the vendor. In clause 2 (*g*) of the plaint the plaintiff alleges that he has no right of pre-emption in respect of the whole property, but that he has such a right in respect of the property mentioned in clause (*a*) which he valued at Rs. 50,000. The plaint then proceeds:—"The remaining property of the villages Chachian and Lahla, as also machinery, implements, goods tea and other moveable articles at villages Gopalpur, Jia and Dadh Uparla, in respect of which the plaintiff has not got a right of pre-emption, are worth Rs. 47,000." From the plaint then it is clear that the plaintiff excepted from his claim machinery and implements on the ground that he had no right of pre-emption in respect of them. This plaint was presented to the Court on the 1st of October 1912. At page 236 of the paper-book will be found the preliminary objections filed by the vendee dated the 4th of January 1913. On that date in the presence of the plaintiff the vendee protested that as the plaintiff did not claim the machinery which was set up in the houses, his suit for a part of the property sold could not proceed. Neither on that date nor on the 6th of January did the plaintiff take any steps to meet his objection. Again on the 22nd of January 1913 the vendee defendant filed full pleas, in which he urged that the machinery fixtures had not been included in the suit. Again on the 8th of February other defendants in the case put in the same objection in the presence of the plaintiff's agent and Pleaders, and on that date issues were struck by the Court and from those issues it appears that even on that date the parties were still at issue on the point whether machinery should be included in the value of the houses, for an issue in that sense was struck and the onus placed on the defendant. Not only that, but another issue, No. 7, was struck as to the market-value of the houses in suit. The 15th of March was fixed for evidence on these issues, but nothing was done on that day and the 28th of April was the date to which the

hearing was adjourned. On that adjourned date, however, nothing was done except that the words "with machinery" were interpolated in issue No. 7, so that the issue then ran:—"what is the market-value of the houses with machinery in suit?" Even at that stage, however, the plaintiff was anxious to avoid the decision of the issue whether the machinery should be included in the value of the houses and on the 1st of May 1913 he presented an application to the Court requesting that issue No. 8 should be struck out, inasmuch as it was alleged to be unnecessary. It was obviously not unnecessary, for even though the Court knew the value of the houses with machinery in suit, it would still have to determine whether the value of the machinery was to be excluded in determining the price to be paid by plaintiff. On the 30th of May no evidence was taken, but on the 25th of June another protest had been put in on behalf of minor defendants with regard to the omission of plaintiff to sue for the machinery which was a fixture. The 12th of July was then fixed for evidence, whereupon on behalf of the plaintiff his Counsel asserted that the machinery and implements which were excluded from the suit were a heap of old machinery lying near the godown and it was further stated that the fixture machinery had been from the first included in the plaint, but even if the Court held that the plaint did not include the working machinery, the suit was still pressed for the land and houses without machinery. No application on behalf of the plaintiff was made to amend the plaint and the suit proceeded on the original plaint.

Now, the question which we have to decide is whether the plaintiff from the outset was suing for the fixture machinery and even if he was not, whether that circumstance should be held fatal to his claim. On behalf of the appellant vendee it is urged that the omission to sue for the machinery was deliberate because the plaintiff was not anxious to purchase second-hand machinery and because he hoped, if successful, to purchase it for a song, knowing that the defendant would find it more profitable to part with it at a loss rather than to take it down and remove it. For the respondent-plaintiff it is urged that the value of the machinery was so small an item (it has been valued at Rs. 5,000) that it is incredible that the plaintiff would have deliberately omitted it; that if he did omit through inadvertence or mistake of law, he had declared his intentions in time and his original mistake had been cured. With regard to the explanation given by plaintiff's Counsel on the 12th of July 1913, we are of the opinion that the statement that the machinery excluded from the suit was a heap of old rubbish was quite incorrect. It is true that there was some discarded machinery lying outside the factory, but that machinery was not mentioned in the deed of sale and it is obvious from the whole wording of the plaint that that discarded machinery was not the machinery referred to in clauses 2 (*b*) and 2 (*g*) of the plaint. Now the right of pre-empti n is a very invidious right which constitutes an invasion of the principle of free contract, and the party who comes into Court to enforce that right must be careful to observe all the restrictions within which that right is hedged. We need not go to the length of assuming that the plot ascribed by the appellant's Counsel to the plaintiff is true, but it seems to us that plaintiff's Counsel in drawing up the plaint made a mistake of law in supposing that his client was entitled to sue for the factory and at the same time exclude the machinery fixtures. It is sufficient for us to say that the machinery fixed in the houses was deliberately excluded from the plaint probably under the mistaken notion that it was no integral part of the factory and as the plaint was never subsequently amended, it was defective.

Had the plaintiff honestly recognized his mistake, and admitted that he had omitted to sue for the machinery and had he prayed to amend, this concession might well have been granted to him, but we do not think he should have been allowed to succeed on a plaint which excludes the machinery, on a false allegation that the machinery was included *ab initio* in the claim.

Had then the first Court dismissed the suit on the preliminary ground that plaintiff alleged in his plaint a right to sue for the factory but refused to include the machinery in his suit, that order of

dismissal would have been justified. As, however, we hold that the plaintiff had no right at all to sue for the factory, we do not think it would be right to dismiss the suit on that ground at this stage, though the matter is one to be borne in mind when costs are being allotted.

In view of the foregoing we accept the appeal and modify the lower Court's decree by decreeing to plaintiff the properties in suit, less the factory buildings and compound and the Ban Jia forest, on payment into Court within two months of Rs. 49,000.

If Rs. 49,000 are paid as above provided, parties shall bear their own costs through out, if not, the suit shall stand dismissed with costs throughout.

Appeal accepted in part.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 325 OF 1917.

November 27, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

CHENGALRAYA CHETTI AND OTHERS—DEFENDANTS NOS. 1 TO 3 AND 5—APPELLANTS

versus

RAGHAVA RAMANUJA DOSS AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 4, 9 AND 10—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 16—Arbitration—Court, reference to, as arbitrator—Reference by some only of parties, validity of—Award as against all parties—Appeal, whether lies—Appeal by ex parte defendants, effect of—Award passed on local inspection without recording evidence and without allowing time for objections—Remand, whether re-opens whole case or only in respect of party appealing—Revision—Irregularity—High Court, power of interference of.

A consent given by the parties to a suit to abide by the decision of a Court is not such a reference to arbitration as is contemplated by the provisions of Schedule II to the Civil Procedure Code. [p. 570, col. 2.]

Where a Court itself acts as arbitrator on a question of fact and gives an award, there is no appeal against its decision, not because the provisions of Schedule II to the Civil Procedure Code apply to the award made by the Court, but because a party cannot go back on his consent to abide by the decision of an arbitrator after the award is given. [p. 571, col. 1; p. 573, col. 2.]

A judgment on an award, if it is pronounced in contravention of the provisions of Schedule II, paragraph 16, clause (1), does not fall under paragraph 16 (2) and, consequently, there is no prohibition of an appeal from such a judgment. [p. 571, col. 2.]

Where, therefore, a Court, which is asked to arbitrate, pronounces an award on a mere local inspection and on no legal evidence and without pronouncing on the evidence already adduced and without giving time to the parties to prefer their objections to it, the award is illegal and an appeal lies against it. Even if no appeal were competent in such a case, the High Court would have power to interfere in revision on the ground of material irregularity. [p. 573, col. 1.]

An award by a Court, which is appointed as arbitrator by some only of the parties, will bind those who join in the reference, but in respect of those who do not, the Court should give its decision on the materials placed before it as a Court. It is illegal for a Court to accept the position of arbitrator when all the parties interested do not join in consenting to such appointment. [p. 572, col. 2.]

Where an Appellate Court remands a case for re-trial on the appeal of those defendants who did not join in a reference to arbitration on the ground that the award was not binding on them, the whole case is re-opened even in respect of those parties who did not appeal. [p. 572, col. 2.]

Appeal against the order, dated the 26th March 1917, of the Court of the Temporary Subordinate Judge of Vellore, in Appeal Suit No. 34 of 1917, preferred against the decree of the Court of the District Munsif, Arni, in Original Suit No. 67 of 1915.

FACTS appear from the judgment.

Mr. *M. Patanjali Sastri*, for the Appellants.—The District Munsif's judgment was on a reference by the parties to him to act as arbitrator. It is an award and no appeal lay from it to the Subordinate Judge. Even if the award is illegal, an appeal is prohibited.

Mr. *A. Viswanatha Aiyar*, for the Respondents.—The order of remand is justified under the circumstances. All the parties did not constitute the Court as an arbitrator and it should not have assumed the functions of an arbitrator. The award should have been restricted to the parties who actually made the reference. An independent judgment should have been pronounced in respect of the *ex parte* defendants on the materials placed before the Court. The *ex parte* defendants were certainly entitled to appeal.

No time was given to the parties for filing objections. Schedule II, Civil Procedure Code, does not apply.

No evidence was recorded and the District Munsif erred in pronouncing judgment on a mere inspection of the locality.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants Nos. 1 to 3 and 5 to 8 are the appellants. The defendants Nos. 1 to 3 alone and the plaintiff agreed to abide by the decision of the District Munsif passed as an arbitrator. The defendants Nos. 4 and 5, who are majors and who are interested in the litigation, remained *ex parte* as also the guardian of the minor defendants Nos. 9 and 10. The defendants Nos. 6 to 8 are minors represented by their guardians, defendants Nos. 1 and 2. So far as the defendants Nos. 6 to 8 are concerned, it might be taken (though the defendants Nos. 1 to 3 do not expressly say so in the statement given to the District Munsif) that their guardians, the defendants Nos. 1 and 2, agreed to abide by the District Munsif's decision on behalf of these minors also.

The District Munsif, as such arbitrator, dismissed the plaintiff's suit on a mere inspection of the disputed house sites without referring to the evidence of the plaintiff's witness already examined and apparently without allowing an opportunity to the plaintiff to prove his case further against the *ex parte* defendants Nos. 4, 5, 9 and 10.

On appeal by the plaintiff, the Subordinate Judge set aside the District Munsif's decision on the following grounds:—

(1) There was no valid reference to arbitration under Schedule II, paragraph 1, to the Civil Procedure Code, as the defendants Nos. 4 to 10 did not join in the reference.

(2) The judgment of the District Munsif (which was also the award) was passed on the date of the award itself, without giving to the plaintiff 10 days' time to apply to set aside the award under Schedule II, paragraph 16 (1).

(3) The reference to arbitration on behalf of the minors (the defendants Nos. 6 to 8) not having been made with sanction of the Court, the reference was invalid under Order XXXII, rule 7.

The Subordinate Judge accordingly remanded the suit to the District Munsif for fresh disposal according to law. In this appeal against the Subordinate Judge's order of remand it was contended as follows:—

3rd ground.—The decision of the District Munsif was in the nature of an award and no appeal lay.

5th ground.—The lower Court erred in assuming that the provision in paragraph 1 of the 2nd Schedule to the Civil Procedure Code would in terms apply to this case.

7th ground.—No appeal would lie from the decree passed on an award even if it is illegal (evidently Schedule II, paragraph 16, clause (2) is relied on in this ground).

Two other points not clearly raised in the grounds of appeal were also argued, namely, (1) that the defendants Nos. 6 to 8 (though their guardians did not expressly state that they gave their consent on the minors' behalf) were bound by the consent given by their guardians, (2) that in any event, the decision was voidable by the minors under Order XXXII, rule 7 (2), and not at the instance of the plaintiff (who appealed to the Sub-Court).

I think that a consent given by the parties to abide by the decision of a Court is not such a reference to arbitration as is contemplated by the provisions of Schedule II to the Civil Procedure Code,

In *Nimmagadda Peda Nagamma, In re* (1) I made the following observations: "An agreement not to appeal is binding on the parties, the consideration being their mutual consent to refer the matter in dispute to the Court as an arbitrator.

"The application to the Court itself to act as arbitrator is not an application coming under the Civil Procedure Code, Schedule II, paragraphs 1 and 2, which paragraphs clearly contemplate the passing of an order of reference under Schedule II, paragraph 3, the fixing of a time by the Court in that order for the making of the award by the arbitrator (other than the Court) *and the Court's not acting further in the matter till the time expires.* They all clearly contemplate a reference to a third person (or third persons other than the Court) as arbitrator or arbitrators.

"When an award is made by the Court itself acting as arbitrator, there is no separate judgment to be passed as distinguished from the award itself. As said in *Nidamarthi Mukkanti* v. *Thammana Ramayya* (2), the decision of the Court 'must

(1) 26 Ind. Cas. 355.
(2) 26 M. 76 at p. 77.

be looked on as an award.' The Code nowhere contemplates that when the Court itself is the arbitrator, it must first give a separate award, then wait for objections to the award made by itself, hear such objections as a Court to its own award as arbitrator and lastly pronounce judgment on the award if it does not set it aside. The provisions of the Civil Procedure Code, which are naturally applicable and were clearly intended by the Legislature to apply only to awards made by an arbitrator other than the Court and which are clearly inapplicable and would be almost grotesque when applied to an award made by the Court itself acting as an arbitrator, cannot be invoked in the latter class of awards."

I adhere to my above view and hold that where the Court itself acts as an arbitrator on a question of fact, the reason why an appeal does not lie is, not because the provisions of Schedule II, Civil Procedure Code, (including the provisions in paragraph 16, clause 2, which forbids an appeal in certain cases) apply to the award made by the Court, but because on general principles of jurisprudence a party cannot go back on his consent to abide by the decision of an arbitrator after the award is given, just as he cannot resile from the obligations arising from an executed contract. I am aware that in *Nidamarthi Mukkanti* v. *Thammana Ramayya* (2) (Bhashyam Aiyangar and Moore, JJ.) the award by the Court is treated on the footing of an award under Chapter XXXVII of the old Civil Procedure Code, corresponding to the present Schedule II, and that sections 521 and 522, corresponding to paragraphs 15 and 16 of the new Code, are referred to in the short judgment delivered by the learned Judges. While the decision itself is, if I may say so with respect, correct, I venture to doubt if the reason based on the assumed applicability of sections 521 and 522 can be supported. In *Sayad Zain* v. *Kalabhai Lallubhai* (3) the learned Judges say at page 755, "here the parties agreed that they would abide by the decision of the Subordinate Judge. The fact that the express provisions of Chapter XXXVIII of the Civil Procedure Code were knowingly disregarded, shows that the proceedings were *extra cursum curiæ* and thus the judgment of the Subordinate Judge was in the nature of an arbitrator's award against which an appeal cannot be entertained, if the competency of the Appellate Court is objected to by the party holding the judgment. See *Burgess* v. *Morton* (4)." The learned Judges in this case clearly held that it is not by reason of the provisions of Chapter XXXVIII that the appeal does not lie, but on general principles of jurisprudence. Turning to *Burgess* v. *Morton* (4), Lord Halsbury says at page 138: "My Lords, it has been held in this House that where, with the acquiescence of both parties, a Judge departs from the ordinary course of procedure and, as in this case, decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode of proceeding and to treat the matter as if it had been heard in due course * * * * * * They are precluded from treating the matter as subject to appeal. The Court of Appeal had no jurisdiction to entertain the question." As Lord Westbury put it in *Bickett* v. *Morris* (5), the decisions in these cases proceeded upon the personal incompetency of the parties to raise an objection to the correctness of the Court's award as arbitrator by way of an appeal, and not on any statutory or other provision.

The reasons, therefore, given by the learned Subordinate Judge and the contentions of the appellant's Vakil based on the provisions of Schedule II cannot, in my opinion, be supported.

I might, however, state that, assuming that the provisions of Schedule II do apply to a submission to the Court, the decision in *Najm-ud-din Ahmad* v. *Albert Puech* (6) lays down that the judgment on an award, if the judgment is pronounced in contravention of the provisions of Schedule II, paragraph 16 (1), does not fall under paragraph 16 (2) and hence there is no prohibition of an appeal from such a judgment.

The Privy Council decision in *Ghulam*

(3) 23 B. 752; 1 Bom. L. R. 366, 12 Ind. Dec. (N. S.) 3.

(4) (1896) A. C. 136; 65 L. J. Q. B. 321; 73 L. T. 713.

(5) (1866) 1 H. L. Sc. 47; 12 Jur. (N. S.) 803; 14 L. T. 835.

(6) 29 A. 584; 4 A. L. J. 450; A. W. N. (1907) 184.

Khan v. *Muhammad Hassan* (7) does not affect this particular question. There the provisions of the first three paragraphs of section 522, corresponding to Schedule II, paragraph 16, clause 1, had been complied with and so the judgment given was a judgment according to those provisions and hence the fourth paragraph of section 522, corresponding to Schedule II, paragraph 16, clause 2, did apply and their Lordships of the Privy Council, therefore, held that no appeal lay.

In the present case, the judgment on the award was pronounced without allowing any opportunity for an application to be made to set it aside and hence without hearing and deciding any objection. The decision in *Najm-ud-din Ahmad* v. *Albert Puech* (6) directly applies, assuming for argument's sake (as I said before) that Schedule II applies to the award made by a Court acting out of its ordinary procedure.

So far as the defendants Nos. 6 to 8 are concerned, I am inclined to agree with the appellants' learned Vakil that their guardians (the defendants Nos. 1 and 2) did evidently intend to refer a question of fact to the arbitration of the District Munsif on behalf of the said minors also and the Subordinate Judge's opinion that the award is invalid owing to the minor defendants Nos. 6 to 8 not having joined cannot, therefore, be supported. But he rightly relied on the fact that the defendants Nos. 4, 5, 9 and 10 did not join in the reference. A perusal of the plaint clearly indicates that the defendants Nos. 4, 5, 9 and 10 were as much interested in the suit as the other defendants and hence the decision in *Vythinatha Aiyar* v. *Vaithilinga Mudaliar* (8) (assuming it to have been rightly decided) has no application, as it was assumed in that case that the *ex parte* defendants were not interested in the suit.

In the result, I am inclined to hold that if the District Munsif acted properly in accepting the position of an arbitrator under the circumstances of this case, his judgment, which is in the nature of an award as between the plaintiff and the defendants Nos. 1 to 3 and 6 to 8, is binding on these parties as between themselves just as a lawful contract is binding on the parties thereto. But the suit as between the plaintiff and the defendants Nos. 4, 5, 9 and 10 could not be decided by the District Munsif as an arbitrator and he ought to have given a decision in the suit, so far as they were concerned, on the materials placed before him as a Court. He, however, dismissed the plaintiff's suit against the defendants Nos. 4, 5, 9 and 10 also, merely on the impression he formed at his local inspection and on no legal evidence and without pronouncing on the evidence already adduced before him as a Court and without giving an opportunity to the plaintiff to proceed with the trial against those defendants.

It is true that those defendants have not been prejudiced and did not appeal to the Subordinate Judge, the plaintiff who consented to abide by the Court's decision as an arbitrator having been the appellant. But the Subordinate Judge was entitled to consider on appeal the illegality of the District Munsif's judgment passed against the plaintiff in favour of the defendants Nos. 4, 5, 9 and 10 and to set it aside. It might be said that he should then have set the Munsif's decree aside only so far as it dismissed the plaintiff's suit against those defendants, and not so far as it dismissed the suit against the defendants Nos. 1 to 3 and 6 to 8. But it would be a wholly inconvenient and anomalous thing that where several defendants have got the same interest, the plaintiff's suit should be dismissed in respect of some defendants and decreed against others. The two decrees would be inconsistent and unworkable. It is, on this ground, that Schedule II, paragraph 1, rightly insists that a reference to arbitration, even when made to an arbitrator who is not a Court, should be by "all the parties interested." (The former Code, section 506, was even more stringent and in its literal sense, insisted on all parties, whether interested or not, joining in the reference.) Though as I said already, paragraph 1 of the Schedule II does not apply to a case

(7) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(8) 31 Ind. Cas. 206; (1915) M. W. N. 847; 18 M. L. T. 374; 2 L. W. 960.

where a Court departing from its function of deciding in the ordinary way is asked to decide a question of fact *extra cursum curiæ* at the request of parties, the Court should follow the rule laid down in Schedule II, paragraph 1 (1), and refuse to act as an arbitrator unless all the parties interested agree. In this particular case, the District Munsif acted with material irregularity and illegally in consenting to decide the suit as arbitrator even as between the defendants Nos. 1 to 3 and 6 to 8 on the one hand and the plaintiff on the other, as the defendants Nos. 4, 5, 9 and 10, who were interested in the dispute in the same way as the other defendants, did not join and as his decision as an arbitrator would not bind the plaintiff so far as his claim was made against the defendants Nos. 4, 5, 9 and 10 and the futility of his decision as an arbitrator, when some of the parties did not join, was apparent.

Though the Subordinate Judge did not base his order setting aside the dismissal of the suit against the defendants Nos. 1 to 3 and 6 to 8 also on the above ground, I think that we might support it on that ground, namely, that the District Munsif acted illegally in accepting the position of an arbitrator when all the parties interested did not join in consenting to his acting as such. I might add that the District Munsif seems to have, when writing his judgment, forgotten altogether that there were other parties in the suit besides those who consented to abide by his decision on inspection (see paragraph 4 of his judgment).

Finally, even if no appeal lay against the District Munsif's judgment (in the nature of an award) because Schedule II, Civil Procedure Code, applies to such an award, because it had not been set aside by an application under Schedule II, paragraph 15, and because paragraph 16 (2) also applied, I should be prepared in revision to set aside the District Munsif's decision [see *Velu Pillay* v. *Appasawmi Pandaram* (9) and *Sita Nath Goswami* v. *Baikuntha Nath Goswami* (10)] as affected with illegalities and irregularities and I would pass a decision in the same terms as those of the Subordinate Judge.

In the result, the appeal is dismissed, but as the plaintiff's own conduct led to the illegal decision of the District Munsif, I would make no order as to costs.

SPENCER, J.—I agree. In *Nidamarthi Mukkanti* v. *Thammana Ramayya* (2), *Sayad Zain* v. *Kalabhai Lallubhai* (3) and *Sita Nath Goswami* v. *Baikuntha Nath Goswami* (10), which are all cases of Munsifs or Judges arbitrating between the parties in suits over which they had jurisdiction, it is stated that their decision in each case "must be looked on as an award" or "was in the nature of an arbitrator's award." In the last named case Chitty, J., goes so far as to say it was an award, and in this and the Madras case allusions are made to the sections of the old Code which provide for references to arbitration. But I agree with my learned brother that parties who give their consent to the Court itself acting as an arbitrator are debarred from afterwards questioning the Court's decision, not by reason of the procedure prescribed in the Code, but because they are bound by their agreement.

In this case even if the District Munsif's decision is treated as falling under the rules laid down in Schedule II of the Civil Procedure Code, an appeal lies on the authority of *Najm-ud-din Ahmad* v. *Albert Puech* (6) on account of that Court's failure to allow time for objections before passing its decree.

I feel some hesitation in assuming, as was done in *Ishar Das* v. *Keshab Deo* (11) and *Vythinatha Aiyar* v. *Vaithilinga Mudaliar* (8), that all parties, who remain *ex parte* at the trial of a suit, even if they are minors or persons whose presence is necessary to enable the Court to adjudicate effectually and completely on the issues, are not "parties interested" within the meaning of paragraph 1 of Schedule II, Civil Procedure Code.

I think that the plaintiff was entitled and bound to prove his claim against those parties who did not join in the agreement to have the suit decided in a particular manner, and I hold that even if no appeal lay to the Sub-Court against the District

(9) 9 Ind. Cas. 197 (1911) 1 M. W. N. 141; 9 M. L. T. 301; 21 M. L. J. 444.

(10) 9 Ind. Cas. 296; 38 C. 421.

(11) 7 Ind. Cas. 68; 32 A. 657; 7 A. L. J. 807.

Munsif's decision, we should not interfere with an order which we should ourselves have passed if the matter had come up to this Court on revision, especially when it is one that, as it stands, does substantial justice between the parties.

The civil miscellaneous appeal should therefore, be dismissed on the terms proposed.

M. C. P.

Appeal dismissed.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 996 OF 1917.
January 24, 1919.
Present:—Mr. Justice Abdul Raoof.
MANGAT RAI—PETITIONER
versus
ALIA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Judgment, construction of—Counsel's fee, apportionment of—Civil Procedure Code (Act V of 1908), ss. 151, 152—Amendment of decree—Inherent power of Court.

Where two defendants are jointly represented by one Pleader, and the suit as against one is *dismissed* with costs and as against the other *decreed* with costs, and the judgment is silent as to how the costs are to be apportioned, the reasonable construction to be put upon the judgment is that the Court intended to allow half the Counsel's fee to the successful defendant. [p. 575, col. 1.]

The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within section 152 of the Civil Procedure Code. [p. 575, col. 1.]

Revision from the order of the Subordinate Judge, 2nd Class, Hissar, dated the 20th June 1917.

Pandit *Nanak Chand*, for the Petitioner.

Mr. *Badr-ud Din Kureshi*, for the Respondents.

JUDGMENT.—This application for revision should be allowed. The facts out of which it has arisen are these. One Mangat Rai, plaintiff, brought a suit for the recovery of Rs. 3,000 on book account against Alia, defendant No. 1, and defendant No. 2, Fatteh Muhammad, the son of the defendant No. 1. Both the defendants engaged one Counsel. Lala Gulal Chand, the Subordinate Judge of the second class, decreed the suit as against the defendant No. 2 with costs and dismissed it with costs as against defendant No. 1 on the 7th October 1916. The order was made in these words:—"On the above findings plaintiff seems entitled to a decree for Rs. 1,663, principal, and Rs. 856-5-0, interest, total Rs. 2,519-5 0, with costs in proportion against defendant No. 2, Fatteh Muhammad only, and I decree accordingly and dismiss the rest of the claim and discharge Alia, defendant No. 1, whose costs will be paid by the plaintiff." The decree-writer entered Rs. 150 as the costs of Alia on account of the Counsel's fee in the case. The present petitioner made an application in the lower Court for the amendment of this decree, on the ground that according to the correct interpretation of the judgment only half the Counsel's fee must be taken to have been decreed by the Court to Alia and the decree had been wrongly prepared inasmuch as Rs. 150, namely, the entire sum taxable on Rs. 3,000 had been allowed to him in the decree. The learned Subordinate Judge disallowed the application. The petitioner has come up in revision to this Court.

It is argued on his behalf that the learned Subordinate Judge has wrongly refused to amend the decree and has thus committed an illegality in the exercise of his jurisdiction. The real question which I have to decide in this case is whether the decree is, as a matter of fact, at variance with the judgment. Now it is quite clear that there is no specified amount of costs decreed by the judgment in the case to any of the parties. I have then to decide the question, what was really intended by the Court that gave that judgment? A very similar question arose in the case of *Beaumont* v. *Senior* (1). His Lordship the Chief Justice, Lord Alverstone, observed thus in that case:—

"It may be that where two defendants are jointly represented by the same solicitor, and it is agreed between them that one of them shall be liable to the solicitor for all the costs of the defence, then in

(1) (1903) 1 K. B. 282; 72 L. J. K. B. 141; 88 L. T. 234.

the event of the other defendant being successful in the action he cannot recover any costs from the plaintiff, not being liable to his solicitor for them; otherwise the successful defendant would be in the position of receiving costs from the plaintiff which he had not incurred in defending the action, and to which, therefore, he was not entitled." Further on he observed: "In the absence of any agreement between the two defendants as to how the costs of the defence were to be borne, it is clear, on the authority of the cases to which we have been referred, that each of the two defendants is liable to their solicitor for half the costs of the defence, and that will be the amount of costs which the plaintiff will have to pay the successful defendant."

In this case also the reasonable construction to be put upon the judgment is that the Court intended to allow half the Counsel's fee to the successful defendant.

It is contended on behalf of the respondents that this application for amendment of the decree cannot be entertained because it does not come strictly within section 152 of the Code of Civil Procedure. In my opinion this contention has no force. When a decree is at variance with the judgment, it has always been held that the Court has got an inherent power to correct the mistake in the decree. It was so decided in the case of *Brijratan* v. *Jaynarain* (2). The head note of that case runs thus:—"The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within section 152 of the Civil Procedure Code (Act V of 1908)." In accordance with the rule laid down in this case, I set aside the judgment of the lower Court and order that the decree be amended and brought into conformity with the judgment and only half the Counsel's fee be allowed to Alia, defendant No. 1. This application for revision is, therefore, allowed with costs in both the Courts.

Revision accepted.

(2) 7 Ind. Cas. 876; 37 C. 649.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 405 OF 1917.

January 10, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

BIJOYA KANTA LAHIRY CHOWDHURY —DEFENDANT No. 1—APPELLANT

versus

KAILASH CHANDRA BHOWMIK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific performance—Agreement, oral, to grant lease —Draft to be prepared and approved by parties—Conditions, some, not settled—Specific performance, whether can be granted.

It is settled law that there may be a concluded agreement, though a document is to be executed embodying its terms. [p. 577, col. 2.]

Where the parties agree to the execution of a formal lease the draft of which is to be approved by them, specific performance can be enforced of the original agreement, even though the draft has not been prepared and approved. [p. 577, col. 2]

The defendant contracted orally with the plaintiffs to give them a *putni* lease of his share in certain property, at a certain annual rent and for a certain premium. The agreement provided for the preparation of a draft of the lease according to the terms settled, which was to be approved by the lessor's Pleader. In a suit for specific performance of the contract:

Held, (1) that all the material terms of the lease having been settled, in the absence of express agreement to the contrary, matters not expressly settled would be regulated by the provisions of the law in that behalf; [p. 577, col. 2.]

(2) that there was, in the circumstances of the case, a binding agreement to grant a lease, though a document was to be executed embodying its terms, and, therefore, defendant could not resile from the agreement, nor could he or his Pleader refuse assent to a properly drawn instrument. [p. 577, col. 2.]

Per *Shamsul Huda, J.*—In all cases of an agreement for a sale or for a lease where a registered document is necessary to complete the transfer, the approval and execution of such a document is always in the contemplation of the parties. To hold that in all such cases there is no contract capable of specific performance till the document itself is executed, would lead to results which the law never contemplated. [p 579, col. 2; p. 580, col. 1.]

Appeal against the decree of the Additional District Judge of Mymensingh, dated the 29th November 1916, affirming that of the Additional Subordinate Judge of that district, dated the 26th April 1911.

Sir *Rash Behari Ghose* (with him Babu *Mohendra Nath Roy*), for the Appellant.

Babu *Jogesh Chandra Roy* (with him Babu *Birendra Kumar De*), for the Respondents.

JUDGMENT.

RICHARDSON, J.—This is a second appea

arising out of a suit for specific performance of an agreement for the grant of a lease. The suit has had a long history. Specific performance was granted by the decree of the trial Court dated 26th April 1911. On first appeal that decree was reversed by a decree dated 5th March 1912, the Court holding that the agreement was incomplete inasmuch as it did not fix the date from which the lease should commence and further holding that the plaintiffs had failed to prove that they had tendered the balance of the premium within the period stipulated. The plaintiffs preferred a second appeal to the High Court (No. 1183 of 1912*), which came before Mookerjee and Roe, JJ. By a judgment dated 15th May 1915 those learned Judges held that it was plain, in view of the provisions of section 110 of the Transfer of Property Act, that the intention of the parties must have been, in the absence of indication to the contrary, that the lease should take effect from the date of the execution of the instrument. On the question of tender, the learned Judges held that no time having been fixed for payment of the balance of the premium the plaintiffs were at liberty to make, and on the facts found had made, their tender within a reasonable time. The result was that the decree of the lower Appellate Court was set aside, and the suit was remanded to that Court in order that the appeal thereto might be re-heard on other points which had not been dealt with. The appeal has accordingly been re-heard by the Second Additional District Judge of Mymensingh, who has made a decree dated 29th November 1916 confirming, with some modifications, the decree of the trial Court for specific performance. From that decision the present appeal has been taken by the defendant No. 1.

The appellant is the owner of a fractional share of the property to which the suit relates. The case for the plaintiffs is that he contracted orally to give them a *patni* lease of the share. A close approach to an agreement to that effect is admitted, but it has been contended in defence that for various reasons other than those already dealt with by the High Court in the judgment of May 1915, the agreement was incomplete and is incapable of specific performance.

Some of the questions in controversy in the Court below have been finally disposed of in the judgment appealed from, and I shall confine myself to the matters discussed in the argument before us.

As the suit is based on an oral agreement, no question arises as to the construction of any document. The terms of the agreement and the intention of the parties are questions of fact depending on oral evidence and unless the Judge in the Court below has misapplied any principle of law to the facts which he has found, we cannot in second appeal quarrel with his conclusions. Moreover, the Judge is not bound by the language in which he states the terms of the agreement, as gathered by him from witnesses speaking to their recollection of conversations, in the same way in which the parties would be bound by the language of a written document to which they had subscribed their names. The statement of the terms by the Judge can only be regarded as approximating more or less closely to the words which the parties actually used at the time, and the Judge may look at the evidence as a whole for the purpose of elucidating the intention of the parties on any particular point.

Now, the Court below has found that negotiations having been going on for some time, on the 15th Pous 1315 an agreement was arrived at between the parties, comprising in substance four terms or conditions as follows:—

(1) That defendant No. 1 would grant to the plaintiffs a *patni* lease of his 3 annas and 15 *gandas* share in Mouzas Ranigaon, Telipara and Pabai.

(2) That the rent payable by the lessors should be Rs. 50 annually.

(3) That a sum of Rs. 1,300 should be paid as *nazar* or premium.

(4) That a draft lease was to be prepared accordingly and approved by the defendant's Pleader, Babu Shyama Charan Roy.

It has further been found that on the same day, the 15th Pous, Rs. 400 was paid by the plaintiffs to the defendant by way of earnest money.

The argument advanced in the Court below that the agreement was incomplete because it made no express provision in

*See *Kailas Candra Bhaumick* v. *Bejoy Kanta Lahiri*, 50 Ind. Cas. 177—*Ed.*

regard to certain particulars said to be essential in a *patni* lease has been pressed before us only in reference to three particulars. It is contended that the agreement is deficient in not providing

(1) for the *kists* or instalments in which rent should be paid,

(2) for the rate at which interest should run on arrears of rent, and

(3) whether security should or should not be given by the lessees for the due payment of the rent.

As to *kists* and interest on arrears, I agree with the Court below that in the absence of express agreement, the parties presumably intended that such matters should be regulated by the tenancy law of the country. As to security there seems no reason why any provision should be made. This contention fails.

The learned Vakil for the defendant, however, directed himself mainly to the fourth of the conditions above set out. It has been urged upon us that inasmuch as the preparation of a formal instrument of lease was contemplated, there was no concluded agreement. The effect of a reference to a formal document in connection with an agreement which is being negotiated was considered in the case of *Hyam* v. *Gubbay* (1) by the late Chief Justice and two learned Judges of this Court. The result of the English authorities there cited appears to be that it is a question of the intention of the parties whether there is to be no binding contract till the document is executed or whether the document is merely to commemorate, it may be in a manner required by law, the terms of a bargain already complete.

The conclusion of the Court below in the present case is that the lease to be drawn up "was only to put into more formal shape the terms agreed upon between the parties with the insertion of usual legal phraseology and terms necessary in *patni patta*." It is said that the mere fact that a formal document was contemplated was *prima facie* an indication that the party did not intend to be bound till it was executed. That may be so, but there was other evidence before the Court. There was, for instance, the payment of earnest money. Such payment may not be conclusive to show a binding contract but it was a fact which the Court was entitled to take into consideration. It cannot be said that there is no evidence to support the conclusion at which the Court arrived. That being so, the conclusion must be accepted.

Stress is laid on the draft lease having to be approved by the defendant's Pleader, but what difference does that make in the circumstances of the present case? The parties arranged to put their agreement in writing and the writing was to be approved by the defendant's Pleader. The two things go together and the whole question is whether there was a concluded agreement. It is settled, as I have said, that there may be a concluded agreement though a document is to be executed embodying its terms. In such a case the contents of the document have, of course, to be approved by both parties before the document is executed, but merely from the point of view whether the document correctly and formally gives effect to the settled terms of the agreement. If it does, it represents the agreement which either party can be compelled to perform. A reference to a Pleader in this connection does not necessarily alter the position. The function of the Pleader may be merely to say whether the draft correctly carries out the agreement. The defendant, therefore, is not entitled to assert, as he has attempted to do, that merely because mention was made of a draft lease and his Pleader's approval thereof, therefore, there never was a binding agreement. It was open to the Court to find, and the Court has found, a binding agreement, and all objections on the score of uncertainty and so forth have been rejected. That being so, the defendant cannot resile from the agreement, nor can he or his Pleader refuse assent to a properly drawn instrument If it be said that he or his Pleader might refuse assent to a draft not in accordance with the agreement, I quite agree. But the defendant has never met the plaintiffs fairly on that ground. He has contended from the first that there was no agreement. No doubt the draft filed by the plaintiffs with the plaint has been found to be open to exception as going beyond the agreement. But the plaintiffs, it appears, have throughout been willing to accept

(1) 32 Ind. Cas. 53; 20 C. W. N. 66.

any reasonable modification of their draft. As modified by the directions contained in the decree of the Court below, the draft will apparently meet the requirements of the case.

There is no ground for our interference in second appeal and I would dismiss the appeal with costs.

HUDA, J.—This appeal arises out of a suit for specific performance of a contract. The facts, so far as they have any bearing on the questions raised before us, are shortly these: plaintiffs alleged that the defendant No. 1 agreed with the plaintiffs Nos. 2, 4 and 5 to grant to them and to other plaintiffs a *maurasi mokarari* lease of the defendant's share in certain Mauzas at a fixed annual *jama* of Rs. 50 and for a premium of Rs. 1,300, out of which the plaintiffs paid Rs. 400 at the time of the agreement and promised to pay the rest within a month, that the plaintiffs were ready and willing to pay this amount within the time stipulated but the defendant refused to accept the balance due and perform his part of the contract.

The defence, *inter alia*, was that although there were negotiations for a lease they had not ripened into a contract, that no portion of the premium was paid, although the plaintiffs had made a deposit of Rs. 400 with the defendant's cashier in anticipation of a contract, that all the terms and conditions of the lease had not been settled and plaintiffs were not, therefore, entitled to a decree for specific performance.

The Courts below have found that there was a binding oral agreement between the parties, that there was no uncertainty either as regards the land to be leased or as regards the rent or the premium and that the plaintiffs' allegation regarding the payment of a portion of the premium was true, and have upon these findings decreed the plaintiffs' suit.

Admittedly there was an understanding between the parties that the draft of the *patta* would have to be approved by the defendant's Pleader. Plaintiffs' case is that they prepared such a draft at defendant's request and submitted it to the defendant's Pleader for approval and that the draft was so approved after certain alterations. This is denied by the defendant and there is no clear finding on this point.

The learned Vakil for appellant has argued in the first instance that the agreement is incapable of being specifically enforced as all the terms and conditions of the lease had not been settled. This agreement is completely disposed of by the finding of the lower Appellate Court, that all the material terms of the lease had been settled, that as regards those not expressly settled it was understood that these would be in accordance with the provisions of the law in that behalf in the absence of an express agreement to the contrary. Accordingly the lower Appellate Court has directed the defendant No. 1 to execute a *patni patta* in favour of plaintiffs Nos. 2, 4 and 5 in respect of 3 annas and 15 *gundas* share in Mouzas Ranigaon, Telipara and Pabai in terms agreed upon between them on 15th Pous 1315, other terms not agreed upon being provided by law.

The first contention, therefore, fails.

It is next argued that as the parties contemplated the execution of a formal lease to be approved by them, specific performance cannot be granted of the original agreement. In support of this contention reliance has been placed on *Winn* v. *Bull* (2), *Hampshire* v. *Wickens* (3) and *Hyam* v. *Gubbay* (1) and on the decisions referred to in the last mentioned case. It seems to me that the cases cited are clearly distinguishable from the present case.

In *Winn* v. *Bull* (2) there was a written agreement whereby the defendant had agreed to take a lease of a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract." No such formal contract was, however, entered into and it was held that there was no final agreement of which specific performance could be enforced. Sir George Jessel laid down the law in these terms: "If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, 'we will have the terms put into form'; then all the terms being put into writing and agreed to, there is a contract."

"If two persons agree in writing that

(2) (1878) 7 Ch. D. 29; 47 L. J. Ch. 133; 26 W. R. 230.

(3) (1878) 7 Ch. D. 555; 47 L. J. Ch. 213; 38 L. T. 408; 26 W. R. 491.

up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled."

In *Hampshire* v. *Wickens* (3) the defendant offered to take a sub-lease from the plaintiff of a house at a particular rent on all usual covenants and provisos. The plaintiff accepted the offer. Afterwards plaintiff insisted that in the lease there should be inserted a covenant to the effect that the defendant would not without the previous consent of the lessor assign, under-let or part with the possession of the said premises, but such consent was not to be withheld to a respectable and responsible tenant. The same learned Judge held that such a covenant was not an ordinary or usual covenant and that the plaintiff could not insist on specific performance on such terms, defendant never having agreed to them.

In *Hyam* v. *Gubbay* (1) specific performance was claimed of an agreement for sale. Certain terms and conditions were agreed to between the parties and earnest money was paid. It appeared, however, that all the terms had not been settled and the parties contemplated the execution of a formal written agreement to be approved by them embodying, in addition to the usual terms and conditions, special terms and conditions as to which no agreement had been arrived at before. It was also found that there were terms and conditions not agreed to or discussed which were embodied in the draft of the formal agreement prepared by the vendor's solicitor and submitted for the approval of the purchaser, which the purchaser did not approve. It was held that there was no completed contract between the parties capable of being enforced.

The present case is different from all the cases above cited. In the first and the third cases it was clearly agreed between the parties that the exact terms of the preliminary agreement should be incorporated in a more formal document, and it was held that this was a clear indication that the first agreement was incomplete and so long as a formal document was not agreed to by the parties and a complete agreement arrived at between them there was no contract. Even in such cases the further question arises whether the execution of a more formal agreement is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will, in fact, go through. "In the former case," observed Jenkins, C. J., in *Hyam* v. *Gubbay* (1), "there is no enforceable contract either, because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored." In the present case there is nothing to show that the parties intended the execution of a formal document embodying the terms of the verbal agreement or that the verbal agreement had left any matters for future settlement. No doubt, the parties intended that to give effect to the agreement a formal lease would be executed after being approved by the defendant's Pleader, but this is very different from a formal document embodying the terms of the original verbal agreement and superseding such earlier oral agreement which was complete in itself. In this case the law required a written and registered lease and the claim for specific performance is a claim to obtain such a document. If the parties had said "we are entering into an agreement provisionally but it is not to bind us so long as the lease itself is not drawn up and approved," it is obvious that neither party could enforce such an agreement. But this is not the case here. The lower Appellate Court says that "it was nobody's case and it was not definitely expressed and understood by the parties that there was to be no contract until the draft lease was made and approved." The whole question resolves itself into this: was there a final agreement in this case? Upon the findings I think this question must be answered in the affirmative.

This case is also different from the case of *Hampshire* v. *Wickens* (3), as the plaintiff in that case insisted on specific performance upon terms to which the defendant had not agreed, and those terms were not the ordinary and usual terms as to which an implied agreement could be inferred.

In all cases of an agreement for sale or for lease where a registered document is necessary to complete the transfer, the approval and execution of such a document is always in the contemplation of the parties,

To hold that in all such cases there is no contract capable of specific performance till the document itself is executed would lead to results which clearly the law never contemplated. The cases cited lend no support to any such proposition.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2521 OF 1914.

January 22, 1919.

Present:—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice Martineau.

Musammat DURGA DEVI—PLAINTIFF—APPELLANT

versus

RAM NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Arts.* 49, 62—*Suit to recover documents taken possession of and moneys realised by defendant—Limitation—Applicability of Art.* 62.

A.N. carried on business in money-lending and as a commission agent He died on 3rd December 1903, leaving a widow, the present plaintiff. Upon *A.N*'s death his father *B.R.* carried on the business as the plaintiff's agent, till his death in February 1908, when *R.N.*, the brother of *A.N.*, took possession of the shop, all the *bahis* and account books, documents and a mortgage-deed. He realised certain sums of money due to the business, but refused to pay the amounts to the plaintiff and to give up the *bahis* and other documents. She, accordingly, on 2nd November 1912, brought the present suit (*a*) to recover the money realised by the defendant, (*b*) for an injunction prohibiting him from realising in future any debts due to *A.N.* and (*c*) for restoration of the *bahis* and other documents The District Judge, being of opinion that the suit in respect of (*a*) was barred by time under Article 62, and in respect of (*c*) under Article 49, dismissed the suit. The plaintiff appealed and did not press her claim for an injunction:

Held, that the reliefs sought were rightly held by the District Judge to be barred under Articles 62 and 49 of Schedule I to the Limitation Act. [p. 581, col. 1.]

Article 62 applies to every case where a defendant, at the time of receipt, in fact, or by presumption or fiction of law, receives money to the plaintiff's use, and is not confined to cases where the defendant intended to receive the money to such use, and as, in this case, the plaintiff had alleged that she was in law solely entitled to the money, the defendant must undoubtedly have received the monies for her use, and therefore the Article applied to bar her claim. [p. 581, col. 2]

First appeal from the decree of the District Judge, Jullundur, dated the 30th July 1914.

The Hon'ble Pandit *Sheo Narain* and Dr. *Gokal Chand Narang*, for the Appellant.

Pandit *Rambhaj Datta* and Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—The late Rai Bahadur Pandit Bhag Ram, C. I. E., had two sons—(1) Mehta Fateh Chand, defendant in this case, and (2) Pandit Amar Nath, who died on the 3rd December 1906, leaving a widow, *Musammat* Durga Devi, the present plaintiff.

The suit was instituted on the 2nd November 1912 and according to the allegations in the amended plaint (page 82 *et seq.* of the paper-book), which was filed on the 6th February 1913, Pandit Amar Nath at the time of his death was sole proprietor of a shop in Jullundur city, which was started in Sambat 1958 and did business in money lending, dealings in silk, etc., and as a commission agency. Upon the death of Pandit Amar Nath, Rai Bahadur Pandit Bhag Ram carried on the business of the shop as plaintiff's agent till his death in February 1908, when defendant took possession of the shop and all the *bahis* and account-books and thereafter realised a large amount of debts from the debtors of the firm, including four specified debts of the total value of Rs. 660; he also realised and misappropriated a sum of about Rs. 500 due upon certain shares of the value of Rs. 5,000 purchased by the late Pandit Amar Nath in the Rajputana Printing Company; and further he took possession of certain documents, including a mortgage-deed for Rs 9,000, dated 12th February 1907, executed in the name of Rai Bahadur Pandit Bhag Ram, but in reality belonging to the estate of Pandit Amar Nath. The plaint asserts that defendant had no right to any of the above-mentioned properties as he was separate from his brother, the late Pandit Amar Nath, and that though called upon several times by the plaintiff to pay the amounts realised by him and to give up the *bahis*, documents and the mortgage-deed, he "put off the matter by giving evasive answers and still refuses" to comply with plaintiff's demand. The cause of action is alleged to have occurred about $2\frac{1}{2}$ years before suit, but the plaint does not explain how

the cause of action arose at that time or give any details upon the point.

The reliefs sought by plaintiff were (*a*) recovery of the Rs. 660 realised by defendant from the four specified debtors and the Rs. 500 realised by defendant in respect of the shares in the Rajputana Printing Company; (*b*) an injunction prohibiting defendant from realising in the future any debts due to the shop of Pandit Amar Nath; and (*c*) restoration of the *bahis*, account books, documents and the mortgage deed for Rs. 9,000.

Defendant urged a number of pleas, both on the merits and on technical grounds, in bar of the suit and upon the pleadings the District Judge framed 12 issues. The learned Judge has held that the suit is barred by time under Article 62 (as regards item (*a*) of the claim) and under Article 49 (as regards recovery of the books, documents, mortgage-deed, etc.,) of the Indian Limitation Act, 1908; that the claim for an injunction (item (*b*) of the claim) is within time; and that the suit is also barred by the provisions of Order II, rule 2, of the Civil Procedure Code. He has accordingly dismissed the suit though upon all the other issues (which he has decided *ex majori cautela*) his findings are in plaintiff's favour. Plaintiff has appealed to this Court, and we have heard Mr. Sheo Narain's arguments on her behalf. The learned Advocate informed us at the outset that as Fateh Chand had died *pendente lite* and was now represented by a minor son under the guardianship of his mother, the claim for an injunction was no longer pressed by plaintiff.

Upon the view we take of the case, it is not necessary for us to discuss any question other than that of limitation, as we agree with the learned District Judge that the reliefs sought are respectively barred under Articles 62 and 49 of the Limitation Act. As regards realisations of debts and of dividends upon the shares in the Rajputana Printing Company, Mr. Sheo Narain argues that Article 120 and not Article 62 is applicable to the claim, inasmuch as there was no contractual relationship between the plaintiff and the defendant, and the defendant admittedly did not *in fact* receive those monies for the plaintiff's use. In support of his argument the learned Advocate relied on *Ohand Mal* v. *Sansar Chand* (1) and *Joti Parshad* v. *Sant Lal* (2), but it appears to us that those decisions, so far from supporting the appellant's argument, are rather in favour of the view taken by the District Judge. It is a well-established principle that Article 62 applies to every case where defendant, at the time of receipt, in fact or by presumption or fiction of law, receives money to plaintiff's use; and it has been repeatedly held that the Article is not confined to cases where defendant intended to receive the money to such use but that it extends to all cases where a defendant has received money which in justice and equity belongs to plaintiff under circumstances which in law render a receipt of it a receipt by defendant to plaintiff's use. The authorities in support of these propositions will be found in Rustomji's Law of Limitation, 2nd Edition, under Article 62. In accordance with these authorities we must hold that upon the allegations in the plaint the defendant undoubtedly must be taken to have received the monies for the use of plaintiff, inasmuch as according to her allegations she was in law solely entitled thereto. We accordingly agree with the District Judge that this claim is barred under the said Article.

As regards the claim to recover *bahis*, documents and the mortgage-deed, Mr. Sheo Narain himself contended that Article 49 of the Act was applicable. In the plaint the allegation is that defendant took possession of the shop and of books, etc., therein at the time of Rai Bahadur Pandit Bhag Ram's death, which occurred in 1908. The learned Advocate admitted that plaintiff was unable to prove that she had made a demand for the recovery of the *bahis*, etc, at any particular time prior to suit and we must take it therefore that the books, etc, were wrongfully taken at the time when defendant took possession of the shop or, in other words, in 1908. Under Article 49, therefore, this claim, which was not preferred till 1912, is clearly barred.

For the reasons given we hold that the suit as a whole is barred by limitation and was rightly dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 17 Ind. Cas. 311; 36 P. R. 1913; 16 P.L.R. 1913.
(2) 21 Ind. Cas. 919; 34 P. R. 1914; 13 P. L. R. 1914; 24 P. W. R. 1914.

PRAMATHA NATH ROY *v.* W. A. LEE.

CALCUTTA HIGH COURT.
CIVIL APPEAL NO. 70 OF 1918.
CIVIL SUIT NO. 706 OF 1916.
January 29, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Charles Chitty, KT.

PRAMATHA NATH ROY—DEFENDANT—APPELLANT

versus

W. A. LEE—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 12, Sch I, Art. 151—Appeal from Original Side filed beyond limitation—Copy applied for after expiry of limitation—Time spent in obtaining copy, whether can be allowed—Extension of time—Sufficient cause—Calcutta High Court Original Side Rule, Ch. XVI, rr. 7, 27, Ch. IV, r. 9, Ch. XXXII, r. 22 (4).

Plaintiff instituted a suit on 24th June 1916 and obtained an *ex parte* decree on the 14th February 1918. On the 1st July 1918 defendant filed an application to set aside the *ex parte* decree, but this was refused on the 26th July. On the 5th August plaintiff applied to have this order drawn up. The draft order was served upon the defendant on the 7th August and was returned by his Solicitor after approval on the 16th. On the 30th August, the last day on which the Court sat before the vacation, after 4.30 P. M, the defendant appeared before Chaudhuri, J., for leave to file a memorandum of appeal against the decree of the 14th February 1918, the order of the 23rd March 1918 and the order of the 26th July 1918 without office copies of the two orders. The Court permitted the appeal to be filed, subject to objections which might be raised. On 3rd September the order of 26th July was filed at the instance of the plaintiff, and defendant applied for a copy of that order on the 9th September and obtained it on the 12th September.

Subsequently, a question arising before the Registrar as to the appeal against the decree and the order of the 23rd March 1918 being within time, the memorandum of appeal was amended and the appeal remained as an appeal against the order of 26th July 1918:

Held, that under Article 151 of Schedule I to the Limitation Act the appeal was *prima facie* time-barred, and that neither section 12 (2) nor section 5 of the Limitation Act could be availed of by the defendant who was guilty of unreasonable and unnecessary delay, and who did not apply to have the order drawn up, and for a copy of the order in accordance with the rules of the Court. [p. 583, col. 2; p. 584, col. 1; p 586, col. 2; p. 587, col. 1.]

Per *Chitty, J*—An appellant, who does not, within the period of limitation, apply for a copy of the order appealed from and who takes no steps whatever towards procuring such copy, cannot be allowed after the period of limitation runs out to claim exclusion of time requisite for obtaining such copy. [p 586, col. 2.]

In order to obtain the indulgence allowed by section 5 of the Limitation Act, an appellant must satisfy the Court that he had sufficient cause for not preferring the appeal within the prescribed time. [p. 587, col. 1.]

Appeal from the order of Greaves, J., dated the 26th July 1918.

Mr. *N. Sircar* (with him Mr. *S. M. Bose*), for the Appellant.

Sir *C. C. Mitter* (with him Messrs. *C. C. Ghose* and *B. Basu*), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the defendant P. N. Roy against an order made by Greaves, J., sitting on the Original Side of the Court, which was dated the 26th July 1918, whereby the learned Judge refused the application of the defendant.

This application was for an order that the Registrar should be at liberty to receive from the defendant the sum of Rs. 27,000 as security furnished by the defendant, and that thereupon the *ex parte* decree (dated the 14th February 1918), which was conditionally set aside by an order dated the 23rd March 1918, might be set aside, and the defendant's defence restored in the suit.

The main question arising in this appeal is whether the appeal is barred under clause 151 of the First Schedule of the Indian Limitation Act of 1908.

In order to make the point intelligible it is necessary to state certain material dates.

On the 24th June 1916 the plaint in the suit was filed: the plaintiff claimed Rs. 27,443-2-0 in pursuance of an agreement dated the 24th June 1913. After a peremptory order had been made that defendant should file a written statement, the defence was filed on 9th February 1917.

On the 8th February 1918 Greaves, J., ordered that the defence should be struck out as the defendant had failed to give inspection of his documents.

On the 14th February 1918 an *ex parte* decree was made in favour of the plaintiff for Rs. 27,443-2-0.

On the 23rd March 1918 it was ordered that upon the defendant on or before the 10th of April furnishing security to the satisfaction of the Registrar for Rs. 27,000 and paying to the plaintiff's Attorneys certain costs, the decree of the 14th February 1918 should be set aside and the suit should be restored for hearing.

On the 26th April 1918 the time for furnishing security was extended by order

of the Court to 30th April 1918. In default the decree was to stand confirmed.

By an order dated the 3rd May 1918, the defendant, upon certain terms therein specified, was allowed one week's time from the date of the order to satisfy the Registrar as to the sufficiency of the security already offered.

On the 7th May 1918 the Registrar again refused to accept the security offered by the defendant.

On the 1st July 1918 notice of the application, already referred to, for setting aside the *ex parte* decree was given, and a petition by the defendant of the same date was filed.

On the 25th July 1918 this application was heard by Greaves, J., and refused.

On 30th August 1918, the defendant filed a memorandum of appeal. It was stated in Court on behalf of the plaintiff, and not denied by the defendant's learned Counsel, that an application was made on behalf of the defendant on the 30th August 1918 to Chaudhuri, J., who was sitting on the Original Side, and that such application was made about 5 P. M., at any rate at some time after the Court of Appeal had risen.

The application was for leave to file the memorandum of appeal without copies of the two orders: such copies should have accompanied the memorandum of appeal, see Chapter XXXII, rule 3 of the Rules of the Court, Original Side.

August 30th was the last day on which the Court sat before the vacation.

The learned Judge granted leave to the defendant to file the memorandum of appeal, but it was stated in Court and not denied that such leave was given subject to any objection which might be taken on behalf of the plaintiff.

On the 2nd September 1918 execution of the decree was stayed by an order of Fletcher, J., one of the Vacation Judges.

The memorandum of appeal purported to be an appeal not only against the order of the 26th July 1918, but also against the decree of 14th February 1918 and the order of the 23rd March 1918.

On the 9th September 1918 the Acting Registrar pointed out to the defendant's Attorney that the appeal was out of time as regards the decree of 14th February and the order of 23rd March,

On the 12th September 1918 the defendant's Attorney wrote the following letter:—

No. 1210. 12th September 1918.

To

The Registrar,
High Court, (O. S.),
Calcutta.

Dear Sir,

APPEAL No. 70 OF 1918.
SUIT No. 706 OF 1916.
P. N. ROY—APPELLANT
versus
W. A. LEE—RESPONDENT.

You consider the appeal against the *ex parte* decree dated the 14th February 1918 and the order dated the 23rd March 1918 as barred by limitation. As I am advised by Counsel that they are not barred, I crave leave to argue the matter before the Appellate Court.

Subject to the above, I initial the alterations made in the grounds of appeal on page 2 thereof.

A copy of this letter may be served with the notice of appeal to be issued herein.

Yours obediently,
P. N. Sen.

Consequently the memorandum of appeal was altered by striking out the decree of the 14th February 1918 and the order of 23rd of March 1918.

The memorandum of appeal, therefore, remained as an appeal from the order of 26th July 1918 only.

The question whether the appeal was out of time, as regards the decree of the 14th February 1918 and the order of 23rd March 1918, has not been raised before this Court on the hearing of the appeal, and we have, therefore, only to deal with the question whether the appeal is out of time as regards the order of 26th July 1918.

Clause 151 of the First Schedule to the Limitation Act, 1908, provides that in the case of an appeal from an order of the High Court of Judicature of Fort William in the exercise of its original jurisdiction the period of limitation is twenty days, and that the time begins to run from the date of the order. Consequently in this case, the order having been made on the 26th July 1918, the period of limitation began to run

from that date, and it would expire on the 15th August 1918.

The memorandum of appeal was not filed until the 30th August 1918 and *prima facie* it was out of time. But on behalf of the defendant reliance was placed upon section 12 (2) of the Act.

That section provides that in computing the period of limitation prescribed for an appeal.....the time requisite for obtaining a copy of the.....order appealed from shall be excluded.

The question is, whether the period from the 15th August 1918 to the 30th August 1918, *viz.*, a period of 15 days, can be said to have been time requisite for obtaining a copy of the order appealed from.

No application was made on behalf of the defendant for a copy of the order now under appeal, until the 9th September 1918: Stamps were paid on the 10th September, and he obtained a copy on the 12th September.

It is not the practice at the present time for the Court to draw up an order until it is applied for by a party: Chapter XVI, rule 27, is as follows:—

No decree or order shall be drawn up until applied for by a party. The application, therefore, shall be made by the requisition in writing of the party in whose favour the decree or on whose application the order was made, or, in default of his applying within four days from the date of the decree or order, by any party within one month thereafter.

In case any decree or order is not applied for within the last mentioned time, the Registrar may decline to draw up the same without the leave of the Court or a Judge.

It was argued on behalf of the plaintiff that the order of 26th July 1918 was made on the application of the defendant and that thereupon in pursuance of this rule he could have applied to the Court for a copy of the order any day after the 26th July 1918, or that at any rate the defendant could have applied for a copy of the order, in default of the plaintiff applying within 4 days from the date of the order; and that if the defendant desired to appeal against the order, it was his duty to get the order drawn up in accordance with the rule.

On the other hand it was argued on behalf of the defendant that a period between the 7th August and 3rd September should be excluded from the period of limitation as time which was requisite for obtaining a copy of the order under the following circumstances:

It appears that about the 5th or 6th August 1918 the plaintiff applied to the Court to have the order drawn up. The date does not appear from the documents before us, but it was stated in Court that it was on the 5th or 6th. On the 7th August 1918 the draft order was sent to the defendant's Attorney: it was approved by the defendant's Attorney on the 16th August 1918: thus a period of nine days was taken for approving the draft order:

In my judgment, this was unreasonable and unnecessary delay; the order was a short and simple one, and no explanation has been given of this delay.

The order was signed by the Master on the 28th August and it was filed on the 3rd September by the plaintiff.

The defendant's learned Counsel argued that the period from August 7th to September 3rd should be excluded: As I understand his argument, it was that the defendant could not obtain a copy until the order was filed on the 3rd September, and that, as the order was being drawn up by the plaintiff, there was no necessity for the defendant to take any steps to have the order drawn up and filed so that he could appeal within the specified time, and that, therefore, this was time requisite for obtaining a copy of the order.

I am not prepared to accept this argument. In the first place the plaintiff did not make any application for drawing up the order until the 5th or 6th August, some ten or eleven days after the order was made, and, to say the least the defendant could at any time after the 30th July 1918, when four days had elapsed from the date of the order, have applied to have the order drawn up.

He made no such application, and he did not even apply for a copy of the order until the 9th September 1918, six days after the order was filed, and indeed when the defendant's Attorney had received the draft order on the 7th August he did not approve it until the 16th August after a lapse of nine days, and after the

twenty days allowed for appealing had expired. A period of fifteen days, *i. e.*, from the 15th August until 30th August has to be accounted for, and the defendant has not made out to my satisfaction that such period was requisite for obtaining a copy of the order. In my judgment, if the defendant desired to appeal from the order he should have applied to have the order drawn up and for a copy of the order in accordance with the Rules of the Court, which he did not do. If he had done so there is nothing to show that fifteen days would have been requisite for obtaining a copy of the order.

In addition it is to be noted that on the 30th August 1918, the last day of the sittings and after the usual Court hours and after the Court of Appeal had risen, the defendant obtained leave from the learned Judge on the Original Side to file his memorandum of appeal without a copy of the order; no explanation has been given why this was left to the last minute, so to speak, in the manner above mentioned: and if it was necessary for him to obtain such leave, there was nothing to prevent him from making his application before the period of limitation had expired.

For the above mentioned reasons in my judgment the memorandum of appeal was filed out of time and this appeal is barred by the Limitation Act.

There was a further point raised by the learned Counsel for the plaintiff, *viz.*, that the defendant had not complied with the rules relating to the preparation and filing of the paper-book, and consequently that this appeal should not be heard. It is not necessary to decide this point in view of the conclusion already arrived at.

Finally, it was urged on behalf of the defendant that the Court should admit the appeal under section 5 of the Limitation Act after the prescribed period of limitation.

The defendant has not satisfied me that he had any sufficient cause for not preferring the appeal within the prescribed period, and consequently, in my judgment, this appeal must be dismissed with costs.

CHITTY, J.—On 24th June 1916 the plaintiff instituted this suit against the defendant to recover a sum of Rs. 27,443-2-0, said to be due under an agreement dated 24th June 1913. The plaintiff also asked, if necessary, for an account. On 2nd February 1917 a peremptory order was made upon the defendant to file his written statement within a week, with which order he complied on 9th February. In consequence of failure by the defendant to give inspection of his documents on 8th February 1918 Mr. Justice Greaves ordered that the defence should be struck out On 14th February 1918 a decree was passed in favour of the plaintiff for the amount claimed. It is stated, but not admitted, that the defendant and his solicitor were present in Court At any rate the defendant appears to have taken no part in that day's proceedings. On 8th March 1918 a notice was given by the defendant that he would apply to set aside the decree On 23rd March Mr. Justice Greaves ordered that the decree would be set aside if the defendant furnished security to the satisfaction of the Registrar for the amount of the claim by 10th April 1918. The time for furnishing security was by subsequent orders, the last being of 26th April 1918, extended to 30th. This order was peremptory. On the 29th the Registrar rejected the security offered by the defendant. On 3rd May, on the defendant undertaking not to apply for any further extension of time, the time for furnishing security was extended by the Court for one week, *i.e.*, to the 10th. Again the defendant tendered a security which was rejected by the Registrar. The defendant gave notice of an application further to extend the time; but this application appears to have been proceeded with. On 26th July a second application for the setting aside of the decree was refused by Mr. Justice Greaves. On 5th August 1918 the plaintiff applied to have this order drawn up. The draft order was served upon the defendant on 7th August 1918 and was returned approved by his solicitor on the 16th. The Master fixed 20th August for the consideration of the order by the parties and, on 28th August 1918, the order was signed by the Master. On 30th August, the last day of the term, after 4-30 P.M. the defendant appeared

before Mr. Justice Chaudhuri and asked leave to file a memorandum of appeal against the decree of 14th February 1918, the order of 23rd March 1918 and the order of 26th July 1918 without office copies of the two orders. The ground stated in the affidavit of Mr. P. N. Sen, the defendant's Attorney, with reference to the order of 26th July 1918 was that it was completed on 28th instant by the plaintiff's Attorneys, who having not yet filed the same an office copy thereof could not be obtained. The Court permitted the memorandum to be filed. It does not appear from the minutes but it is conceded on both sides that that order was subject to any objections which might be raised thereafter. On 3rd September 1918 the order of 26th July 1918 was filed at the instance of the plaintiff. On 9th September 1918 the defendant applied for a copy of that order. He furnished the requisite stamp on the 10th and the copy was supplied to him on the 12th. A question had arisen before the Registrar as to the appeal against the decree and the first of the two orders being within time; and on that day Mr. P. N. Sen for the defendant struck out of his memorandum of appeal the words "the decree made on the 14th day of February 1918" and "the order made on the 23rd day of March 1918". The appeal thus stood from that day as an appeal only against the order of 26th July 1918. The question for our determination is whether this appeal was filed within time. A further question arises whether having regard to the laches of the defendant in preparing and filing his paper-book, the appeal should not be dismissed on that ground also.

Under Article 151 of Schedule I of the Limitation Act the time for filing an appeal from an order of a High Court in the exercise of its original jurisdiction is twenty days from the date of the order. That time expired on 15th August 1918, and unless the appellant is entitled for some reason or other to have the time extended, his appeal which was filed on 30th August is clearly out of time. It was argued by Mr. Sircar on his behalf that he was entitled under section 12 of the Limitation Act to exclude the time requisite for obtaining a copy of the order appealed from. This contention is, in my opinion, unsound for two reasons. In the first place, an appellant cannot be permitted to avail himself of this provision, unless he satisfies the Court that he has exercised due diligence towards obtaining the copy. Here admittedly the appellant did nothing in this behalf until 9th September 1918 when he applied for a copy and even then he did not furnish the requisite stamp until the following day. It was argued that he could not procure a copy until the order was filed and that as on 7th August 1918 he learnt that the plaintiff was taking steps to have the order filed, it was useless for him also to take steps in the matter. In my opinion this excuse is worthless. A litigant on whom the law of procedure lays some duty or obligation cannot be heard to say that he is absolved, wholly or in part, because his opponent is doing something which may possibly save him the trouble. Here no doubt the appellant could not in the ordinary course obtain an office copy of the order until it was filed (See High Court Rules, Chapter IV, rule 9). But it was his duty at any rate after 30th July 1918 to have it drawn up. (Chapter XVI, rule 27). It was all the more incumbent upon him to do so and to have the order filed without delay if he was intending to appeal from the order. The appellant, however, took no steps whatever to expedite the filing of the order. His Attorney retained the draft for nine days before he approved it. Then again after the order was filed on 3rd September he waited six days more before he applied for an office copy. It is unnecessary to discuss the cases which were cited to us on either side. The question must be decided on the Limitation Act and the Rules of this Court on the Original Side. On principle I would hold that an appellant who has not within the period of limitation applied for a copy of the order appealed from, and who has within that period taken no steps whatever towards procuring such copy, cannot be allowed after the period of limitation has run out to claim exclusion of time requisite for procuring such copy.

There is in this case a further reason for holding the appeal to be out of time. On 30th August the appellant applied for and obtained leave to file his appeal without an office copy of this order. This exemption was granted by Mr. Justice Chaudhuri

under Chapter XXXII, rule 22 (*b*). In these circumstances no question of procuring an office copy arises. It was open to the appellant to have preferred this application and obtained the exemption on 15th August or before. Indeed, before the period of limitation had expired, his application would have come with greater force. There was no reason whatever for his allowing the period of limitation to go by without making that application. When he did so the appeal was already out of time.

At the close of the arguments it was suggested that we might exercise our powers under section 5 of the Limitation Act and admit the appeal though out of time; but in order to obtain that indulgence, the appellant must satisfy the Court that he had sufficient cause for not preferring his appeal within the prescribed period. Here he has shown not only no sufficient cause, but no cause whatsoever.

It is unnecessary to consider the question of the appellant's laches, if any, in the preparation and filing of his paper-book. I would dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1963 OF 1915.

January 30, 1919.

Present:—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice Martineau.

Musammat HUSAIN BIBI—PLAINTIFF—APPELLANT

versus

HAKIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 6, 7, 14—Pre-emption suit—Vendee, one of several, death of, before institution of suit—Legal representatives brought on record after limitation, effect of—Extension of time.

On 7th October 1914 the plaintiff brought the present suit to pre-empt certain lands sold by her father on 7th November 1913. One of the vendees had died before the suit was instituted and his heirs were impleaded as co-defendants on 8th December 1914. The suit was dismissed as time-barred on the ground that the sale was one jointly in favour of the vendees and as the suit was barred against the representatives of the deceased vendee, it was equally barred against the surviving vendee. Plaintiff appealed, pleading minority and ignorance of the vendee's death:

Held, that sections 5 and 14 of the Limitation Act were not applicable to the case, and as sections 6 and 7 of the Act did not extend to suits to enforce a right of pre-emption, the suit had been rightly dismissed.

Second appeal from the decree of the District Judge, Gujranwala, dated the 10th June 1915.

Mr. *Azim Ullah*, for the Appellant.

JUDGMENT.—*Musammat* Husain Bibi sued to pre-empt certain land sold by her father to Piran Ditta and Hakim by deed of sale, dated 7th November 1913. The suit which was filed on the 7th October 1914 purported to be against both vendees, but it was subsequently discovered that Piran Ditta, one of the joint vendees, had died previously to the institution of the suit, and it was not till the 8th December 1914 that heirs were impleaded as co-defendants with Hakim. The District Judge has dismissed the claim as time barred, on the ground that the sale was one jointly in favour of the vendees, and the suit, being barred against the representatives of Piran Ditta, is equally barred against Hakim. Plaintiff has appealed to this Court and on her behalf it is urged that she was a minor at the time of suit and that neither she nor her husband, who was acting as her next friend, had any knowledge of Piran Ditta's death. But even if we assume that such was the case, we do not see how plaintiff can be granted an extension of time, as sections 5 and 14 of the Indian Limitation Act are not applicable and the provisions of sections 6 and 7 do not extend to suits to enforce a right of pre emption.

The suit has accordingly been rightly dismissed as time barred and we must reject this appeal.

Appeal dismissed

CALCUTTA HIGH COURT.
CIVIL SUIT No. 1116 OF 1919.
May 19, 1919.
Present:—Mr. Justice Rankin.
SARDARMULL JESSRAJ—PLAINTIFF
versus
AGAR CHAND MAHATA & Co.—
DEFENDANT.

Arbitration—Party denying contract, remedy of—Procedure—Injunction, interlocutory, when can be granted.

Where a dispute is referred to arbitration under a clause contained in a commercial contract, and one or other of the parties to that contract seeks to impeach it upon equitable grounds, such as fraud, mistake or surprise, and seeks either to have it set aside or to have it rectified, in such a case the Court will, and should, restrain the arbitration proceedings until the question of the contract out of which they arise has been determined by the Court. [p. 588, col 2]

Where, however, a party denies the contract altogether, his course is to let the arbitrators do what they like, to wait till there is a question of the award being enforced, and the moment he gets notice that the award is going to be filed or has been filed to object to it. It may be prudent in such a case to inform the arbitrators of the objection to their jurisdiction and that, if the award is filed without due notice to the objecting party, such as the law requires, and if, as the result of that, execution is levied, then the arbitrators may make themselves liable in damages, if the party is successful when he moves the Court to take the award off the file [p. 590, col 1.]

Where the proceedings will be a nullity and futile, although vexatious, the Court will not grant an interlocutory injunction. [p. 589, col. 2.]

Mr. *B. L. Mitter* (with him Mr *B. K. Ghose*,) for the Plaintiff.

Mr. *K. P. Khaitan*, for the Defendant.

JUDGMENT.—In this case the plaintiffs ask for an interlocutory injunction to restrain further proceedings before an Arbitration Tribunal under a commercial contract for the sale of goods. The plaintiffs deny that the alleged written contract was ever signed by them or on their behalf. The defendants put forward a document and they allege that that document was the document of the plaintiffs, and in this case as in may others I find there is no possibility of my deciding even provisionally with any certainty as to which of these parties are in the right. Under these circumstances I have to consider whether it is right that an interlocutory injunction should go to restrain the arbitration until this question has been determined. This is a question which has arisen before, but I have not had occasion to decide it before, and I think it desirable that the matter should be decided, so far as I am concerned, for the benefit of future cases that may arise.

Now it is to be determined according to the principles which this Court has inherited as part of its inherent jurisdiction from the old Court of Chancery. The special Indian legislation about interlocutory injunctions is contained in the Civil Procedure Code and as regards perpetual injunctions, it is contained in the Specific Relief Act; but I cannot find that there is anything in either of these statutory enactments to assist me as regards this matter. I certainly do not find any power in them which would enable me to grant this injunction, and I have to resort to equitable principles.

When one looks at the English cases one finds that they are somewhat burdened by matters with which I am not concerned, namely, by the question whether section 25 of the Judicature Act has not extended the rights of the Courts in England to grant an injunction where, previous to that Act, the Court of Chancery could not have granted one at all. Cleared of this difficulty the position in my view stands thus. It is quite clear on the authority of *Kitts* v. *Moore* (1) that where an agreement has been made and where one or other of the parties to that agreement seeks to impeach it upon equitable grounds such as fraud, mistake or surprise, seeks either to have it set aside on equitable grounds or to have it rectified, in these cases the Court will and should restrain the arbitration proceedings until the question of the contract out of which they arise has been determined by the Court. Previous cases are somewhat instructive on this point. There is a case of *Maunsell* v. *Midland G. W. Ry.* (2). That was a case where two companies entered into an agreement containing an arbitration clause. The plaintiff was a share-holder in one of the companies and he brought his action on behalf of himself and all the other share holders to have it declared that the agreement was *ultra vires* of the Director of his own company, and in that case it was decided

(1) (1895) 1 Q. B. 253; 64 L. J. Ch. 152; 12 R. 43; 71 L. T 676; 43 W. R. 84.

(2) (1863) 1 H. & M. 130; 32 L. J. Ch. 513; 8 L. T. 826; 9 Jur. (N. S.) 660; 11 W. R. 768; 71 E. R. 58; 136 R. R. 54.

that the arbitration proceedings should be restrained until that matter had been determined. Again in the case of *Mylne* v. *Dickinson* (3) it was sought to rescind the contract and a suit was brought in equity upon that footing: in the meantime the arbitration under that contract was restrained. The basis of those decisions is that if the Court of Equity did not interfere there would be a contract which was good in law and that an arbitration held under that contract would be an arbitration to which the parties would have no answer, if it had resulted in an award, when an action at law was brought. In that state of the law undoubtedly it was an embarrassment to a person who had an equitable right to set aside or rectify the contract that the arbitration should be allowed without that question being determined.

There is, however, another principle running parallel with that, which has the authority of the Court of Appeal in the case of *North London Railway Company* v. *Great Northern Railway Company* (4) and also *Wood* v. *Lillies* (5). These were cases where there was an arbitration clause in an agreement; the plaintiff's case was that the matter sought to be referred was not one within the arbitration clause; and in those cases what the Court held was this, that the proceedings before the arbitrator would be futile and vexatious; the award, if made, would be a nullity; but such an award was no legal injury to the plaintiff; and under these circumstances the Court would not issue an injunction merely because the proceedings were futile and vexatious. It is quite clear that in such a case the plaintiff, if he does not attend before the arbitrators, would stand no chance of the award being in his favour. It is also quite clear that in every such case, if he does attend before the arbitrators under protest, there will be no way by which the Court afterwards, if it finds in his favour, can award to him the costs which he incurred before the arbitrator. In spite of these facts the Court of Appeal did decide, and I think in conformity with the previous practice of the Court of Chancery, that where the proceedings would be a nullity and futile although vexatious, it would not grant an interlocutory injunction. The result of the arbitration proceedings would merely be that the successful party would have either to bring an action on the award or else to apply under the Rules of the Supreme Court to get leave to enforce the award as a judgment, and such leave will not be given if there is any case for impeaching the jurisdiction of the arbitrators. In the result, having an award which is invalid is analogous to having a bad cause of action. As there is no means of preventing parties bringing unfounded actions against their neighbours, the Court would not interfere with such an arbitration.

I have not found a case where a question arose as to the existence or non-existence of the contract containing the submission. There have been cases where there were admitted contracts but it was contended that the matter referred to was not within the submission. I have noticed in some of the references to *Kitts* v. *Moore* (1) that the matter has been put in this way that if the plaintiff is seeking to impeach the contract he is entitled to restrain the arbitration. The words "impeach the contract" were used by the Lord Justices in *Kitts* v. *Moore* (1) but, I think, meant to impeach the contract on equitable grounds such as fraud, mistake or surprise. To impeach the contract on a ground of equity is quite different from denying the existence of any contract as a matter of fact. In my view the latter case is exactly the same as where the submission is admitted but the allegation is that the matters to be referred are outside it. I think there is no legal injury and no embarrassment in equity if a person who has not made a contract is put into the position of having an arbitration held against him. The question of costs that I have mentioned is then the only embarrassment. These considerations in my judgment take the present case out of the principles of *Kitts* v. *Moore* (1).

I have also considered one matter in which the Indian practice differs from the practice at home. Under the Arbitration Act, section 11, when an award is

(3) (1815) G. Cooper 195; 35 E. R. 528 14 R. R 243.
(4) (1883) 11 Q. B. D. 30; 52 L. J. Q. B. 330; 48 L. T. 605; 31 W. R. 490.
(5) (1892) 61 L. J. Ch. 158.

made then instead of the party who wants to enforce it bringing an action on the award or applying on summons for leave to enforce the award summarily, the award when filed becomes the subject-matter of execution as though it were a decree of Court and the party prosecuting it does not require to obtain leave or to bring an action. *Prima facie*, therefore, execution can be levied as though it were a decree of Court the moment it is filed. I have considered whether that difference of practice makes a difference in the application of the principles to which I have referred. I find, however, by the Arbitration Act it is a duty laid upon the arbitrators to give notice to the parties when the award is made. I think it is a matter of procedure and not of substance that the party complaining in such a case would have to apply to the Court to have the document taken off the file. I do not think that I ought to start granting interlocutory injunctions upon novel considerations, and attempt to commence a new system as regards interfering with arbitrators in such matters by reason of this difference in practice between the Indian Arbitration Act and the provisions of the English rules. Therefore the position is simply this, that in all these cases where a man says that he wants to deny the contract altogether, his course is to let the arbitrators do what they like, to wait till there is a question of the award being enforced, and the moment he gets notice that the award is going to be filed or has been filed to object to it. It may be prudent in such a case to inform the arbitrators of the objection to their jurisdiction and that if the award is filed without due notice to the objecting party, such as the law requires, and if, as the result of that, execution is levied, then the arbitrators may make themselves liable in damages if the party is successful when he moves the Court to take the award off the file.

I will add a word with regard to the special class of cases which sometimes arises out of commercial contracts for sale containing an arbitration clause, *viz.*, where the contract is attacked on the ground that the transactions are gaming and wagering transactions and that, therefore, the arbitrators have no jurisdiction. In that class of case the law has been settled by the Court of Appeal here, following the case of *M'Harg* v. *Universal Stock Exchange* (6), that it is not a question of attacking the contract upon equitable grounds, and it appears to me that the present practice is not to grant an interlocutory injunction in cases where the contracts are said to be void on other than equitable grounds.

In this case the motion for an injunction is refused. As regards the costs I will make them costs in the action.

Injunction refused.

(6) (1895) 11 T. L. R. 409.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1218 OF 1918.

May 2, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr Justice Napier.

SAMARAPURI CHETTIAR—DEFENDANT No. 2—APPELLANT

versus

A. SUTHARSANA CHETTIAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 55—Contract for re-sale of property conveyed—Time, whether of essence of contract.

The doctrine that time may not be of the essence of a contract, which arises on the construction of contracts of sale, should not be applied to contracts for the re-sale of property conveyed. The right to re-purchase, being an option, must be exercised according to the strict terms of the power. [p. 591 col. 1.]

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 80 of 1917, preferred against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Original Suit No. 14 of 1916.

Messrs. *T. Narasimha Aiyangar* and *A. Sadagopachariar*, for the Appellant.

Mr. *Krishnamachariar*, for the Respondents.

JUDGMENT.—The lower Appellate Court was in error in applying the doctrine that time may not be of the essence of the contract, which arises on the construction of contracts of sale, to contracts for re-sale of property conveyed. The true doctrine is stated in Fisher on Mortgages, Page 11, Chapter I, section 18, and is that if the transaction is not a mortgage, the right to re-purchase, being an option, must be exercised according to the strict terms of the power, *vide* *Joy* v. *Birch* (1), *Ranelagh* v. *Melton* (2) and *Dibbins* v. *Dibbins* (3). There is no reason why a different rule should prevail in India. We, therefore, reverse the decisions of the lower Courts and remit the case to the Court of first instance for the trial of issues one and four in the light of the observations of the Full Bench in *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar* (4). Costs to abide. Appellants to have refund of costs paid on this memorandum of second appeal.

M. C. P.

Appeal allowed;
Case remanded.

(1) (1836) 7 E. R. 22; 4 Cl. & F. 57; 10 Bligh (N. S.) 201.

(2) (1864) 62 E. R. 627; 2 Dr. & Sm. 278; 5 N. R. 101; 34 L. J. Ch. 227; 10 Jur. (N. S.) 1141; 11 L. T. 409; 13 W. R 150; 143 R. R. 115.

(3) (1896) 2 Ch. 348; 65 L J. Ch. 724; 75 L. T. 137; 44 W. R. 595.

(4) 50 Ind Cas. 205; 36 M. L. J. 385; 9 L. W. 365; 25 M. L. T. 332; 42 M. 407; (1919) M. W. N. 393.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 745 OF 1915.

January 9, 1919.

Present:—Mr. Justice Chevis and Mr. Justice Abdul Raoof.

SHAMBHU NATH—DEFENDANT—APPELLANT

versus

Musammat RALLI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. XXII, r.* 3 —*Appeal*—*Death of sole appellant*—*Failure to bring legal representatives on record, effect of*—*Abatement of appeal*—*Hindu Law*—*Succession*—*Sister, whether heir.*

Where a sole appellant dies and no application is made to bring his legal representatives on to the record, the appeal abates The fact that in a cross-appeal the deceased's legal representatives have been brought on to the record as respondents will not suffice to prevent his appeal from abating. [p. 592, col. 1.]

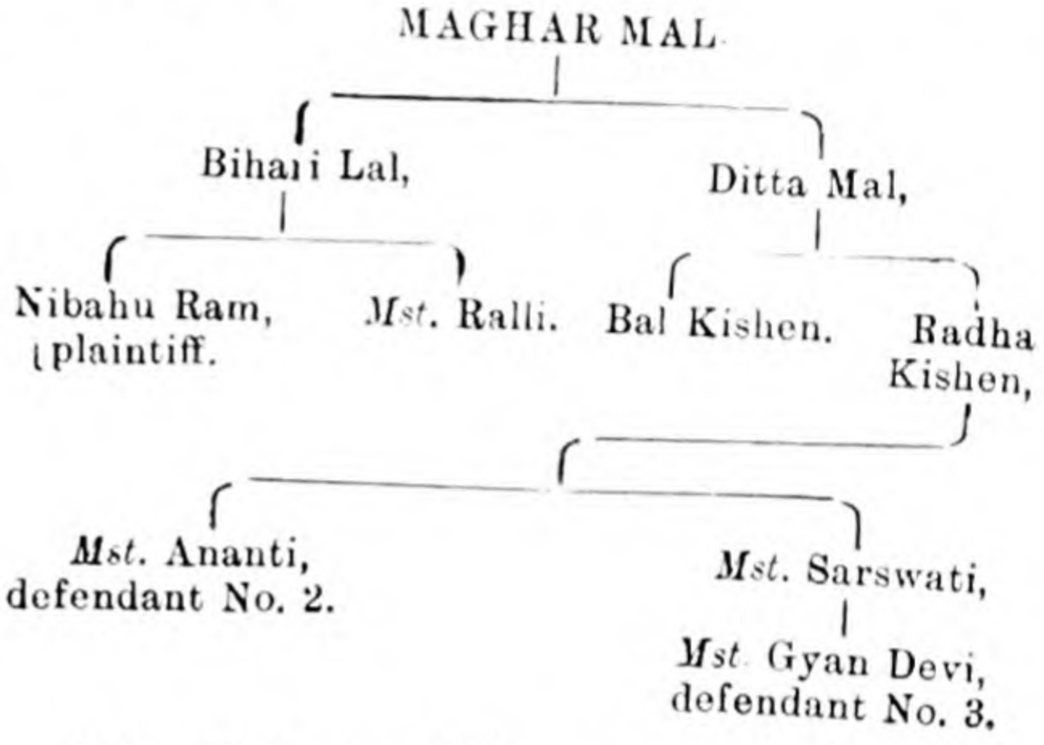
Under the Mitakshara School of Hindu Law a sister is not an heir at all to her brother, and, consequently, cannot be brought on to the record as the heir and legal representative of her deceased brother to continue a suit or appeal. [p. 592, cols. 1 & 2]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 1st February 1915, decreeing the plaintiff-respondent's claim.

Lala *Durga Das*, for the Appellant.

Mr. *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—The genealogical tree is as follows:—



Bal Kishen died sonless, leaving a widow *Musammat* Thakri, who died on 28th July 1913. Her brother Shambhu Nath is defendant No. 1. The case relates to the estate of Bal Kishen. Nibahu Ram sued for possession, alleging that Shambhu Nath was in illegal possession. Plaintiff alleges that *Musammat* Thakri succeeded to a life tenure only. The defence was that the plaintiff had sold his rights to *Musammat* Thakri for Rs. 1,155, and that *Musammat* Thakri had executed a Will in favour of the defendants. The Senior Subordinate Judge held that the sale of reversionary rights was invalid, that the Will executed by *Musammat* Thakri was also invalid, but that it was not proved that *Musammat* Thakri had left any property except the houses mentioned in the Will. So the learned Subordinate Judge gave plaintiff a decree for the houses but dismissed the suit for the rest of the property.

Against the Subordinate Judge's decree three appeals were lodged, one by the plaintiff (admitted as a pauper appeal in March 1915), one by Shambhu Nath, and one by *Musammat* Ananti and *Musammat* Gyan Devi. This judgment will cover all three appeals.

SHAMBHU NATH *v.* RALLI.

Nibahu Ram died in May 1915. The defendants appellants put in applications, asking that Nibahu Ram's sister *Musammat* Ralli should be brought on to the record of their appeals as representative of the deceased respondent. On these applications there are orders of the Deputy Registrar of this Court granting the applications subject to confirmation by the Court.

In the appeal lodged by Nibahu Ram no application has ever been made for bringing his representative on to the record. Mr. Jai Gopal, who represents *Musammat* Ralli in this Court, says his client made no application as she thought that as she had been made respondent in the cross-appeals, this was sufficient. It is not sufficient. As no application for bringing a representative on to the record in due time has been made, the appeal lodged by Nibahu Ram has abated.

On behalf of Shambhu Nath, appellant, a fresh application has been put in urging that the application for bringing *Musammot* Ralli on to the record was made under a mistake of law, and that the real representative, if any, is *Musammat* Ananti. The latter, however, is only a daughter of the first cousin of the deceased, and Lala Durga Das is unable to show us how such a relation can be regarded as an heir under Hindu Law. But the question remains whether the sister is an heir. Mr. Jai Gopal Sethi urges that in the absence of other heirs the sister must be regarded as the legal representative of the deceased. The whole subject is ably discussed in Mayne on Hindu Law and Usage, 8th Edition, pages 724—753, wherein it is pointed out that as regards the provinces which follow the Mitakshara School both principle and authority seem to exclude the daughter. Counsel refers us to *Lakshmanammal* v. *Tiruvengada Mudali* (1) and *Bhagwan Vithoba* v. *Warubai* (2). We think it unnecessary to enter into any lengthy discussion. We may only remark that in Northern India it has always been held that under the Mitakshara School a sister is not entitled to inherit, and we prefer to follow what seems to us the decided weight of authority.

(1) 5 M. 241; 2 Ind. Dec. (N. S.) 169.
(2) 32 B. 300; 10 Bom. L. R. 389.

Then it is urged that in the absence of other heirs the sister must inherit. But as we understand the law the position of the sister is not that she is an ultimate heir, but that she is not an heir at all.

Then it is urged that a legal representative need not be an heir, and here *Charanjit Mal* v. *Mitho* (3) is relied on. But in that ruling certain reversioners were allowed to remain on the record on the great probability that they were as much the next heirs and representatives as the other persons who were pointed out as the heirs. Here, however, we find that there are no heirs at all, so far as we can discover; at all events we hold that the sister is not an heir. We, therefore, refuse to confirm the order of the Deputy Registrar bringing *Musammat* Ralli on to the record as representative of the deceased plaintiff-respondent and we strike her name off. There being no respondent the appeals lodged by the defendant cannot proceed, and must be dismissed. The effect is, of course, practically the same as if the appeals were accepted, as *Musammat* Ralli cannot execute the decree of the lower Court and it does not appear that there is any one else who can. The defendants-appellants are to blame for having named her as representative, but on the other hand she was in no way bound to defend these appeals; and if she wished to avoid the risk of being ordered to pay costs she could have appeared and pleaded that she was not the heir and had wrongly been impleaded, instead of attempting to show that she was the heir. We think the proper course is to leave the parties to bear their own costs in this Court.

All three appeals are dismissed, but we pass no order as to costs in this Court.

Appeal dismissed.

(3) 29 P. R. 1888

KORDIA GOPAL KATKARI *v.* EMPEROR,

BOMBAY HIGH COURT.

CRIMINAL REVISIONS NOS. 125, 126 AND 127 OF 1919.

July 10, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

KORDIA GOPAL KATKARI AND OTHERS—APPLICANTS

versus

EMPEROR—OPPONENT.

Workman's Breach of Contract Act (*XIII of* 1859), *s.* 2, *scope of*—*Contract Act* (*IX of* 1872), *ss.* 16, 19 *A*—*Contract induced by undue influence, breach of*—*Jurisdiction of Magistrate.*

It is only where a contract between an employer and a workman is broken by the latter without lawful or reasonable excuse, as provided by section 2 of the Workman's Breach of Contract Act, that the employer has the right to have recourse to the Criminal Courts for the enforcement of the contract. A contract which is liable to be avoided or broken as having been obtained by undue influence under sections 16 and 19A of the Contract Act, cannot be so enforced. [p. 594, col. 2.]

Criminal application for revision against the decision of the Resident Magistrate, Bandra.

Mr. *S. Y. Abhyankar*, for the Petitioners.

Mr. *W. B. Pradhan*, for the Opponent.

The Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—This is an application against an order made by the Resident Magistrate of Bandra under Act XIII of 1859. The contracts in question are between certain "Kathodis" and the complainant. The contracts relate to the work to be done as charcoal burners from the 1st of September 1918 to the 15th of June 1919. They refer to certain small advances in cash, and the rate of wages is fixed at 2 annas per bag of charcoal. They also provide that the wages should be set off against the sums advanced and to be advanced to the workmen.

"It has been found by the Magistrate that "a Katkari, if he is a good and hardworking workman, manufactures with the assistance of others and his family about 300 bags of charcoal in a season of 10 months. His earnings, therefore, at 2 annas a bag would come to Rs. 37-8-0." In plain terms, the result of this contract, according to the finding, is that when a workman with his whole family works for 10 months, he earns Rs. 37-8-0, that is, he earns nearly Rs. 4 per mensem. It is admitted by the complainant in his evidence that the wife and children of the Katkaris work with the Kathodi, that they are not paid separate wages for their work and that their labour is also included in the rate. It is also admitted by him that, though he feeds them, he could charge them for the same and would do so in case the workmen did not return to work for the following season. Taking the terms of the contract as stated in the document, with the finding of the Magistrate and the facts admitted by the complainant, I am wholly unable to accept his conclusion that the conditions of the contract are fair and reasonable. It is suggested before us that these workmen get some further remuneration under some other arrangement or contract. But there is no evidence in support of this suggestion. The fairness of the contracts must be determined on the evidence on the record; and it is hardly possible to treat these contracts, under the circumstances established, to be fair or reasonable. The workmen refused to work though they received the advances; and the question is, whether, under the circumstances, it is established that they had no lawful or reasonable excuse to neglect or refuse to perform the work as contemplated by the Act. Having regard to the terms of the contract, it seems to me that it cannot be said that the workmen had no lawful or reasonable excuse to refuse to work. The learned Magistrate has referred to some other facts which go to show that the complainant treats his workmen with a certain degree of consideration. But it appears from his evidence that the consideration he shows to the workmen means an addition to the legal dues recoverable from them. No doubt it is claimed that if these persons would return to work for the next season, he would not charge them the dues of the preceding season. But that is a matter of concession on his part and not of any right of the workmen under the contract. I do not think that, on such considerations, the terms of a contract which may not be otherwise fair, can be treated as fair for the purpose of determining whether the workmen had a lawful or reasonable excuse to refuse to work. There is no question on the present proceedings of the civil liability of these workmen for

the moneys received or for breach of contract. But all breaches of contract are not within the scope of the Act; I am satisfied, on a consideration of the terms of the contract and the other circumstances which are not in dispute, that in the present case the omission on the part of the workmen to perform the work did not render them liable to be dealt with under Act XIII of 1859.

I would, therefore, make the Rule absolute and set aside the order of the Magistrate.

The same order in the other companion applications Nos. 126 and 127 of 1919.

HAYWARD, J.—I concur that the order should be set aside as proposed by my learned brother.

The charcoal burners entered into this contract with the contractor,—"I bind myself to work for a season from 1st September 1918 to 15th of June 1919. Therefore, you have paid me at my request in advance cash Rs. 14. I bind myself to work for you till the amount is paid. The conditions of payment of your money, which is to be paid off by working, are that for my personal labour in preparing charcoal account will be made at the rate of 2 annas per bag. The money should be set off against the sum advanced. In case more money is taken by me as an advance in respect of my wages I bind myself to work under you till that amount is paid off. Till all your money is paid off as above I bind myself to work under you. If owing to any cause I give up your work and go away, you are fully empowered to proceed against me under Act XIII of 1859." The charcoal burners—it has been calculated and not disputed—would under this contract earn Rs. 37-8-0 by 10 months work with the aid of their families—whereas they would have to spend during the same period about Rs. 225 for their own support and that of their families. The contractor has been said to have made special arrangements for providing them with food and, unfortunately also, with drink. But it would appear that the expenses of these items have all been scrupulously and regularly debited to their account. He has, however, stated that the balance which would, under the arrangement, inevitably be due against them at the end of each year could be wiped off provided they returned to work with him the following year. They have had accordingly to return to work for him during the last 6 or 7 years. They have, however, on this particular occasion been tempted to break away by a better offer, and the consequence has promptly resulted which would in similar circumstances have happened during any of the past 6 or 7 years. The balances due against them have not been wiped off and they have been directed to work as usual upon the same disadvantageous terms or in default to be sent to jail under the provisions of Act XIII of 1859.

The charcoal burners have been described as "ignorant Kathodis"; and, again, as members of "the improvident and half barbarian tribe like the Kathodi" by the learned Magistrate. The contractor, on the other hand, would appear to be a well-to-do forest contractor. There could be, in my opinion, no doubt, in these circumstances, that the relations subsisting between the parties were such that one of the parties was in a position to dominate the will of the other, and there could, in my opinion, also be no doubt whatever, upon a consideration of the terms of the contract, that the transaction was unconscionable. The contractor was, therefore, bound by law to prove that the contracts were not induced by undue influence. No such proof has been pointed out to us, and the result must follow that the contracts would be liable to be avoided or broken as contracts obtained by undue influence under sections 16, and 19A of the Indian Contract Act. If so, it could not, in my opinion, properly be said that the contracts have been broken without lawful or reasonable excuse. The charcoal burners had the lawful right to break the contracts. They could not be said, in the circumstances, to have left the contractor without reasonable excuse. They have, no doubt, been wilfully broken, but that would not be enough. They must also have been broken without lawful or reasonable excuse as provided by section 2 of Act XIII of 1859. It is only in such circumstances that the contractor has been given a right to have recourse for the enforcement of his contracts to the Criminal Courts, and that has for a number of years been the view of Benches of this Court.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 988 OF 1918.

November 22, 1918.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

HARIHAR ROY—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (1) (h), 190 (1) (a, b, c), 200, 526—'Complaint' 'Police report'—Report made by Police Officer in non-cognizable case, whether complaint or 'Police report'—Jurisdiction of Magistrate to take cognizance Failure to examine complainant on oath, effect of – Irregularity.

The Superintendent of Police by a letter to the Deputy Commissioner made charges of extortion against the petitioner who was a Police Officer under suspension, and this letter was placed before a Magistrate empowered under section 190, Criminal Procedure Code, who issued a warrant for the arrest of the petitioner and thereby instituted proceedings against him without examining the Superintendent on oath:

Held, that if the Police Superintendent's letter was not a 'Police report' it was a 'complaint' within the meaning of section 4 (1) (*h*) of the Criminal Procedure Code, and the proceedings were not liable to be quashed, whether the letter was a 'Police report' or a 'complaint' [p. 595, col. 2.]

If a Magistrate, duly empowered, takes cognizance of an offence upon complaint, but omits to examine the complainant on oath the omission is no more than an irregularity and it does not affect the Magistrate's jurisdiction to try the offender. [p. 596, col. 1.]

Rule against the decision of the District Magistrate, Jalpaiguri.

Babu *Manmatha Nath Mookerjee* (with him Babu *Panna Lal Chatterjee* not present), for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.—This is a Rule upon the District Magistrate of Jalpaiguri to show cause why the criminal proceedings pending against the petitioner under section 384 of the Penal Code, in the Court of the Deputy Magistrate of Jalpaiguri, should not be quashed or, in the alternative, why the case should not be transferred to some other District for trial.

The petitioner is a Police Officer. In June 1918 the Superintendent of Police, Jalpaiguri, by a letter addressed to the Deputy Commissioner, made certain charges of extortion against the petitioner who had been suspended. The letter on receipt in the Deputy Commissioner's Office appears to have been placed before Mr. A. Majid, Deputy Magistrate, who issued a warrant for the petitioner's arrest and thereby instituted the proceedings against the petitioner to which the Rule relates.

Mr. Majid is specially empowered to take cognizance of offences under section 190, sub-section (1), clauses (*a*) and (*b*) of the Criminal Procedure Code. The first point taken on the petitioner's behalf is that the Superintendent's letter is not a Police report within the meaning of clause (*b*), and that Mr. Majid erred in taking cognizance of the case, as it appears that he did, under that clause. An offence under section 384 of the Penal Code is a "non-cognizable" offence and it is argued, on the authority of the decision of a Full Bench of the Bombay High Court in *King-Emperor* v. *Sada* (1), that the expression 'Police report' in clause (*b*) of section 190 (1) of the Criminal Procedure Code does not include a report made by a Police Officer of his own motion in a non-cognizable case. If that be so, what follows? In the definition of "complaint" in section 4 (1) (*h*) of the Code it is stated that the term does not include "the report of a Police Officer." If the expression "Police reports" is to have a restricted meaning, then, as the case cited itself shows, the meaning of the expression "report of a Police Officer" must be similarly restricted, so as to bring a report made by a Police Officer of his own motion in a non-cognizable case within the definition of "complaint". Otherwise, such a report as the Police Superintendent's letter in the present case would be neither a "complaint," nor a "Police report" nor could it be dealt with under section 190 (1) (*c*) as "information received from any person other than a "Police Officer." That could not have been intended by the framers of the Code. It is sufficient, therefore, for the purposes of the present case to say that if the Police Superintendent's letter was not a "Police report," it was a complaint and the Deputy Magistrate is empowered to take cognizance of offences upon complaint under section 190 (1) (*a*). It is said that the Deputy Magistrate did not examine the Superintendent on oath under the provisions of section 200 of the Criminal Procedure

(1) 26 B. 150; 3 Bom. L. R. 586.

Code. But, even on the assumption that the Superintendent's letter was a complaint, the mere fact that he was not examined on oath would not, in our opinion, vitiate the proceedings or render them proceedings taken without jurisdiction. Under section 529, clause (*e*) of the Code if a Magistrate not empowered by law to take cognizance of an offence under section 190, sub section (1), clause (*a*) or clause (*b*) does so erroneously but in good faith, his proceedings are not to be set aside merely on that ground. That being expressly laid down if a Magistrate, duly empowered, takes cognizance of an offence upon complaint, but omits to examine the complainant on oath, the omission can hardly be more than an irregularity which does not affect the Magistrate's jurisdiction to try the offender. This is the second time the petitioner has moved the Court to intervene in the proceedings against him. On the last occasion this question of jurisdiction was not raised or mentioned. Moreover, the Police Superintendent's letter was based on information received by him and his examination on oath would have been a mere formality.

To sum up, if the Superintendent's letter was a "Police report" no question even of irregularity arises. If it was a "complaint" the petitioner has no substantial grievance. We are accordingly unable to accept the contentions now put forward as disclosing any sufficient reason for quashing the proceedings.

There remains the alternative prayer for the transfer of the case to some other Court for trial. The petitioner, though he is under suspension, is a Police Officer. As a Police Officer he is subject to the disciplinary rules of his department and the lawful authority of the Officers to whom he is subordinate. He complains that disciplinary orders, to which he is bound to render obedience, hamper him in the conduct of his defence. Now it is entirely beyond our province to interfere with the discipline of the force or the exercise by the Superior Officer of Police of their lawful powers. We have no doubt that the observations made on the 23rd August 1918 by the learned Judges who were then dealing with criminal matters have borne fruit and that the Superintendent of Police has honestly attempted to remove any cause of complaint on the petitioner's part that he was being harshly or inconsiderately treated.

On the other hand, we are bound to satisfy ourselves that the conditions under which the petitioner is being tried do not impede him in his defence and for that purpose we must look at the matter not only from the point of view of the superior officers but also from the point of view of the petitioner.

The principal order governing the petitioner's movements appear to be an order of the 5th September 1918, quoted in the explanation submitted by the Deputy Commissioner. By that order the Superintendent directs that the petitioner is to be "allowed facilities for instructing his legal adviser or taking such other steps as may be necessary for the conduct of his defence at any time on application made to me." We are quite prepared to believe that no exception can be taken to the spirit in which that order was meant to be carried out. The order, nevertheless, seems to involve this, that the petitioner has to apply to the Superintendent from time to time for such facilities as he requires. The Superintendent may be quite willing to grant the facilities but there may be at any rate some delay before the petitioner's applications are received or dealt with by him. The result has been to engender in the petitioner's mind a feeling that his movements are unduly restricted and on the materials before us we cannot characterize his state of mind as entirely unreasonable.

While, therefore, we make no reflection on the conduct of the Superior Police Officers, and while no one questions the impartiality of the Deputy Magistrate before whom the case is now pending, we are of opinion that a transfer of the case is desirable and we direct accordingly that the case be transferred for trial to the Court of such competent Magistrate at Siliguri as the Deputy Commissioner of Darjeeling may appoint.

Case transferred.

BOMBAY HIGH COURT.

CRIMINAL APPLICATIONS FOR REVISION NOS. 396 AND 397 OF 1918.

February 12, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

ABU HASAN—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Defence of India Consolidation Rules, 1915, *rr.* 21 *A*, 28, 30—*Consent in writing, want of, effect of—Consent authorising proceedings against one person—Initiation of proceeding against several persons, legality of—Offence not specified, effect of—Attempting to melt sovereigns—Proof—Presumption.*

A person cannot be convicted under the Defence of India Consolidation Rules of 1915, without the written consent of the authority mentioned in rule 30 of the rules to initiate proceedings against him

The shop of accused No 1 was raided by the Police who found a furnace ready heated, and on it a crucible containing molten silver and near it a large number of sovereigns in an open dish or receptacle so placed as to be ready for transfer to the crucible: he was convicted of attempting to melt sovereigns under rules 21A and 28 of the Defence of India Consolidation Rules 1915. On revision to the High Court:

Held, that he had been rightly convicted

A and *B* were tried and convicted of offences under rules 21A and 28 of the Defence of India Consolidation Rules, 1915. It was found that the consent in writing required by rule 30 authorised proceedings against *A*. alone and that it did not specify the offence for which he was to be tried:

Held, (1) that *B's* conviction was illegal and must be set aside;

(2) that the defect in the consent did not invalidate the proceedings as regards *A*.

Criminal application for revision against the order of conviction and sentences passed by the City Magistrate, Surat, confirming the Sessions Judge, Surat.

Mr. *Jinnah* (with him Mr. *A. D. Sabnis*), for Accused No. 1.

Mr. *Binning* (with him Mr. *P. B. Shingne*), for Accused No. 2.

The Hon'ble Mr. *Strangman* (Advocate-General) (with him Mr. *S. S. Patkar* Government Pleader), for the Crown.

JUDGMENT.

HEATON, J.—We are hearing these matters in revision, but, as well as the point of law, we have had the evidence laid before us. It is a prosecution under the Defence of India Consolidation Rules of 1915. Under rule 21A of those rules it is made an offence to melt any current gold coin. It is urged against the accused No. 1 that he attempted to melt a number of sovereigns, and it is conceded that if he did attempt to melt sovereigns, he is guilty under this rule together with another rule which penalizes attempts. It is provided by rule 30 that "no Court shall take cognizance of any offence punishable under these rules" unless certain authorities, amongst whom is the District Magistrate, have "by order in writing consented to the initiation of the proceedings." We have in this case the order in writing which purports to be the consent to the initiation of the proceedings, and that document recites that, in the exercise of the authority vested in him by rule 30, the District Magistrate of Surat hereby consents to proceedings being initiated against Memon Abu Hasan of Surat in the Court of the First Class Magistrate of Surat. The nature of the proceedings is not stated in the order. Memon Abu Hasan is the accused No. 1 in the case. After proceedings had been initiated against him, it transpired that there was another man, accused No. 2 in the case, who, it is alleged, abetted the offence by providing the sovereigns. It is claimed for him that there is no consent in writing to any proceedings against him. That, I think, is so. He might be got at, it seems to me, at most in only two ways, either by entering his name in the written consent, but that was not done, or possibly, (I will not say certainly) by describing the offence in the written consent and thereafter showing that he was concerned in that particular offence. But this has not been done either. There is no offence described in the consent in writing, and the name of accused No. 2 is not mentioned, therefore, it seems to me that accused No. 2 must be acquitted for the reason that I have stated that the proceedings against him have not been consented to in writing. This is a great deal more than a merely technical matter. We are dealing with an act which has been made an offence by certain rules which are temporary in their nature and are made to meet a special emergency. It is specially provided that there must be consent in writing for the initiation of proceedings. This is intended as a real safeguard and it must be given full effect to,

That has not happened in this case as regards accused No. 2.

This rule about a consent in writing is, as I read it, intended to be an undertaking by the Government that no one shall be prosecuted unless his case has been considered by one of the authorities named. This has to be shown by a consent in writing. There is no guarantee here that the case of accused No. 2 received any consideration whatever from the District Magistrate. Therefore, to uphold his conviction would cause a breach of an undertaking given by the Government. To that we cannot possibly consent

It is urged also that the consent in writing does not properly cover even the case of accused No. 1. We think, however, that it does cover his case, because he is named and from what happened contemporaneously with the grant of this consent there is no doubt that the nature of the proceedings to be initiated was known and understood, so that the omission of mention of them in the document does not render that document inoperative as regards accused No. 1. But I must say that the document is very carelessly drawn up, and further that proper care and attention ought to be given to these matters by the responsible officers.

I will now turn to the facts. It was proved to the satisfaction of the trial Court and of the Court of Appeal that when the Police raided the shop of accused No. 1, they found a furnace ready heated and on it a crucible containing molten silver and near it a large number of sovereigns in an open dish or receptacle so placed as to be ready for transfer to the crucible. It is contended that these facts are not established by the evidence and in particular that it is not shown that there was a crucible on the furnace with molten silver in it. No doubt that fact was disputed before the trial Magistrate and evidence was recorded before him to show that there was no crucible. The Magistrate, however, found that there was a crucible with molten silver in it, and when the matter came up in appeal before the Sessions Judge, he recorded in his judgment,—"It is admitted, that when the shop of accused No. 1 was raided, a furnace was found burning with a crucible on it containing molten silver." If that circumstance was admitted before the Court of Appeal I feel no hesitation whatever in accepting it as a fact, sitting here as a Court of Revision. The facts, therefore, are as stated in the judgment of the Sessions Judge, and what those facts mean beyond any doubt to my mind is this that the sovereigns were there for the purpose of being melted, and that the crucible with the molten silver on it was there for the purpose of having those sovereigns or some of them placed in it.

The only point that remains, then, is to consider whether this does amount to an attempt to melt these sovereigns or some of them. It seems to me that it does. I will take a case that has been referred to—*Queen Empress* v. *Luxman* (1),—it is stated that Sir Lawrence Jenkins described an attempt in these words:—"An attempt is an intentional preparatory action which fails in its object—which so fails through circumstances independent of the person who seeks its accomplishment." We have another view of what an attempt is stated in the case of *Emperor* v *Chandkha Salabatkha* (2), in which, at page 555*, there is a quotation of what Mr. Justice Blackburn said, that,—"if the actual transaction has commenced which would have ended in the crime, if not interrupted, there is clearly an attempt to commit the crime." The transaction in this case comprised the heating of the furnace, the placing of the silver in the crucible, the placing of the crucible with the silver in the furnace, the lapse of time required to melt the silver and, finally, the depositing of the sovereigns in the crucible containing the molten silver. The whole of this somewhat complicated, and by no means brief, transaction had been accomplished except the final act of putting the sovereigns into the molten silver in the crucible. That, in my judgment, shows, and clearly shows that there was an attempt to commit this offence. Therefore, I think, that the accused No. 1 was rightly convicted.

(1) 2 Bom L. R. 286 at p 296.
(2) 20 Ind Cas. 611: 37 B. 553 at p. 555; 15 Bom. L. R. 564: 14 Cr. L. J. 451.

*Page of 37 B.—*Ed.*

BIR KISHORE ROY v. EMPEROR.

But I think that, having regard to the circumstance that the melting of coin was formerly not an offence and we are told formerly not uncommon, and that it has been made an offence by special rules of a temporary character to meet a special purpose and that, so far as we know, this is the first case of the kind in these parts—certainly the first case that has come before us—we think that the punishment need not be so severe as that which has been imposed.

We, therefore, change the sentence of imprisonment to imprisonment for that period which the accused No. 1 has already undergone, and we leave the sentence of fine unchanged.

Accused No. 2 is acquitted and the fine, if paid, must be refunded.

SHAH, J.—I agree.

Order accordingly.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 93 OF 1918.

May 8, 1919.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Coutts.

BIR KISHORE ROY—APPLICANT

versus

EMPEROR—RESPONDENT.

Legal Practitioners Act (XVIII of 1879), s. 13, order made under—Appeal to His Majesty in Council, whether permissible—Letters Patent (Patna) cls. 31 to 34.

The Legal Practitioners Act contains no provision conferring a right of appeal to the Privy Council from an order passed by a High Court under section 13 of the Act Clauses 31 to 3 of the Letters Patent dealing with the right to appeal to His Majesty in Council do not apply to orders passed in exercise of the administrative or disciplinary powers conferred upon the High Court by Letters Patent or by Statute. [p. 599, col. 2; p. 600, col. 1.]

Mr. *S. A. Ashgar* (with him Mr. *Gajendra Prasad Das*), for the Applicant.

Mr. *Sultan Ahmad*, Government Advocate, for the Crown.

JUDGMENT.

MILLER, C. J.—This is a petition on behalf of Bir Kishore Rai, a Pleader practising at Puri, in the Courts subordinate to the District Court of Cuttack, praying for leave to appeal to His Majesty in Council from an order passed by a Full Bench of this Court, under section 13 of the Legal Practitioners Act, 1879, suspending him from practice for a period of six months from the 7th February 1918. The circumstances under which the petitioner was suspended appear from the judgment of the Court in the matter of *Emperor* v. *Bir Kishore Rai* (1). There were three charges against him of accepting briefs for both sides. The first was a mortgage suit in which he appeared for the plaintiffs and signed the plaint and subsequently accepted a *vakalatnama* from the mortgagor, one of the defendants, and filed a written statement admitting the claim although other defendants, transferees, were contesting it. In the second case he appeared for a decree-holder in an execution case, and subsequently appeared for the judgment-debtor praying for an order to set aside the sale obtained in execution. In the third case he first appeared for the decree holder in execution, then appeared for an adverse claimant under Order XXI, rule 58, in the same proceedings, and when that claim was dismissed and the property sold, finally appeared for the judgment-debtor seeking to set aside the sale. This Court found that this was grossly improper conduct in the discharge of his professional duty within section 13 (*b*) of the Legal Practitioners Act and suspended him accordingly.

We are now asked to grant a certificate that the case is a fit one for appeal to His Majesty in Council.

A preliminary objection has been raised that the Court has no jurisdiction to grant leave to appeal in such a case as the present, as no appeal lies unless their Lordships should decide for special reasons to admit it.

There is no provision in the Legal Practitioners Act conferring a right of appeal from an order passed by the High Court under section 13. It is contended, however, that under clause 31 of the Letters Patent by which this Court is constituted an appeal lies to His Majesty in Council. That clause provides that an appeal shall lie to His Majesty in Council in any

(1) 45 Ind. Cas. 684; 3 P. L. J. 390; 19 Cr. L. J. 636.

matter not being of criminal jurisdiction (*inter alia*) any final order made in the exercise of original jurisdiction not coming under the operation of clause 10. Admittedly, the case is not covered by clause 10, which provides for appeals to the High Court itself from the decision of a Single Judge, or of two or more Judges where they are equally divided in opinion. There is a proviso to clause 31 that the sum or matter at issue shall be of the amount or value of not less than Rs. 10,000, or that the judgment, decree, or order appealed from shall involve a claim, demand or question respecting property of the like amount or value, and an appeal is also allowed.

"From any other final judgment, decree, or order made on appeal or otherwise as aforesaid when the said High Court declares that the case is a fit one for appeal."

The words "or otherwise as aforesaid" clearly refer to judgments, decrees, or orders passed in the exercise of original jurisdiction not being criminal jurisdiction or covered by clause 10.

Clauses 9 to 27 of the Letters Patent deal with the different clauses of jurisdiction which are conferred on the High Court. They are civil, criminal, admiralty, testamentary, and intestate and matrimonial jurisdiction, appellate and original. The next three clauses deal with procedure, and clauses 31 to 34 deal with appeals to the Privy Council. In my opinion, the clauses dealing with the right of appeal to His Majesty in Council were meant to be confined to the different clauses of jurisdiction above enumerated and not to the administrative or disciplinary powers conferred on the Court by earlier clauses in the Letters Patent or by Statute. The use of the word "jurisdiction" in clause 31 clearly seems to indicate that the appeals referred to are appeals from judgments, decrees, and orders passed in the exercise of one or other of the clauses of jurisdiction conferred by clauses 9 to 27 where the word jurisdiction is used. In the clauses conferring administrative and disciplinary powers the word jurisdiction is nowhere used to describe such powers. In fact, the powers of removing or suspending from practice granted by clause 8 of the Letters Patent are confined to the cases of Advocates, Vakils, and Attorneys. The like power in the case of Pleaders is conferred only by section 13 of the Legal Practitioners Act, and is not a power referred to in the Letters Patent at all. It has been held, however, by the High Court at Bombay that the right of appeal to His Majesty in Council granted by clause 39 of the Letters Patent of that High Court (corresponding to clause 31 in those of this Court) did not apply to orders passed suspending a Vakil in the exercise of the disciplinary powers granted to that Court similar to those contained in the present clause 8. [See *G. S. D.* v. *Government Pleader* (2)]. It was also held by the Supreme Court of Bombay in *Morgan* v. *Leech* (3) in 1841 that the Charter granting an appeal from a "judgment or determination" did not apply to a rule of the Court refusing to strike a person off the rolls. Matters of this nature have generally been held to be the subject of special leave. *James Minchin, In re* (4) was a case where the Supreme Court of Madras made an order dismissing the Master of that Court from his office for alleged misconduct. On appeal to Her Majesty in Council it was pointed out by their Lordships of the Judicial Committee that there was no right of appeal under the Charter, and that the order was not made in the course of a judicial proceeding. The clause in the Charter in question was as follows:—

"And it is our further will and pleasure and we do direct establish and ordain that if any person or persons shall find him, her or themselves aggrieved by any judgment or determination of the said Supreme Court of Judicature at Madras in any case whatsoever it shall be lawful for him, her or them to appeal to us our heirs or successors in our or their Privy Council in such manner and under such restrictions and qualifications as are hereinafter mentioned, that is to say, in all judgments and determinations made by the Supreme Court of Judicature at Madras in any civil cause the party or parties against whom or to whose immediate prejudice the said...

(2) 32 B. 106; 10 Bom. L. R. 21.
(3) 2 M. I. A. 428; 3 Moo. P. C. 368; 1 Sar. P. C. J. 215; 18 E. R. 362.
(4) 4 M. I. A. 220; 6 Moo. P. C. 43; 18 E. R. 683.

determination shall be or tend may by his or their humble petition to be preferred for that purpose to the said Court pray leave to appeal to us our heirs or successors in our or their Privy Council stating in such petition the cause or causes of such appeal."

Special leave was subsequently granted, and the appeal was heard on the merits. The words "in any civil cause" in the Charter quoted do not appear to me to be less comprehensive than the words in clause 31 of this Court's Letters Patent which restrict appeals to judgments, decrees or orders passed in the exercise of appellate or original jurisdiction, such jurisdiction having already been defined in the preceding clauses, the only possible class which might apply to the present case being that described as civil jurisdiction. In Safford and Wheeler's Privy Council Practice, at page 789, the practice relating to this class of cases is referred to as the subject of special leave, and there can be little doubt that they have been so treated by the Judicial Committee for a considerable period. The judgment of the Bombay High Court in the case of *G. S. D.* v. *Government Pleader* (2), above mentioned, refers to three earlier cases where the High Courts of Calcutta and Allahabad appeared to have granted leave, but, as pointed out in that judgment, those cases are of doubtful authority. In one of them, *Parboti Charan Chatterji, In the matter of* (5), it does not appear from the report whether leave was granted and in another [*Sashi Bhusan Sarbadhicary, In the matter of* (6)] special leave was obtained.

In my opinion this petition should be refused.

COUTTS, J.—I agree.

Application rejected.

(5) 17 A. 498 (P. C.); 22 I. A. 193; 6 Sar. P. C. J. 635; 8 Ind. Dec. (N. S.) 644.

(6) 34 I. A. 41; 4 A. L. J. 34; 9 Bom. L. R. 9 (P. C.); 17 M. L. J. 74; 11 C. W. N. 273; 5 C. L. J. 130; 2 M. L. T. 1; 29 A. 95; 5 Cr. L. J. 152.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 436 OF 1918.

January 10, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

HIRA GOBAR—ACCUSED No. 1—APPELLANT

versus

EMPEROR—RESPONDENT

Evidence Act (I of 1872), ss. 8, 25, 26—Statement made by accused to Police Officer, admissibility of—Conduct, evidence of—Statement made by Police Officer to complainant in presence of accused, admissibility of.

Statements made to a Police Officer or to a complainant in the presence of a Police Officer are inadmissible in evidence under sections 25 and 26 of the Evidence Act. [p. 603, col. 1.]

Similarly, evidence, which is substantially evidence of the confession of an accused person in the presence of a Police Officer is inadmissible as evidence of conduct apart from the accompanying statements under section 8 of the Act. [p. 603, col. 1.]

The second explanation to section 8 of the Evidence Act does not apply to a statement made by a Police Officer to a complainant in the presence of an accused person. [p. 603, col. 1.]

Criminal appeal from conviction and sentence passed by the Second Presidency Magistrate, Bombay.

Mr. *Munshi* (with him Messrs. *Thakoredas, T. Parekh* and *J. B. Kapadia*), for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—In this case three persons were charged with house-breaking at night and theft of property worth about Rs. 22,000, said to have been committed in the bungalow of the complainant on the Walkeshwar Road on the 11th February last year. The theft and the house-breaking alleged were undoubtedly committed. A part of the property stolen was later on traced to one Moti Narottam residing in the Palanpur territory, and, as a result of the investigation that followed upon this tracing of the property, the present accused who belong to the Kaira District, were sent up for trial to the Second Presidency Magistrate.

The property which has been traced has been identified, and there can be no doubt that the property traced to Moti and the witness Shiva in the case formed part of the property stolen from the house of the

complainant. The principal evidence against these three persons was the evidence of the witness Moti Narottam. The learned trial Magistrate acquitted accused Nos. 2 and 3 on the ground that the evidence of Moti Narottam, who was undoubtedly an accomplice, required independent corroboration and that there was no such corroboration in any material particulars as regards these two accused persons. As to the accused No. 1 the trial Magistrate held that such corroboration was afforded first by the close resemblance between the foot-print of accused No. 1 and the tracing of a foot-mark which was found on a table in the house of the complainant immediately after the offence, and secondly, by the evidence of the Inspector of Police to the effect that the accused No. 1 pointed out on the 5th June the house which he had entered on the night of the offence and the various places in the house connected with the offence and accordingly convicted him. The accused No. 1 has appealed to this Court and the points in the appeal relate to the admissibility and sufficiency of the evidence relied upon by the learned Magistrate as corroborating the story of the accomplice so far as it affects the appellant.

I may mention, at the outset, that the general account given by the accomplice appears to me, as it appeared to the trial Magistrate, to be substantially true, and that, under the circumstances, corroboration as to the connection of the accused with the house breaking and theft is needed. It is proved in the case that about this time Shiva occupied a house in Khetwadi; that the three accused used to stay with him or to visit him, and that probably they were in Bombay at the time, when this theft was committed. But that circumstance does not corroborate the story of the prosecution that the three accused were concerned in the theft on the night of the 11th of February. In fact, the trial Magistrate has not treated the circumstance in that way as to accused Nos. 2 and 3, and it is equally ineffective as regards accused No. 1.

The argument in the appeal has mainly ranged round the two circumstances which the trial Magistrate has relied upon as sufficiently corroborating the evidence of the accomplice as to the connection of accused No. 1 with the theft. The evidence which relates to the resemblance of the two foot-prints is not sufficient to corroborate the accomplice. A careful comparison of the foot-print with the tracing on the glass does not yield any better result than that the two foot-prints may be of the same man. It is impossible to say with any degree of confidence on a comparison of these prints that the mark which was observed on the table in the house of the complainant on the night of the 11th was really the mark of the right foot of accused No. 1. There was some argument as to the admissibility of the evidence of the expert examined on behalf of the prosecution to establish the identity. But it is not necessary to go into that question. Assuming his evidence to be admissible, it is clear that his opinion cannot be accepted as establishing the identity of the appellant as the foot marks do not coincide with sufficient accuracy. In the course of the argument it was fairly conceded by the Government Pleader that he could not maintain that the two marks were sufficiently identical, and on a comparison of these two marks I have come to the same conclusion. The apparent resemblance between the two marks does not carry the case of the prosecution any further than the evidence of the accomplice.

As to the second item of corroboration, which consists of the evidence of the Inspector and the complainant, the question is whether that evidence is admissible. The learned Magistrate is of opinion that it is admissible. I am, however, unable to agree with that view. In my opinion the evidence taken as a whole shows that it is evidence of a confession of the accused in the presence of a Police Officer. It is true that in terms it purports to establish that accused No. 1 pointed out the house and the various places connected with the offence and it is contended that it is really evidence of the conduct of the accused, and that, therefore, it is admissible under section 8 of the Indian Evidence Act. It is clear from the evidence that the real significance of the conduct arises out of the statements made by the accused at the time, and that the conduct apart from the statements made either expressly or impliedly by gestures by the accused has very little value. The

meaning that was conveyed to the witnesses by what is contended to be the conduct of the accused and not his statements was really conveyed by the statements made at the time when he pointed out the various places. Such statements would clearly be inadmissible under sections 25 and 26 of the Indian Evidence Act as they were made to the Police Officer or to the complainant in the presence of the Police Officer. It is common ground that no fact is deposed to as discovered in consequence of the information furnished by the accused and that section 27 of the Indian Evidence Act does not apply. I am unable to accept the contention urged by the learned Government Pleader that this evidence, which is substantially evidence of the confession of the accused in the presence of a Police Officer, can be admitted as evidence of conduct, apart from the accompanying statements, under section 8. It is further urged that in any case the statements made by the Police Officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the theft, would be admissible under Explanation 2 of section 8. I do not think, however, that Explanation 2 can apply to the statement made by the Police Officer to the complainant in the presence of the accused, first, because the conduct, apart from the accompanying statements, is not shown to be relevant, and secondly, because under the circumstances such a statement cannot be said to affect the conduct of the accused For these reasons I am of opinion that the evidence of the Police Inspector and the complainant as to the pointing out of the various places by the accused No. 1 is really evidence of the confession of his guilt made while he was in the custody of the Police Officer, and is, therefore, inadmissible.

In the result, therefore, we have the evidence of the accomplice without any material corroboration as to the connection of the appellant with the theft and house breaking. On that evidence the learned Magistrate has rightly refused to convict accused Nos. 2 and 3 and under the circumstances the accused No. 1 also is entitled to the same treatment. I am of opinion that the evidence of the accomplice is insufficient to justify the conviction of the appellant on the charge of theft and house-breaking. The conviction and sentence must be set aside and the appellant should be acquitted and discharged.

HEATON, J.—I agree. Taking the evidence and circumstances in this case I think it is inevitable that the appellant must be acquitted. He is convicted of theft and, apart from the two matters to which I will allude later on, the evidence of importance in the case is directed to connect him not with the theft, but with the disposal of certain of the stolen property some time after the theft and at places hundreds of miles away from the scene of the offence. The evidence of the approver Moti makes much more certain the connection of himself and other persons with the stolen property than the connection of the present appellant and those who were co accused as thieves with him. The Magistrate very rightly, as I think, found it quite impossible to convict any of these three persons on the strength of Moti's evidence. As regards the present appellant, however, he was convicted by reason of the two items of evidence which my learned brother has fully dealt with.

As regards the foot-print, all I need say is that after the closest examination and after careful comparison of the outline taken on glass of the foot print found on the table with the foot print of the accused No. 1, the present appellant, the result is this. The two may be impressions of the foot of the same person, but it is at least equally possible that they may be the impressions of the feet of different persons. That item of evidence is, therefore, absolutely neutral.

As regards the other item, I entirely agree with my learned brother that in this case what the appellant was doing was that he was making a confession to a Police Officer. But the confession comprised not merely words but gestures, and what is sought to be done is, while not proving the words, to prove gestures and further to prove all that is necessary to give significance to those gestures. But I quite agree that gestures are just as much a part of a confession as are the words used. So that item of evidence also must be discarded.

Therefore, I think the order of acquittal, as I have said in this case is inevitable.

Accused acquitted.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1161 OF 1918.

January 7, 1919.

Present:—Mr Justice Wilberforce.

EMPEROR—PROSECUTOR

versus

ASGHAR ALI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 439—Revision—Enhancement of sentence—Sentence not in accordance with law—High Court, power of—Sentence of imprisonment for period already undergone, legality of.

The High Court can interfere, under section 439 of the Criminal Procedure Code, to enhance a sentence, only in those cases in which a legal sentence has been passed. A sentence for a period already undergone in the lock-up is not a legal sentence.

Case reported by the District Magistrate, Karnal, with his No. 1332 G. of 3rd October 1918.

FACTS.—Lieutenants C. Reynolds and N. Walker, while travelling from Simla to Delhi by train, were robbed of their articles. The former was robbed on the night between 19-20th July and the latter on the night between 1st-2nd August 1918. The accused was travelling without tickets in the same trains as the complainants. Last time when arrested he was searched and found in possession, besides the articles of stolen property, of two 1st class tickets from Simla to Delhi, which apparently belonged to the complainants. He was charged under section 411, Indian Penal Code, and sentenced to imprisonment for the period already passed by him in the lock-up.

GROUNDS.—The sentence is perfectly absurd. So is the conviction under section 411 instead of section 379. The thief is proved to have been on the trains on both nights on which the thefts were committed, he is also found in possession of the two 1st class tickets stolen besides other property. How could he have obtained the 1st class tickets unless he himself had stolen them? They are worth nothing and no one would "receive" them. I think the accused should have been sentenced to one year's imprisonment at least. There are two separate thefts which show the man is a habitual train thief. The case must go up for enhancement of punishment.

JUDGMENT.—In this case the accused has been sentenced in two cases by a Magistrate to imprisonment for the period which he had already passed in the lock-up. The District Magistrate has referred the case to this Court with a recommendation for enhancement of the sentences. I regret, however, that I am unable to take action as no legal sentence has been passed and the provision of section 439, Criminal Procedure Code, only refers to such sentences. *Bhagel Singh* v. *Crown* (1) is an authority that a sentence for a period already undergone is not a legal sentence. I am, therefore, compelled to remand the case to the Magistrate with directions that he shall pass sentences in accordance with law upon the accused.

Case remanded.

(1) 9 P. W. R. 1907 Cr.; 5 Cr. L. J. 217.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 28 OF 1919.

April 7, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

MURARJI RAGHUNATH GUJARATI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 420—Cheating—Goods paid for in currency notes—Shopkeeper, refusal of, to give face value of notes—Offence—Guilty, plea of—Admission of facts alleged, effect of.

Where a customer paid for goods in currency notes and a dispute arose as to the amount of change due to him, the shopkeeper stating that the notes were not worth their face value and in consequence gave less change than was due:

Held, that the shopkeeper did not commit the offence of cheating. [p 605, col. 2.]

Where an accused person admits the facts alleged such admission does not necessarily amount to an admission of the offence with which he is charged. [p. 605, col. 1.]

Criminal application for revision against conviction and sentence passed by the 1st Class Magistrate, East Khandesh.

Mr. *P. B. Shingne*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

MURARJI RAGHUNATH GUJARATI *v.* EMPEROR.

JUDGMENT.

HEATON, J.—This is a case which is both interesting and important. A customer purchased from a shopkeeper goods the price of which was Rs. 2-13-0 and he tendered in payment two currency notes, one of Rs. 2-8-0 the other of rupee one. The shopkeeper accepted the notes and the change which apparently he ought to have given was annas 11 but he tendered as change only 9 anna and 3 pies, saying that the notes were not worth their face value and that 1 anna and 9 pies was charged by the shopkeeper on that account. At least that is what in substance happened, though of course we cannot be sure from the evidence, what were the exact words used. What happened exactly next we do not know from the evidence. But we know either that the customer complained to a Police Officer or that the Police Officer saw what had happened and intervened, for the two notes paid to the shopkeeper were attached, a Panchanama was made and the shopkeeper was sent before a Magistrate who, after taking evidence, framed a charge of cheating. The accused pleaded guilty to the charge. He was convicted and sentenced to pay a fine of Rs. 25 and he has applied to this Court in revision.

First, I will deal with the plea of guilty. I feel perfectly certain in my own mind that the accused never intended by his plea of guilty to admit more than that the facts alleged against him were true. Whether on those facts he ought to be held to have committed the offence of cheating is really a question of law, as to which the plea of the accused must be considered immaterial. Magistrates sometimes make mistakes of this kind. They think that because an accused person admits the facts, therefore, he admits that he has committed the offence with which he is charged. This is one of those cases in which the admission of the facts does not amount to an admission of the offence. Therefore, I shall proceed to deal with the case as if there were no plea of guilty.

For cheating there must be deceit. In this case, obviously, there was no deceit at all in the earlier part of the transaction. There was a sale of goods after the usual inquiry as to price and there was a tender of the price by the purchaser. So far then, there was clearly no deceit. But it is said that the shopkeeper deceived when he stated that the notes were not worth their face value. Whether he said this before or after he had taken the notes into his hands does not appear. But, in substance, it is to my mind perfectly clear that there was no deceit at all. The customer was not induced to hand over the notes by any representation on the part of the shopkeeper that he would get change calculated on the face value of the notes. He handed the notes to the shopkeeper in the ordinary course of the sale and purchase transaction and what really happened was, that a dispute then arose as to the correct amount of change due to the customer. He claimed 11 annas calculated on the face value of the notes. The shopkeeper said he would give only 9 annas and 3 pies, because the notes were not worth their face value. It is, as I judge it, simply a case of a dispute between the shopkeeper and the customer, and in no way whatever a case of deceit, and certainly not a case of cheating. That is the only matter that we have to consider. The case may illustrate the fact that there are economic and financial difficulties about these notes. With that we have nothing to do. We have merely to decide whether the present applicant is guilty of the offence of cheating, and, in my opinion, it is not a matter even of the slightest doubt—I hold that it is perfectly clear—that he never committed the offence of cheating in this matter at all.

I think our order should be that the conviction is set aside and that the fine, if paid, should be refunded.

SHAH, J.—I entirely agree.

Order set aside.

PUNJAB CHIEF COURT.
CRIMINAL REVISION NO. 1320 OF 1918
January 31, 1919.
Present:—Mr. Justice Shadi Lal.
HOSHNAK RAM-GANGA RAM—
PETITIONERS
versus
EMPEROR—RESPONDENT.

Petroleum Act (VIII of 1899), ss. 11, 15 (a)—Transporting petroleum, what amounts to—Unlawful possession of petroleum, what is.

A person who purchases petroleum from the agent of a company who, in order to give delivery, has to procure it from another place, cannot be convicted of "transporting" petroleum, within the meaning of section 11 of the Petroleum, Act.

A person who takes delivery of a quantity of petroleum in excess of the quantity allowed by law, and is unable to prove that he did not continue for a reasonable time to be in possession of the entire quantity of which he took delivery, is guilty of the offence of being in possession of petroleum in excess of the quantity allowed by law, within the meaning of section 15 (*a*) of the Petroleum Act.

Criminal revision from the order of the Sessions Judge, Lyallpur, dated the 9th October 1918.

Mr. *Ram Chand*, for the Petitioner.

Mr. *Mul Chand*, Public Prosecutor, for the Respondent.

JUDGMENT.—The petitioners, who constitute the firm of Hoshnak Ram-Ganga Ram, doing business at Toba Tek Singh, in the District of Lyallpur, have been convicted of having transported and possessed petroleum in contravention of section 11 of the Indian Petroleum Act, VIII of 1899. Now, so far as the offence of transporting is concerned, I am of opinion that the conclusion of the lower Courts cannot be upheld.

The material facts are briefly as follows:—The Asiatic Petroleum Company of Karachi, which consigned the petroleum have got their agents Mul Chand-Khan Chand at Lyallpur. It appears that the petitioners entered into a contract with the agents at Lyallpur for the purchase of a certain quantity of petroleum, and that, in pursuance of that contract, the agents wrote to the Asiatic Petroleum Company at Karachi to despatch the goods. The latter consequently despatched petroleum and sent the railway receipts to Mul Chand Khan Chand. It is to be observed that in the railway receipts the Asiatic Petroleum Company are described as the consignors and Mul Chand Khan Chand as the consignees. So far as these receipts are concerned, the petitioner's names did not originally appear.

Upon instructions received from Mul Chand-Khan Chand, the petitioners went to them, paid the money and got the railway receipts endorsed in their favour. They then went to the railway station and took delivery of the goods. Upon these facts I am not prepared to hold that the petitioners can be deemed to have transported petroleum from Karachi to Toba Tek Singh. The word "transport," as defined in section 2 of the Act, means *to remove* from one place to another, and I fail to understand how it can be said that the petitioners removed petroleum from Karachi to its destination.

It is perfectly clear that they originally entered into a contract to purchase the goods, and that the property therein did not pass until the payment by them of the price to Mul Chand-Khan Chand and the endorsement of the receipts by the latter in their favour. The petroleum was, up to that date, the property of the Asiatic Petroleum Company, and the possession was also with them. If they had refused to deliver the goods to the petitioners, the latter could only claim damages for the breach of an agreement to sell; but they could not say before the aforesaid date that the *dominium* had passed to them or that the goods were in their possession. Suppose, the agents, instead of endorsing the railway receipts, had gone to the railway station at Toba Tek Singh and taken delivery of the petroleum from the railway administration, and then handed it over to the petitioners. In that case, I do not think that it could be seriously contended that the petitioners had transported the petroleum. And I do not consider that the fact that the agents endorsed the receipts to the convicts and authorised them to receive the goods makes any real difference in the matter.

Mr. Mul Chand for the Crown invites my attention to a judgment of the Madras High Court in *Queen-Empress* v. *Ramanujam* (1), which deals with the offence of trans-

(1) 13 M. 191; 1 Weir 834; 4 Ind. Dec. (N. S.) 845.

porting opium in contravention of the provisions of the Opium Act, I of 1878. In that case the accused had sent a servant to buy opium from a licensed dealer at a certain place and to bring it to Madras, and the Court rightly held that the act of the servant was the act of the master and consequently convicted the latter of the offence of transporting. I do not think that that judgment has any application to the facts of the present case. Neither the Asiatic Petroleum Company nor their agents, Mul Chand-Khan Chand, can be viewed as the agents of the petitioners. It seems to me that the petitioners were one party to the contract, and the Asiatic Petroleum Company, through their agents, were the other party to the contract. I am unable to hold that either the promisor or the promisee can in this case be regarded as the agent of the other.

On the question of possession, the matter seems to be simple enough. It is beyond dispute that the petitioners received delivery of 800 gallons of kerosene oil on the 9th May 1918, which was in excess of the quantity allowed by law. The evidence adduced by them that they sold 500 gallons to one Ram Chand at the railway station on that day has been disbelieved by the lower Courts, and there is nothing to show that they did not continue for a reasonable time to be in possession of the entire quantity of the kerosene oil of which they undoubtedly took delivery on the aforesaid date. They accordingly kept petroleum in excess of the quantity allowed by law, and have been rightly convicted of having been in possession of the entire quantity covered by the third consignment. Mr. Ram Chand for the petitioners places his reliance upon a judgment in *Swaminatha Iyer, In re* (2) but that case is distinguishable on the simple ground that there the person concerned immediately after taking delivery from the Railway Company distributed the petroleum at the railway premises to certain persons for whom it was intended. The Court accordingly held that he did not "keep" within the meaning of section 15 (*a*) of the Petroleum Act more than 500 gallons of petroleum for a reasonable time. Here, as stated above, the petitioners have failed to establish that they distributed any petroleum out of 800 gallons which they received on the 9th May 1918.

Accordingly, I accept the application for revision so far as to set aside the convictions and sentences in respect of the transporting of petroleum. The convictions and sentences in regard to the possession of petroleum are maintained. The fines levied in consequence of the convictions which are hereby set aside must be refunded to the petitioners.

Revision accepted in part.

(2) 39 Ind. Cas. 995; 18 Cr. L. J. 627; (1917) M. W. N. 720.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION NO. 14 OF 1919.

April 11, 1919.

Present:—Mr. Justice Heaton and Mr Justice Shah.

In re CHANDULAL RANCHHOD—ACCUSED—APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 488, 489 -Maintenance, order directing payment of, to wif —Restitution of conjugal rights, decree for, effect of.

Where a wife obtains an order against her husband under section 488 of the Criminal Procedure Code and subsequently thereto the husband obtains a decree against the wife for restitution of conjugal rights, such decree determines and puts an end to the order of maintenance notwithstanding the fact that the husband does not execute the decree and continues to pay the maintenance. The wife in such a case is not in a position to make an application under section 489 of the Code. [p. 607, col 1.]

Criminal application for revision against conviction and sentence passed by the City Magistrate, 1st Class, at Ahmedabad.

Mr. *H. V. Divatia*, for the Applicant.

Mr. *G. N. Thakor*, for the Opponent.

JUDGMENT.

HEATON, J.—This is in form an application under section 489 of the Criminal Procedure Code by a wife who, in the year 1910, obtained an order under section 488 for maintenance from her husband. She asked for an increased allowance and that is granted; and now the husband has applied to us in the exercise of our revisional powers.

The facts we have to deal with are these: The order under section 488 was

made in 1910. In 1912 the husband obtained a decree against his wife for restitution of conjugal rights. That decree was never executed. The wife has never, since 1910, lived with her husband and the husband has continued to pay without objection the allowance directed by the Magistrate's order of 1910. These, as the case is presented to us, are undisputed facts.

It seems to me that the decree of 1912 did, as a matter of law, determine or put an end to the Magistrate's order under section 488, and for this simple, but to me convincing, reason. The decree for restitution of conjugal rights is a statement by a Court of matrimonial jurisdiction that husband and wife are under an obligation to live together and that the wife has no right to live apart from her husband. The Magistrate's order of 1910 was in law a statement that the wife had a right to live apart from her husband; but, of course, in the nature of things, any order made by a Magistrate in the exercise of the limited powers conferred on Magistrates by Chapter XXXVI of the Criminal Procedure Code, is subject to the orders of Civil Courts exercising matrimonial jurisdiction. For it is those latter Courts and they alone, that have the power to say finally what are the legal relations between the husband and the wife. A Magistrate under Chapter VI of the Criminal Procedure Code is granted a very limited power for the sake of convenience and that only. Therefore, it seems to me that the wife was not in a position to make a proper application under section 489, because there was no subsisting order under section 488. However, in all the circumstances of the case, we have to come to the conclusion that the Magistrate should treat the application nominally under section 489 as an application made by the wife under section 488. The Magistrate should hear any further evidence that may be offered and what arguments are offered and then determine, in the light of the circumstances at or about the date of the application, whether the wife is or is not entitled to an order for maintenance under section 488, and, if she is what the amount of that maintenance should be. The proceedings should be returned to the Magistrate for this purpose.

We set aside the order which the Magistrate has made.

SHAH, J.—I agree.

Order set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 331 OF 1919.

May 8, 1919.

Present:—Mr. Justice Walmsley, and Justice Sir Syed Shamsul Huda, KT.

SAHADAT KHAN—2ND PARTY—PETITIONER

versus

TAIJADDI SHEIKH—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Order under s. 145 without taking evidence, legality of—Jurisdiction of Magistrate—Revision.

An order under section 145, Criminal Procedure Code, without taking any evidence whatever, is an order made without jurisdiction.

Rule against the order of the Sub Divisional Magistrate, Khulna, dated the 14th March, 1919.

Babu *Bir Bhushan Dutt*, for the Petitioner

Babu *Hemendra Coomar Das*, for the Opposite Party.

JUDGMENT.—The ground on which this Rule was issued was that the learned Magistrate had acted without jurisdiction in passing the order under section 145, Code of Criminal Procedure, without taking any evidence whatever. The explanation submitted by the Magistrate and the affidavit filed by the opposite party do not afford sufficient justification for the order. The Magistrate was doubtless invited to go to the spot. But that invitation did not mean that he was to dispose of the case without recording any evidence whatever. We think in this case that the Magistrate acted without jurisdiction (and the order must be set aside). We make no order as to any further proceedings because that lies outside the scope of our functions.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1839 OF 1917.

December 16, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Kumaraswami Sastri.

V. RAMAMURTHI AYYAR AND ANOTHER —DEFENDANTS—APPELLANTS

versus

PARASARAM MANGAYACHARYULU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss 65, 190—Magistrate directing arrest of accused, legality of—Damages, suit for—Magistrate, liability of.

A Sub-Magistrate, acting under sections 65 and 190 of the Criminal Procedure Code in respect of a complaint under section 448 of the Penal Code, went to a temple, where the accused were in hiding, and arrested them, although he had passed no final order on the occurrence report which he had received the day previous:

Held, that, independently of the occurrence report, the Magistrate's action was justified, and he was not liable in an action for damages

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Appeal Suit No. 43 of 1916, preferred against the decree of the Court of the Additional District Munsif, Bapatla, in Original Suit No. 222 of 1914.

FACTS appear from the judgment.

Messrs. *V. Ramesam* and *N. Kunjitapatam Ayyar*, for the Appellants.—The 1st defendant, in making the arrest, acted in exercise of his powers. Under section 60, Criminal Procedure Code, a Magistrate can himself make an arrest or direct the arrest of a person and under section 190 (*c*) he can take cognizance of an offence on his own knowledge or suspicion that such an offence had been committed. Here the Magistrate, on entering the temple, found the accused making attempts to conceal themselves. They shut themselves in and refused to open the door. That is a case of legitimate suspicion entitling the Magistrate to act as he did under section 190. That he was perfectly fair is evidenced by his having enlarged the plaintiffs on bail immediately. When he made the arrest the occurrence report was also not disposed of. The defendants are immune from civil action.

Mr. *C. Rama Rao* for Mr. *P. Narayanamoorthy*, for the Respondents.—The Sub-Magistrate had the occurrence report before him on which he should have acted. There were no grounds for suspicion and the Magistrate should not have acted under section 190.

JUDGMENT.—The pleadings clearly state that the second defendant the Sub-Magistrate, was acting under sections 190 and 65 of the Criminal Procedure Code in respect of a complaint under section 448 of the Indian Penal Code, when he went to the temple and found the plaintiffs barricading themselves inside and refusing to open the door, and then arrested them, releasing them immediately after on their recognizance to appear to answer a charge under section 448 of the Indian Penal Code. His acts and those of the 1st defendant, the Inspector of Police, were perfectly legal. The Subordinate Judge has misread the evidence of the Sub-Magistrate, who does not say that he had disposed of the occurrence report which reached him on the previous day. As he has passed no final order on the report, it was open to him to take action upon it next day, and further under section 190 (1) (*c*) the facts which he saw at the temple were sufficient to justify him in taking action independently of the occurrence report. We set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

M. C. P.

Appeal allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2271 OF 1918.

December 18, 1918.

Present:—Mr. Justice Martineau.

BISHAMBAR NATH—DEFENDANT—APPELLANT

versus

Musammat PARBATI—PLAINTIFF—RESPONDENT.

Lunacy Act (IV of 1912), Ch. V—Court, power of, to alienate portion of lunatic's estate.

Under Chapter V of the Lunacy Act, where a manager is appointed of a lunatic's estate it is he alone who can, with the permission of the Court, alienate any portion of it. The Court has no power to do so. [p. 610, col. 1.]

JOGENDRA NARAYAN RAY *v.* DURGA CHARAN GUHA.

Miscellaneous first appeal from the order of the District Judge, Delhi, dated the 26th July 1918.

Bhagat *Govind Das*, for the Appellant.

Mr. *B. D. Kureshi*, for the Respondent.

JUDGMENT.—Jagdish Rai was adjudged to be of unsound mind, and Bishambar Nath was appointed manager of his estate. On an application made by *Musammat* Parbati, the guardian of the person of the lunatic, under section 80 of Act IV of 1912, for the removal of the manager, and for the appointment of another person in his place for the purpose of selling the lunatic's house, the District Judge has passed an order for the house to be sold. Bishambar Nath appeals.

There is no need to go into the question whether it is desirable or not that the house should be sold, or whether, as the learned District Judge finds, Bishambar Nath has been mismanaging the property of the lunatic, as the appeal must succeed on the ground that the learned District Judge had no power to order the house to be sold. Under Chapter V of Act IV of 1912, where a manager of the lunatic's estate has been appointed, the Court has no power to alienate any portion of it.

It is only the manager who can do so, with the permission of the Court. If the appellant is mismanaging the estate and is not a fit person to remain in charge of it the Court may, under section 80 (1) of the Act, remove him and appoint some one else in his place. This is in fact what the respondent asked the Court to do, but instead of passing an order under section 80 the lower Court has ordered the sale of the property, which it was not competent to do. I cannot agree with the contention of Counsel for the respondent that the order should be regarded as one for the removal of the manager.

Although the objection that the order is illegal was not taken in the grounds of appeal, it is one which cannot be ignored.

Holding that the lower Court's order was *ultra vires* I accept the appeal and set aside the order. This will not debar the District Judge from taking action under section 80, if he finds that there is sufficient cause for doing so. The parties will bear their own costs.

Appeal accepted.

CALCUTTA HIGH COURT.

CIVIL RULE No. 384 OF 1918.

November 25, 1918.

Present:—Mr. Justice Chatterjea and Mr. Justice Newbould.

JOGENDRA NARAYAN RAY—PETITIONER

versus

DURGA CHARAN GUHA THAKURTA—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 4, 5, 6, 7—Application for leave to sue in forma pauperis—*Inquiry, scope of—Evidence, admissibility of, on merits—Examination of applicant—Jurisdiction—Irregularity—Revision.*

Where, upon an application to sue *in forma pauperis*, the Court holds an inquiry under the provisions of Order XXXIII of the Civil Procedure Code, it is empowered to examine the applicant not only with reference to the question of his pauperism, but also with reference to the merits of his claim, and to consider the statements made in the plaint and by the applicant in his examination in determining whether his allegations do not show a cause of action as laid down in clause (*d*) of rule 5 of that Order. But the Court cannot examine other witnesses for deciding the question of limitation or any question other than the pauperism of the applicant. [p. 611, col. 1.]

Where, therefore, a Court decided the question of limitation, not upon the allegations made in the plaint, nor upon the statements made by the applicant in his examination, but upon conclusions based upon an examination of the witnesses who were summoned for the purpose of proving the pauperism of the applicant, the High Court set aside the order as being made without jurisdiction. [p. 613, col 2; p. 614, col. 1.]

Rule against the order of the Subordinate Judge, Barisal, dated the 2nd April 1918.

Babu *Gunada Charan Sen* (with him Babu *Nilkanta Ghose*), for the Petitioner.

Babu *Abinash Chandra Guha* (with him Babu *Jitesh Chandra Guha*), for the Opposite Party.

JUDGMENT.—This is a Rule calling upon the opposite party to show cause why an order of the Subordinate Judge of Barisal dismissing an application for leave to sue as a pauper should not be set aside.

The petitioner applied in the Court below for leave to sue *in forma pauperis* for recovery of certain *debattar* property. The learned Subordinate Judge found that he was a pauper, but dismissed the application on the ground that upon the evidence adduced by the plaintiff, the suit was barred by limitation. The Court below says that the evidence adduced by the petitioner shows that since 1286 B. S. neither the petitioner

nor his father has ever been in possession of the property. No such statement was made by the plaintiff himself either in his plaint or in his examination before the Court, and the learned Subordinate Judge, therefore, has evidently come to that conclusion upon certain statements made by some witnesses (on behalf of the plaintiff-petitioner) who had been summoned for a different purpose, namely, for the purpose of proving that the plaintiff was a pauper.

The question is whether the Court below was right in taking evidence on the point in an enquiry into the pauperism of the petitioner.

Order XXXIII of the Civil Procedure Code lays down the procedure for hearing an application for leave to sue as a pauper. Rule 3 lays down what the contents of the application should be. Rule 4 provides that where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant. Rule 5 lays down the grounds upon which the Court shall reject an application for permission to sue as a pauper, and one of the grounds, clause (*d*), is "where his allegations do not show a cause of action." Rule 6 says that when the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government Pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof. Rule 7 says that on the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party and may examine the applicant or his agent and shall make a memorandum of the substance of their evidence. The provisions of rules 5 and 7 of Order XXXIII correspond to sections 405, 407 and 419 of Act XIV of 1882.

There has been some difference of judicial opinion with regard to the exact scope of an inquiry under rules 5 to 7, or the corresponding sections of the earlier Codes. In some cases it has been laid down that the Court cannot go into any question as to the merits of the case; while a contrary view appears to have been taken in some other cases. In some other cases again it has been held that a Court is not confined merely to the statements contained in the plaint, but also can look into the statements made by the applicant who may be examined by the Court, and the Court, therefore, can look into the merits of the case in so far as they appear upon the plaint and the statements of the petitioner.

Rule 4 expressly gives power to the Court to examine the applicant regarding the merits of the claim and the property of the applicant, so that there is no doubt that the applicant himself can be examined not only with reference to the question of his pauperism but also with reference to the merits of the claim. If the application is to be decided merely upon a consideration of the statements made in the plaint, it would be wholly unnecessary to examine the applicant on the merits of his claim.

We think, therefore, that the Court may not only consider the statements made in the plaint but also the statements made in his examination by the applicant before the Court, in determining whether his allegations do not show a cause of action as laid down in clause (*d*) of rule 5 of Order XXXIII. But we think the Court cannot examine other witnesses for deciding the question of limitation or any question other than the pauperism of the applicant.

Turning to the decided cases on the point, we find that in the case of *Gunga Dass Adhikaree, In the matter of* (1), where the Court below had disallowed the application on the ground that a Will under which the applicant claimed had already been construed by the High Court in a previous suit against him, and that he had, therefore, no rights to sue, this Court (L. S. Jackson and D. N. Mitter, JJ.) held that it was competent to the Court to take into consideration the construction of the Will on which the applicant relied. The learned Judges observed that where the grounds stated in section 304 appear, the Court is bound to refuse an application to sue as a pauper, but if the Court does

(1) 14 W. R. 281; 11 B. L. R. App. 23 *note*.

not see reason to refuse the application, the Court is at liberty to fix a day for hearing evidence to be adduced on either side upon the question of pauperism, and upon such further hearing if the opposite party should bring to the notice of the Court any grounds upon which the Court would be bound to refuse the application, it would be at the discretion of the Court upon being so informed to refuse leave

On the other hand, in the case of *Parkash Ojha* v. *Dusruth Ojha* (2) it was held that where a Subordinate Judge had decided the question of limitation not upon the examination of the petitioner but upon that of other witnesses summoned for a different purpose, he exceeded his jurisdiction.

In an earlier case on the Original Side of this Court, the defendant proposed to show by examination of the plaintiff that on the facts stated in the petition, there was no cause of action. Macpherson, J., allowed the plaintiff to be examined with a view to show that on her own evidence, she had no cause of action. She was accordingly examined but her evidence did not show that she had no cause of action. It was then proposed to show it by calling other witnesses but Macpherson, J., refused to allow this. The case of *Gunga Dass Adhikaree, In the matter of* (1) appears to have been cited in argument on behalf of the defendant [see *Turramoney Dabee* v. *Hurro Mohun Chatterjee* (3)].

The decisions in the cases *Debo Das* v. *Mohunt Ram Charn Dass Chella* (4) and *Gopal Chandra Neogy* v. *Bigoo Mistry* (5) affirm the proposition that it is not open to a Court, at a preliminary stage, to enter into the merits of the suit.

If the learned Judges meant to lay down that the Court cannot go into the merits of the claim so far as they appear from the allegations in the plaint, and the statements made by the applicant in his examination, it would be opposed to the express provisions of sections 406 and 409 of the Code. But we do not think that that was meant, because the learned Judges observed: "if the Subordinate Judge had confined his enquiry to the allegation as made in the plaint, and if he said that these allegations do not show a right to sue, it is extremely doubtful whether this Court could interfere with his order." It does not appear that the applicant was examined in those cases. In the first, the Court below had decided the question of the rights of the parties, and not whether the allegations showed a right to sue, and in the second, the Court below dismissed the application upon a construction of a Will. The learned Judges (Ghose and Pratt, JJ.) held that the Court could not construe the Will at that stage.

In the Madras High Court in one of the earlier cases, *Koka Ranganayaka Ammal* v. *Koka Venkatachellapati Nayudu* (6), Turner, C J., and Kindersley, J., held that the Code does not authorise the rejection of an application for leave to sue *in forma pauperis* for want of merits, when the applicant is found to be a pauper and his allegations disclose a right to sue, and that when an application for leave to sue *in forma pauperis* is made, the Court should not go into evidence as to the merits of the claim. A different view, however, was taken in a later case [*Vijendra Tirtha Swami* v. *Sudhindra Tirtha Swami* (7)], where Subramania Ayyar, J., held that the Court below had not acted illegally in taking evidence and going into the questions whether the plaintiff's claim was *res judicata* and whether it was barred by limitation.

In *Amirtham* v. *Alwar Manikkam* (8) Sir Arnold White, C. J., held that under section 407 the applicant must make out that he has a subsisting cause of action capable of enforcement. In that case the Court below dismissed the application on the ground that the applicant on the face of the plaint did not appear to have a right to sue, though this was done at the hearing under section 409. In another case in the same volume [*Sankararama Ayyar* v. *Subramania Ayyar* (9)] White, C. J., held that the Court is not bound to give leave if the allegations made by the petitioner

(2) 25 W. R. 74.
(3) 11 B. L. R App 23
(4) 2 C. W. N. 474.
(5) 8 C. W. N. 70.
(6) 4 M. 323; 1 Ind Dec. (N. S.) 1061.
(7) 19 M. 197; 5 M. L. J. 193; 6 Ind. Dec. (N. S.) 842.
(8) 27 M. 37.
(9) 27 M. 120.

are such that, if true, they would show a good cause of action. In a still later case, a Full Bench of that Court held that "the investigation contemplated under section 409 of the Civil Procedure Code, where a day is fixed for hearing an application for leave to sue *in forma pauperis*, must be confined to the question of the applicant's pauperism. No evidence as to the merits of the case can be gone into in such an investigation" [see *Rathnam Pillai* v. *Pappa Pillai* (10)]. This was followed in the case of *Sankararamier* v. *Subramania Aiyar* (11), in which the learned Judges (Subramania Ayyar and Boddam, JJ.) held that the evidence referred to in section 409 of the Civil Procedure Code is confined to evidence in proof or disproof of the pauperism of the applicant, and does not include evidence as to the merits of the case, and the decision of White, C. J., in *Sankararama Ayyar* v. *Subramania Ayyar* (9) was overruled. In the latest Madras case, *Govindasami Pillay* v. *Municipal Council, Kumbakonam* (12), it has been held that Order XXXIII, rule 5 (*d*), applies only to cases where the allegations of the petitioner do not show a cause of action, and that this should appear clearly upon the face of the petition. In that case, the applicant does not appear to have been examined.

Some stress was laid on behalf of the opposite party on a passage in the judgment of a Full Bench of the Allahabad High Court in the case of *Chattarpal Singh* v. *Raja Ram* (13), in which the learned Judges held that the terms of section 407 (*c*) must not be read as limiting the Court's discretion to merely ascertaining whether the right to sue arose within its jurisdiction, but have a more extended meaning, namely, "that an applicant must make out that he had a good subsisting cause of action capable of enforcement in Court and calling for an answer and not barred by the law of limitation or any other law." But we do not think that it was intended to lay down that evidence is to be gone into on such points, as the learned Judges in an earlier passage said that it was competent for the Subordinate Judge to reject the applicant's petition on the ground that, as from his petition and his examination his cause of action was shown to have arisen beyond the period of limitation allowed by law for instituting the suit, his allegations did not show a right to sue. The passage quoted from the judgment of the Full Bench was followed with approval in a latter Allahabad case, *Kamrakh Nath* v. *Sundar Nath* (14), where it was held that the Court was not confined merely to the allegations contained in the plaint but that it was open to the Court to examine the applicant and take the statements in his examination in determining whether the applicant had a cause of action. The same passage was also quoted with approval by Jardine, J., in *Dulari* v. *Vallabdas Pragji* (15). In that case it appears the action was not maintainable upon the allegations made in the plaint itself.

The latest case in our Court is that of *Nawab Bahadur of Murshidabad* v. *Harish Chandra Acharjee* (16), in which Mookerjee and Sharfuddin, JJ., after referring to the cases on the point, held that before an application for leave to sue *in forma pauperis* is granted, it is the duty of the Court to satisfy itself that the allegations of the petitioner do show a cause of action, and that the allegations are not only those made in the plaint but also those made in the examination of the applicant before the Court. We have already expressed our opinion that the Court may not only look into the allegations made in the plaint but also into the statements made in the examination of the applicant. The evidence, however, to be taken under rule 7 is confined to the evidence which may be adduced by the applicant in proof of his pauperism, and any evidence which may be adduced in disproof thereof as laid down in rule 6.

We are accordingly of opinion that the Court, in an enquiry under Order XXXIII of the Code, cannot take evidence (accept the evidence of the applicant himself) on the merits of the claim. The learned Subordinate Judge having decided the question of limitation, not upon the allegations made in the plaint nor upon the statements made by the applicant in his examination, but upon

(10) 13 M. L. J. 292 (F. B.).
(11) 13 M. L. J. 425.
(12) 45 Ind. Cas. 95; 41 M. 620; 34 M. L. J. 399.
(13) 7 A. 661 (F. B.); A. W. N. (1885) 156; 4 Ind. Dec. (N. S.) 854.
(14) 20 A. 299 A. W. N. (1893) 36; 9 Ind. Dec. (N. S.) 552.
(15) 13 B. 126; 13 Ind. Jur. 265; 7 Ind. Dec. (N. S.) 84.
(16) 11 Ind. Cas. 55; 13 C. L. J. 593.

conclusions based upon an examination of the witnesses who were summoned for the purpose of proving the pauperism of the applicant, his order must be set aside.

The result is that the Rule is made absolute. The case will go back to the Court below in order that the petitioner may be allowed to proceed with the suit as a pauper, as the lower Court has already come to the finding that he is a pauper.

The petitioner will be entitled to costs.

Rule made absolute.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 68 OF 1918.

November 20, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

ALUR LAKSHMI NARASIMHA SASTRULU AND OTHERS—DEFENDANT No. 1's LEGAL REPRESENTATIVES—RESPONDENTS Nos. 8 TO 10—APPELLANTS

versus

VENKATA NARASAMMA—PLAINTIFF—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Partition, suit for—Preliminary decree—Death of defendant—Application by plaintiff to bring legal representatives on record and for division and allotment of property, nature of—Application granted—Objection on score of limitation, whether can be taken in second appeal—Hindu Law—Partition, preliminary decree for, against father—Death of father—Sons, position of.

After a preliminary decree for partition was passed by the District Court at Cuddapah the 1st defendant died. The plaintiff filed an application for bringing his representatives on to the record, for the appointment of a Commissioner to divide the properties into six shares, and for delivery of one such share to herself. The District Judge brought defendants Nos. 8 to 10 on to the record as 1st defendant's legal representatives, but treated the other prayers as prayers in execution and transferred the execution to the District Court at North Arcot:

Held, (1) that as the Cuddapah District Court had jurisdiction under the law to continue the further trial of the suit, which must be considered as pending in that Court till a final decree was passed, the order of transfer to the District Court of North Arcot was illegal; [p. 615, col. 1.]

(2) that the plaintiff's application was in substance not an application for execution, but an application in the suit to pass a final decree. [p. 615, col. 1.]

Where an application to bring the legal representatives of a deceased party on to the record is granted by a trial Court without any objection being taken thereto on the ground of limitation, an objection that the suit had abated by the application not having been made within the prescribed period, cannot be entertained in second appeal. [p. 615, col. 2.]

Where a preliminary decree is passed against a Hindu father for partition, it is presumably passed against him as representing his undivided family and binds his sons, and on his death the plaintiff is entitled to add his sons as his legal representatives or even as parties whose names should be deemed to be already on the record as represented by their father till his death and which names are merely sought to be inscribed on the record openly after his death. [p. 615, col. 2.]

Appeal against the order of the District Court, Cuddapah, in Execution Petition No. 35 of 1916, in Original Suit No. 3 of 1903.

Mr. *K. Rajah Aiyar*, for the Appellants.

Mr. *S. Subramanya Aiyar*, for the Respondents.

JUDGMENT.—The defendants Nos. 8 to 10 (the sons of the deceased 1st defendant) are the appellants before us. A preliminary decree for partition of the B Schedule properties was passed by the District Court, Cuddapah, in the plaintiff's favour against the 1st defendant in 1904. The 1st defendant died in January or February 1914. The plaintiff filed the present petition on 8th December 1916 in the form of an execution petition and she filed it in the District Court of Cuddapah praying for the defendants Nos 8 to 10 being brought on the record as the 1st defendant's legal representatives, for the appointment of a Commissioner to divide the B Schedule properties into six shares and for delivery of one such share to her.

The District Court has brought the defendants Nos. 8 to 10 on the record as the 1st defendant's legal representatives (evidently because no objection was taken by them to that course). But it treated the other prayers as prayers in execution and transferred the execution to the North Arcot District Court.

The appellants contend before us that,

Ground No. 2.—The appellants not having been made parties to the suit cannot be proceeded against in execution.

Ground No. 3.—The Court below erred in treating the application as a proceeding in execution.

Ground No. 4.—The legal representatives of

the deceased not having been brought on the record within the time limited by law the District Judge ought to have held the suit as against him had abated.

Ground No. 6.—The lower Court has failed to note that the High Court expressly treated the decree as a preliminary decree to be followed up by a final decree, which alone is capable of execution.

Ground No. 8.—The District Judge ought to have held that the application was barred by limitation.

Ground No. 10.—The Court below had no jurisdiction to transfer the decree for execution to the District Court of North Arcot.

So far as grounds Nos. 3, 6 and 10 are concerned, the appellants' contentions are sustainable and the order of the District Judge of Cuddapah transferring execution to the District Court of North Arcot must be and is set aside. It must be admitted that the judgment of the High Court in A.A. O. No. 252 of 1912 is not quite clear on the question whether the District Court of North Arcot had exclusive jurisdiction over the further proceedings in the suit but that judgment, in our opinion, did not intend to deprive the Cuddapah District Court of its undoubted jurisdiction under the law to continue the further trial of the suit, which must be considered as pending in that Court till a final decree is passed in the suit.

Ground No. 8 is unsustainable, as the petition is in substance not an execution petition but an application in a suit to pass a final decree and as such is not affected by the bar of limitation. Too great a stress should not be laid on the form of the petition.

As regards ground No. 4, the contention that the suit had abated by an application not having been made within six months of the 1st defendant's death was not raised or argued in the lower Court and the defendants Nos. 8 to 10, the appellants, were brought on the record of the suit without such an objection having been raised on their part. It is too late to raise the objection now and even if it is not too late, the plaintiff having filed a similar application (to bring on the record the legal representatives of the 1st defendant) in March 1915 in the North Arcot District Court and it appearing to us that the judgment of this Court in the previous proceeding between these same parties might have misled the plaintiff into the impression that applications as in execution proceedings could be taken by her once in three years and that they may be made to the District Court of North Arcot, we consider that the delay in filing the present application in the District Court of Cuddapah to bring in the defendants Nos. 8 to 10 as the legal representatives of the 1st defendant might be excused and we excuse it accordingly.

As regards ground No. 2 when a preliminary decree is passed against a Hindu father for partition, it is presumably passed against him as representing his undivided family and binds his sons, and on his death the plaintiff is entitled to add his sons as his legal representatives or even as parties whose names should be deemed to be already on the records as represented by their father till his death and which names are merely sought to be inscribed on the records openly after his death. [See also *Hira Lal Sahu* v. *Parmeshar Rai* (1).]

In the result we modify the lower Court's order by setting aside the direction transferring the decree for execution to the North Arcot District Court and direct the Cuddapah District Court to treat the application of the plaintiff, not as one in execution but as one in the pending suit itself, to pass a final decree after appointment of a Commissioner, &c., and to pass fresh orders accordingly. We need not say that the commissioner appointed under Order XXVI, rule 14, may be a resident within the jurisdiction of the North Arcot District Court if the District Court of Cuddapah thinks it desirable or convenient to appoint such a person.

There will be no order as to the costs of this appeal.

M.C.P.

Decree modified.

(1) 21 A. 356 A. W. N. (1899) 100; 9 Ind. Dec. (N. S.) 936.

UPENDRA NATH BISWAS *v.* SHIB KUMARI DEBI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1939 OF 1916.

December 13, 1918.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

UPENDRA NATH BISWAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHIB KUMARI DEBI—RESPONDENT.

*Probate and Administration Act (V of 1881), s. 90 (2)—Will restraining power of executors to mortgage property—Mortgage without sanction of Court, validity of—Hindu Law—Joint family—*Karta, *powers of, with regard to shares of minor members—Guardians and Wards Act (VIII of 1890), ss. 29, 30—Mortgage executed by guardian of Hindu minor without sanction of Court, whether binding on minor.*

When a testator says in his Will that the proceeds of a sale are to be applied in a particular manner, he practically points out very distinctly that the property is not to be mortgaged, more especially that it is not to be mortgaged at a high rate of interest, which must almost necessarily be injurious to the estate. [p. 617, col. 2.]

Where a Will contains an implied restriction on the power to mortgage the property, the executor has no power to mortgage the property without the sanction of the Court obtained under section 90, sub-section (2), of the Probate and Administration Act. [p. 617, col. 1.]

A *karta* of a joint Hindu family, who is appointed guardian of a minor member of the family under the Guardians and Wards Act, comes under the control of the Court and so cannot exercise the powers of a *karta* in mortgaging the minor member's property. [p. 618, cols. 1 & 2.]

Surut Chunder Chatterjee v. *Ashootosh Chatterjee*, 24 W. R. 46; 15 B. L. R. 350, *Bhupendro Narayan Dutt* v. *Nemye Chand Mondul*, 15 C. 627; 7 Ind. Dec. (N. s.) 1001, and *Ranjit Sing* v *Amullya Prosad Ghose*, 9 C. W. N. 923 at p. 927, relied on.

Gharib-ullah v. *Khalak Singh*, 30 I. A. 165; 25 A. 407 (P. C.); 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483, distinguished.

Where a guardian of a minor appointed by Court executes a mortgage on behalf of the minor without obtaining any sanction from the Court which appointed him guardian, the mortgage is not binding on the minor, and the latter can be equitably held liable only if it is shown that the debt or any portion of it was actually applied for the benefit of the minor. [p. 618, col. 2; p. 619, col. 1.]

A testator by his Will gave away all his properties to his sons, defendants Nos. 1 to 6, and appointed his two elder sons defendants Nos. 1 and 2, executors of his Will and guardians of their minor brothers, defendants Nos. 3 to 6. The Will, which did not expressly impose any restriction on the executors' power to mortgage, stated that the testator had debts the interest payable whereon exceeded the income of his property and that, therefore, the executors should relieve him from the "sin of his debts" by granting permanent settlement of or by sale of certain properties specified in the Will. After the death of the testator, the executors, defendants Nos. 1 and 2, took a certificate of guardianship in respect of the properties of their minor brothers and about 10 years after the death of the testator executed a mortgage of the properties for selves and as executors to the estate of their father and also as certificated guardians of their minor brothers:

Held, (1) that the minors were not liable merely because the mortgage was executed by the defendants Nos. 1 and 2 as executors and as certificated guardians of the minors, but that the latter could be held liable only to the extent to which the debt was actually applied for their benefit; [p. 618, col. 2, p. 619, col. 1.]

(2) that, having regard to the terms of the Will, there was a restraint on the powers of the executors to mortgage the properties and that, as no permission of the Court under section 90, sub-section (2), of the Probate and Administration Act was obtained for mortgaging the properties, the defendants Nos. 1 and 2 had no power to mortgage as executors under the Will [p. 617, col. 2.]

Sreemutty Deeno Moyee v *Tarrachurn Koondoo Chowdry*, 3 W. R. Mis. 7 *note*; Bourke A. O. C. 48 and *Kanti Chandra Chattopadhya* v. *Kristo Churn Acharjee*, 3 C. W. N. 515, relied on.

Purna Chundra Bakshi v *Nobin Chandra Gangopadhya*, 8 C. W. N. 362, distinguished.

(3) that at the date of the mortgage the real position of the defendants Nos. 1 and 2 in relation to the defendants Nos. 3 to 6 was that of guardians and managers and not that of executors. [p. 617, col. 1.]

Appeal against the decree of the District Judge, Nadia, dated the 24th of May 1916, affirming that of the Subordinate Judge of that district, dated the 30th of January 1915.

Babu *Harendra Nath Mukherjee*, for the Appellant.

Babu *Amulya Kumar Bhattacharji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit upon a mortgage-bond executed by defendants Nos. 1 and 2 for selves, as executors to the estate of their father and as certificated guardians of their four minor brothers, the defendants Nos. 3 to 6. The suit has been decreed by both the Courts below against the defendants, and defendants Nos. 3 to 6 have appealed to this Court.

It is contended on behalf of defendants Nos. 3 to 6 that they were minors at the date of the mortgage bond, that defendants Nos. 1 and 2 who had obtained a certificate of guardianship did not obtain sanction of the Court for the mortgage and that, therefore, the mortgage was not binding upon them.

Before dealing with this contention, we have to consider the powers of the defend-

ants Nos. 1 and 2 under the Will, as they executed the mortgage bond not only as certificated guardians of the minors, but also as executors. By the Will it was provided that all the brothers would be "entitled to what remained after performing the obsequial ceremony." The two elder brothers (the defendants Nos. 1 and 2) were appointed guardians of the minors, and they were directed to manage the estate during the minority of the younger brothers and were given the power of transferring the two Mahals specified in the Will for paying off debts. The mortgage was executed 10 years after the death of the testator, and before the date of the mortgage the defendants Nos. 1 and 2 had taken a certificate of guardianship in respect of the property of the minors, thus treating the estate to have been absolutely vested in the brothers. We think that in these circumstances the real position of the defendants Nos. 1 and 2 at the date of the mortgage was that of guardians and managers and not that of executors. But even assuming that the position was that of executors, we are of opinion that the Will imposed a restriction on their power to mortgage. Under section 90, sub section (2) of the Probate and Administration Act, the power of an executor to dispose of immoveable property vested in him is "subject to any restriction which may be imposed in this behalf by the Will appointing him, unless Probate has been granted to him and the Court which granted the Probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order." In the second paragraph of the Will the executors were authorised to grant a permanent settlement of or sell two Mahals specified in the Will for the purpose of liquidating the testator's debts. There is no express restriction on their power to mortgage, but the restriction need not be express and the question is whether having regard to the terms of the Will there was any implied restriction on the power of the executors to mortgage the property. The testator in the second paragraph of the Will states that he had debts amounting to abont Rs. 9,000, that the annual interest payable thereon exceeded the income of his property, that there was little means of paying off the debts and that, therefore, the executors should "save him from the sin of debt" by granting some permanent settlement of or by sale of the two Mahals specified in the Will.

It is clear, therefore, that the intention of the testator was that his debts should be paid off by sale of the two Mahals, so that the remaining portion of the estate might be saved and that he might be saved from the "sin of debt" It cannot be contended in the circumstances that the intention of the testator was that the debt, which was such a large sum (Rs. 9,000), was to be paid off by another mortgage-debt the existence of which would be equally injurious. It may be mentioned that the mortgage bond in suit provided for interest at the rate of Rs. 14-4 0 per annum with half yearly rests.

Sir Barnes Peacock in the case of *Sreemutty Deeno Moyee* v. *Tarrachurn Koondoo Chowdry* (1), after referring to the case of *Haldenby* v. *Spofforth* (2) in which it was laid down "that a trust to 'make sale or dispose of' the testator's real estates, does not authorise a mortgage, there appearing an intention on the part of the testator that the whole estate should be converted," observed: "In the present case, we think that the clear intention of the testator was that if it should become necessary to raise money for the purposes of his estate, the house in Calcutta should be sold, and the surplus proceeds, if any, would be invested in Government securities. When a testator says, that the proceeds of a sale are to be applied in a particular manner, he practically points out very distinctly that the house is not to be mortgaged, more especially that it is not to be mortgaged at a high interest which must almost necessarily be injurious to the estate." See also the case of *Kanti Chondra Chattopadhya* v. *Kristo Churn Acharjee* (3). No permission of the Court was obtained for mortgaging the property in the present case and we are accordingly of opinion that defendants Nos. 1 and 2 had no power to mortgage as executors under the Will.

(1) 3 W. R. Mis. 7 note; Bourke A. O. C. 48.
(2) (1839) 1 Beavan 390; 8 L. J. Ch. 238; 3 Ju 241; 48 E. R. 991; 49 R, R. 390.
(3) 3 C. W. N. 515.

Our attention has been drawn to the case of *Purna Chundra Bakshi* v. *Nobin Chandra Gangopadhya* (4). In that case the learned Judges held that where a Will gave the executor power to sell the testator's property to pay off the debts incurred by him or if the property was a losing concern, there being no provision in the Will against the executor mortgaging the property, he had power to mortgage such property and the case of *Kanti Chandra Chattopadhya* v. *Kristo Churn Acharjee* (3) was distinguished The decision of the learned Judges, however, turned upon the terms of the Will, and they held that it was clear that the testator never prohibited or intended to prohibit the executor mortgaging the property in case of necessity. In the present case the intention, as stated above, was that the property should be sold and not mortgaged and we think, therefore, that there was an implied restriction on the power of the defendants Nos. 1 and 2.

The learned District Judge also was of opinion that as the bond was executed some ten years after the death of the testator, it did "not appear that defendants Nos. 1 and 2 took the loan as executors of the Will, the more so, as in the Will it was laid down that the testators' debts were to be discharged by the sale of two specific properties."

The next question is whether the mortgage by defendants Nos. 1 and 2 as certificated guardians of the minors is binding upon the latter. There is no doubt that under section 29 of the Guardians and Wards Act, VIII of 1890, the guardian of the property has no power, without the previous permission of the Court, to mortgage the property of his ward, and under section 30 the disposal of immoveable property by a guardian in contravention of section 29 is voidable at the instance of the minor. It is contended, however, that the defendant No. 1 was *karta* of the family and that, therefore, he had power to mortgage even though he had not obtained sanction of the Court, which would be required in the case of a certificated guardian in effecting a mortgage. But if the *karta* of a joint Hindu family chooses to apply under Act VIII of 1890 for being appointed a guardian of a minor and has been appointed as such guardian, we think that he comes under the control of the Court and cannot exercise the powers of a *karta*. As pointed out by Macpherson, J., in the case of *Surut Chunder Chatterjee* v. *Ashootosh Chatterjee* (5): "Having been appointed under Act XL of 1858 the guardian could no longer act for the minor otherwise than under his appointment by the Court. If one who is the natural guardian is appointed by the Court and acts under the appointment, he can have no power other than that given him by Act XL of 1858." The same view was taken in the cases of *Bhupendro Narayan Dutt* v. *Nemye Chand Mondul* (6) and *Ranjit Sing* v. *Amullya Prosad Ghose* (7). Reliance is, however, placed on behalf of the respondents upon the case of *Gharib-ullah* v. *Khalak Singh* (8). But that case is clearly distinguishable. There the minor belonged to a Mitakshara family and although a guardian was appointed of his property, it was pointed out by the Judicial Committee that the guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family, on the plain ground that the interest of a member of such a family is not individual property at all, and that, therefore, a guardian, if appointed, would have nothing to do with the family property. In the present case the family is governed by the Dayabhaga, and defendants Nos. 1 and 2 had been properly appointed guardians. That being so, the mortgage executed by the guardians without the sanction of the Court is certainly voidable at the instance of the minor.

Nor does the plaintiff's case stand on a better footing if the position of the defendants Nos. 1 and 2 be taken to have been that of testamentary guardians (assuming that they could exercise their power as such after having been appointed guardians under the Guardians and Wards Act),

(4) 8 C. W. N. 362.

(5) 24 W. R. 46; 15 B. L. R. 350.
(6) 15 C. 627; 7 Ind. Dec. (N. S.) 1001.
(7) 9 C. W. N. 923 at p. 927.
(8) 30 I. A. 165; 25 A. 407 (P. C.); 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483.

as we have found that an implied restriction was imposed on their power by the Will which appointed them guardians.

The learned District Judge, however, was of opinion that defendants Nos. 1 and 2 as adult male members of a joint Hindu family were entitled to borrow what they considered necessary for joint family expenses. One of them was the *karta* of the family, but the question of family necessity or benefit of the minors was not raised in the plaint, and the case was brought on the footing that the minors were liable because the mortgage was executed by defendants Nos. 1 and 2 as executors and certificated guardians of the minors. The learned District Judge says that the defendants had an opportunity of meeting this aspect of the case, because it was raised in the examination of the witnesses. But as there was no allegation in the plaint on the point, the defendants might have considered it unnecessary to adduce evidence on the point. Apart from that there is no finding that the minors have been actually benefited by the money borrowed by defendants Nos. 1 and 2, and it is only where it is shown that the debt or any portion of it was actually applied for the benefit of the minors that they can be equitably held liable. The case will, therefore, go back to the lower Appellate Court in order that the question whether the mortgage debt or any portion of it was applied for the benefit of the minors may be decided. If it is found that the minors had been benefited, then they will be made liable to that extent.

The last contention is as regards interest. The rate of interest provided in the bond cannot stand, as the contract is not binding on the minors. In the event of it being shown that the minors were benefited by the debt they should be made liable for interest at a reasonable rate, and in order to obviate any further discussion on the question as to the rate of interest, the appellant has suggested 6 per cent. per annum and the respondent not objecting to it, we think that interest at that rate should be allowed on such amount (if any) for which defendants Nos. 3 to 6 may be held liable. As against defendants Nos. 1 and 2 the mortgage decree will stand.

Costs will abide the result except as regards the defendants Nos. 1 and 2.

Case sent back.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No 204 OF 1918.

March 10, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

ATHERMANKUTTI—DEFENDANT—APPELLANT

versus

CHANDROTH MOIDEENKUTTY—PLAINTIFF—RESPONDENT.

Oaths Act (X of 1873), ss. 9, 10, 12—Challenge to take oath—Oath not taken on appointed day on account of challenger's failure to pay charges—Oath taken on subsequent day—Challenger, whether bound by oath—Right to trial.

The plaintiff challenged the defendant to take a particular oath on a specified day and the challenge was accepted including a term that, if plaintiff failed to pay the cost of taking the oath and the defendant did not take it, that should be treated as equivalent to his taking it. On the day fixed the plaintiff made default and defendant did not take the oath, but took it on a later day. The plaintiff objected and applied for a trial on the merits, but the trial Court made a decree in defendant's favour:

Held, that the plaintiff was not bound by the oath and that his default in his part of the agreement was not a foundation on which the law could allow any decree to be founded, and that it was for the defendant to show that his deviation from his agreement was immaterial and that the date specified in it was not of its essence. [p. 620, col. 2; p. 621, col. 1.]

Appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 281 of 1916, preferred against the decree of the Court of the Principal District Munsif of Badagara, in Original Suit No. 790 of 1915.

FACTS.—Suit on a pro-note against the defendant, one of the executants, and the assets of the other executant in his hands as he was dead. Plaintiff consented to be bound by the oath of the defendant so far as his personal liability was concerned and the oath was ordered to be administered on the 4th February 1916. Plaintiff did not pay the charges therefor on some frivolous plea and the oath was not administered and

plaintiff applied that the suit be regularly tried. But the Munsif ordered the oath to be administered on the 11th February at defendant's cost and the oath was taken on that day. The question was how far plaintiff was bound by that oath.

Mr. *B. Pocker*, for the Appellant.—Once an agreement to be bound by oath is come to, it is not open to either party to resile from it.

[OLDFIELD, J.—It is clear that plaintiff did not agree to the taking of the oath on the 11th February. Why should we not say that he is not bound by it?]

See *Ayyakannu Nadar* v. *Muthiah Nadar* (1). Time is not of the essence of the agreement; what sections 9 and 10 of the Oaths Act say is only that the form of the oath should be clearly set out.

[SESHAGIRI AIYAR, J.—Section 12 is against that contention.]

Section 12 does not apply but section 11 applies. See also *Vithu Govinda* v. *Ramji Yelluji* (2). If the oath is not taken on the appointed date owing to plaintiff's default, it must be taken as if the oath was taken. That is the case in *Ayyakannu Nadar* v. *Muthiah Nadar* (1).

Mr *C. Madhavan Nair*, for the Respondent. —This point was obviously given up in the Courts below. If the plaintiff's default was the cause of the non taking of the oath on the 4th February it may be that section 12 raises a presumption against me.

Mr. *Pocker*, in reply.—The defendant can enforce the agreement. See *Thukku Goundan* v. *Kuppauda Goundan* (3). Even if the oath is taken contravening the provisions of the Oaths Act, the oath is valid and binding except as regards third parties, *Ram Narain Singh* v. *Bibu Singh* (4). Section 12 applies only as regards the form Here the oath has been taken and in any case he is bound by it. See *Seshagiri* v. *Tenkamakki Sankayya Setti* (5)

If the oath does not take place on the appointed day owing to plaintiff's default, the defendant is entitled to get an opportunity of taking it on some other date: *Velayuda Goundan* v. *Narayanasami Goundan* (6).

(1) 17 M. L. J. 99.
(2) 8 Bom. L. R. 19; 1 M. L. T. 63.
(3) 17 Ind. Cas. 339; 12 M. L. T. 613.
(4) 18 A. 46; A. W. N. (1895) 158; 8 Ind. Dec. (N. S.) 736.
(5) 36 Ind. Cas. 100; 4 L. W. 258; (1917) M. W. N. 104.
(6) 17 M. L. J. 536 at p. 537.

[*Moyan* v. *Pathukutti* (7) was referred to by the Court as against the contentions.]

Thoyi Ammal v. *Subbaroya Mudali* (8) considers whether time was of the essence of the contract.

JUDGMENT.—The plaintiff-respondent in this case challenged the defendant-appellant under section 9, Oaths Act, to take a particular oath on a specified day and the challenge was accepted, including a term that, if owing to plaintiff's failure to pay the cost of taking the oath, defendant did not take it, that should be treated as equivalent to his taking it. On the day fixed, as plaintiff did not pay, defendant did not take the oath. He, however, in spite of plaintiff's opposition and application for a trial on the merits took it on a later day; and the District Munsif passed a decree in his favour. The lower Appellate Court in the order appealed against held that plaintiff's consent was only to be bound by the oath as originally agreed on, that he withdrew his consent on that agreement proving abortive and that he was entitled to a remand for a trial on the merits. It has been argued that this withdrawal was not open to plaintiff and did not, in fact, take place. But we deal with this part of the dispute on the shorter ground that the plaintiff's default in his part of the agreement was not a foundation on which the law could allow any decree to be founded. Section 11, Oaths Act, says that the evidence given in pursuance of the challenge shall be conclusive proof of the matter stated. Section 12 says that a refusal to make the oath shall be recorded; and it has been held, for instance, in *Moyan* v. *Pathukutti* (7) that such refusal is a relevant fact in a trial on the merits. But there is no provision, under which any legal effect follows on any other incident than the making of the oath or on any act or omission by the party, who gives the challenge. In these circumstances the agreement before us, by which a legal result was to follow on the default of the challenger, plaintiff, was to that extent an attempt to introduce a method of decision which the law does not authorise and which can have no legal conse-

(7) 31 M. 1; 17 M. L. J. 545; 3 M. L. T. 98.
(8) 22 M. 234; 8 Ind. Dec. (N. S.) 167.

quences. That part of the agreement, therefore, must be treated as inoperative and all argument founded on it must be rejected.

Defendant has then asked us to deal with the remainder of the agreement, which provides for the taking of the oath by him on a specified day and to hold that the oath he took on a later day is equally conclusive. Assuming that this part of the agreement is separable, we cannot construe it in the manner suggested. It is for defendant to show that his deviation from the terms of the agreement is immaterial and that the date specified in it is not of its essence. We see no reason for accepting and much for rejecting this view. It, moreover, is unsupported, so far as we have been shown, by authority. In the circumstances this contention also fails.

We must, therefore, confirm the lower Appellate Court's decision, with, however, the observation that at the renewed hearing it will be open to the District Munsif to consider the evidence as to plaintiff's conduct and his responsibility for defendant's failure to take the oath on the date originally arranged and to give it what weight it may deserve. The appeal against order is dismissed. In the circumstances there will be no order as to costs.

M. C. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 178 OF 1917.

May 12, 1919.

Present:—Mr. Daniels, A. J C., and Mr. Lyle, A. J. C.

THEPAI *alias* JAGDEO—PLAINTIFF—APPELLANT

versus

MAHABIR PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Denial of vendor's title in previous mutation proceedings, whether extinguishes right.

The fact that the plaintiff in a pre-emption suit had, in mutation proceedings previous to the institution of the pre-emption suit, denied the title of the vendor to a part of the property does not deprive him of his right of pre-emption. [p. 622, col. 1.]

Appeal against the decree of the Subordinate Judge, Gonda, dated the 22nd November 1917.

Mr. *Bisheswar Nath Srivastava*, for the Appellant.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—This is an appeal in a pre-emption suit which has been dismissed on the ground that the plaintiff had previously, in mutation proceedings, denied the title of the vendor to a part of the property sold. This was held by the learned Subordinate Judge to deprive him of his right of pre-emption. There is nothing in the language of the Oudh Laws Act to support this contention and there is direct authority in Agra against it. In *Bhagwoti Saran* v. *Parmeshar Das* (1) it was held that there is nothing to prevent a plaintiff even in the same suit from setting up a claim for possession of the property as owner, and in the alternative claiming pre-emption. Here the denial was not made in the same suit, but in mutation proceedings a considerable period previously. The appellant's objection in mutation proceedings was decided against him on 12th September 1916. He acquiesced in this decision and filed the suit, out of which the present appeal arises, on 8th May 1917. There is nothing in the plaint in the present suit which questions the vendor's right to the property. The learned Subordinate Judge relied mainly on three decisions, the first two of which are clearly inapplicable. The first is a decision of the Privy Council in *Abdul Wahid* v. *Shalukha Bibi* (2). In this case the defendants in the same suit denied the plaintiff's title to the property and in the alternative pleaded that they had a right of pre-emption. It may be mentioned that the claimant had sold part of the property to her co-plaintiffs in order to obtain funds to maintain the suit and this sale was the basis of the claim to pre-emption put forward. Their Lordships say:—

"If the defendant succeeded and the suit was dismissed there would have been no property to be sold. In truth the transac-

(1) 25 Ind. Cas. 283; 36 A. 476; 12 A. L. J. 798.

(2) 21 C. 496; 21 I. A. 26; 6 Sar. P. C. J. 399 Rafique & Jackson's P. C. No. 134; 10 Ind. Dec. (N. S.) 961 (P. C.).

tion was a sale of a share in a law suit. The position taken up by the defendant was altogether inconsistent with claiming a right of pre-emption."

In *Durga Pershad* v. *Mendi Lal* (3), which is the second case relied on, the denial of title was in the same suit in which pre emption was claimed and the suit was dismissed on the ground that the two reliefs prayed for were inconsistent with each other. The case of *Fakhr ud-din Ahmad* v. *Musammat Rasulan* (4) is no doubt in favour of the respondents. In that case Mr. Spankie held that a suit for pre-emption was barred by reason of a denial of the vendor's title made by the plaintiff in previous litigation. He conceded that the Privy Council case in *Abdul Wahid* v. *Shalukha Bibi* (2) was distinguishable on this ground, and remarked: "This (*i. e.*, denying the title) is what the plaintiff-respondent did at the time when Rajab Ali proposed to sell the share; she denied his title and alleged that he was not a co-sharer. It is true that she now admits that he is; but the fact is immaterial."

Three things may be remarked regarding this case; first, that it was a decision of a single Judge, secondly, that no reason is given for the decision, and thirdly, that the remarks quoted above were really *obiter*, as the learned Judge had already dismissed the suit on the ground that it was barred by limitation. In our opinion the fact that the denial of title occurred a considerable time previously is not immaterial but on the contrary makes a considerable difference. If the principle relied on by the respondents were accepted, to what extent is it to be carried? Is a denial of title once made but immediately withdrawn to deprive the plaintiff of his right of pre-emption altogether? It is unnecessary for us to decide whether, under the present Code of Civil Procedure, a claim for possession and in the alternative a claim for pre-emption is maintainable, as has been held by the Allahabad High Court, but we are clearly of opinion that a denial of title in previous mutation proceedings does not have that effect. It has been contended by the respondents that the case of *Fakhr-ud-din Ahmad* v. *Musammat Rasulan* (4) has been followed in two subsequent cases: *Ram Dayal* v. *Bhajju Lal* (5) and *Khurshaid Ali* v. *Rashid Husain* (6), but a glance at those cases is sufficient to show that neither of them is in point. In the former case (*vide* the last paragraph of the judgment) it was held that the plaintiffs were on the horns of a dilemma. If they admitted that the sale was a valid one, any interest they previously had in the property was lost to them on the sale taking place and, therefore, they had no subsisting title at the date of the institution of the suit, while if they denied that their father had power to transfer their interest, they were precluded from claiming pre-emption. In the second case the ground of decision was that the vendor was not in possession of the property and that what was really sold was a share in a law suit.

In our opinion the view taken by the lower Court is incorrect. We accordingly allow the appeal and as the suit has been decided on a preliminary point we remit the case for decision on the merits under Order XLI, rule 23. Costs will abide the result.

Appeal allowed.

(3) 1 O. C. 174.
(4) 2 O. C. 9.
(5) 7 O. C. 61.
(6) 9 O. C. 331.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1567 OF 1917.

January 9, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

ANIKADEN MANAPPATTI KANARI, KARNAVAN AND MANAGER OF THE TARWAD, AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

THAYYAN KALLIANI AND OTHERS—PLAINTIFFS NOS. 1, 2, 4 AND 5, DEFENDANT NO. 4 AND LEGAL REPRESENTATIVE OF PLAINTIFF NO. 3—RESPONDENTS.

Mortgage—Redemption—Time-barred mortgage-deeds, whether must be redeemed along with deeds not barred.

Where a person has executed several mortgages in favour of one party, some of which are barred, he

can sue for redemption of such of the mortgage-deeds only as are not barred, and is under no obligation to redeem those which are time-barred. [p. 624, col. 1.]

Ramakrishna Kukkilaya v. *Nekkar Kuppanna*, 43 Ind. Cas. 286; 6 L. W. 621; 33 M. L. J. 581; 22 M. L. T. 422; (1918) M. W. N. 75, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 621 of 1916 (Appeal Suit No. 645 of 1915 on the file of the District Court of North Malabar), preferred against the decree of the Court of the Principal District Munsif of Tellicherry, in Original Suit No. 299 of 1914.

Mr. *C. Madhavan Nair*, for the Appellants.

Mr. *C. Kunhi Raman*, for the Respondents.

This second appeal coming on for hearing on the 1st August 1918, the Court made the following

ORDER.—The appellants have no case against the 5th respondent on the findings of fact. Defendants Nos. 1 and 2 contended that the plaintiffs must redeem the mortgages evidenced by Exhibits I and II simultaneously with the mortgage under Exhibit B. Before we decide this point of law, we think it desirable to call for a finding on the following issue:—

"Whether the mortgages under Exhibits I and II were real and valid and if so, whether they were time-barred or not on the date of plaintiffs' suit."

As this will depend on whether there is any evidence that these rights were really created and were kept alive by acknowledgment or otherwise, either party will be allowed to adduce fresh evidence on both points. The finding should be submitted within two months from the date of the receipt of this order and ten days will be allowed for filing objections after the notice of the receipt of the same has been posted up in this Court.

In compliance with the above order the Temporary Subordinate Judge of Tellicherry submitted the following

FINDING.—I have been ordered to submit a finding on the following issue, namely:—

Whether the mortgages under Exhibits I and II were real and valid and if so, whether they were time-barred or not on the date of plaintiffs' suit?

2. In Original Suit No. 456 of 1889, these two debts were held to be not binding on the Tarwad. It was so held, as the mortgaged property was found to be property belonging to the Tarwad and Kunhoonhan Amma, who held the property as a provision for her maintenance, had no right to create charges on the property (*vide* Exhibit III). But in that case Raman Nambiar, one of the executants of these two documents, when examined in that case admitted receipt of consideration (*vide* Exhibit IV). So it should be held that the bonds are genuine and that they are supported by consideration. In 1900, this property was found to be the separate property of Kunhoonhan Amma and the decree in Original Suit No. 456 of 1889 to be one obtained by collusion (*vide* Exhibit D). In 1910 on a Melcharth obtained from the Tarwad a suit was instituted to recover this property. There also it was found that the property did not belong to the Tarwad (*vide* Exhibit E). The property should, therefore, be held to be property which belonged exclusively to Kunhoonhan Amma. Kunhoonhan Amma is one of the executants of Exhibits I and II. Under the circumstances, I should hold that the mortgages under Exhibits I and II were real and valid.

3. The next question is whether these debts were time-barred or not on the date of this suit. Kunhoonhan Amma leased this property in 1052 (1877) to Raman on a rent of Rs. 6 a year (*vide* paragraph 6 of the plaint). In 1053 (1877) Raman was empowered to appropriate this rent of Rs. 6 towards the interest due to him for the sum of Rs. 50 lent by him under Exhibit B. Exhibit I is mortgage-deed for Rs. 70 executed on 22nd Kumbhom 1056 (22nd *sic* February 1881). The interest fixed in it is 18 per cent. per annum. The time fixed for payment is one year. Exhibit II is for Rs. 35. It is a document executed on 17th Vrichigam 1063 (1st December 1887). The interest fixed in it is 18 per cent. per annum. The time fixed for payment in it expired on 15th August 1888. On default of payment on the due date there is provision in it, that the amount due then with further interest at 24 per cent. per

annum, should be a charge on the plaint property. There is Raman's admission of these debts on 3rd October 1890 (*vide* Exhibit IV). After the case was sent back for finding, parties have not produced any new document. The only witness examined is 1st defendant. He states that the agreement was to return the sum due under Exhibit II along with the sum due under Exhibit B. This agreement does not find a place in Exhibit II. On the evidence on record I should find that the claims under Exhibits I and II were time-barred on the date of the institution of this suit.

4. My finding, therefore, is that the mortgages under Exhibits I and II were real and valid and that they were time-barred on the date of the plaintiffs' suit.

This second appeal coming on for final hearing, after the return of the finding of the lower Appellate Court on the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings. Following *Ramakrishna Kukkilaya* v. *Nekkar Kuppanna* (1), we consider that plaintiffs were under no obligation to redeem the time barred hypothecation deeds. The second appeal is dismissed with costs.

Time for redemption is extended for three months.

M. C. P.

Appeal dismissed.

(1) 43 Ind. Cas. 286; 6 L. W. 621; 33 M. L. J. 581; 22 M. L. T. 422; (1918) M. W. N. 75.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 131 OF 1917.

January 23, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

C. A. S. SUBRAMONIAN CHETTY—PLAINTIFF—APPELLANT

versus

MAHAIR ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens, *doctrine of, applicability of—Transfer in pursuance of compromise out of Court, whether protected.*

Section 52 of the Transfer of Property Act only protects rights which are acquired under a decree or order of Court [p. 625, col. 1]

The doctrine of *lis pendens* cannot be applied so as to protect a transfer of land made during the pendency of a suit, when such transaction is not embodied in the final order or decree. [p. 625, col. 1.]

A purchaser from a litigant *pendente lite* cannot go behind the final order in the suit in order to show that the order would not have been made but for the fact that the land in dispute had been transferred to him by another party to the suit in pursuance of a compromise made out of Court. [p. 625, cols. 1 & 2.]

Mr. *Mc Donnell*, for the Appellant.

Mr. *Vertannes*, for the Respordents.

JUDGMENT.—The plaintiff Chetty sued on a mortgage made in his favour on the 12th May 1913 by the defendants Nos. 1 to 6, who were the heirs of their father, deceased. The 7th defendant was Mahair Ali, who obtained a conveyance of the property from the defendants Nos. 1 to 6 on the 12th August 1914. The 8th defendant is a mortgagee from the 7th defendant. The lower Court refused the plaintiff a decree against the 7th and 8th defendants on the ground that though his mortgage was prior to the conveyance to the 7th defendant, he took it during the pendency of Suit No. 11 of 1912, and under section 52 of the Transfer of Property Act, which deals with the law regarding the doctrine of *lis pendens*, his mortgage was postponed to the 7th defendant's title. The plaintiff now appeals as against the 7th and 8th defendants.

Suit No. 11 of 1912 was brought by the 1st defendant as Receiver of his father's estate against the 7th defendant for ejectment, alleging that the 7th defendant was a tenant of his deceased father and that the tenancy had expired. That suit was dismissed for default on the 24th September 1914. A petition of compromise was put in in that suit on the 12th August 1914, the date of the conveyance to the 7th defendant, alleging that the plaintiff in that suit (who represented the present defendants Nos. 1 to 6, the present plaintiff's mortgagors) had agreed to convey this land to the present 7th defendant and asking that the compromise be recorded and the suit dismissed. Nothing was done on that application, but on the 17th August the plaintiff in that suit applied to withdraw the application of compromise. It was, therefore, withdrawn with leave to file a fresh application of compromise. No fresh

application of compromise was filed, and on the 24th September 1914 the plaintiff appeared in person and asked to withdraw the suit, and the suit was accordingly dismissed for default. The learned Judge in the lower Court has found that the conveyance to the 7th defendant was in pursuance of the compromise in that suit; and apparently the order for dismissal was in consequence of that compromise. He refers to the case of *Annamalai Chettiar* v. *Malayandi Appaya Naik* (1). The decision in that case merely shows that a decree by consent which embodies the terms of a compromise is no less a decree because it is made by the Court at the instance of the parties, and that the doctrine of *lis pendens* applies to such a decree. He also refers the case of *Kishory Mohun Roy* v. *Mahomed Muzaffar Hossein* (2) as showing that the Court will go behind the actual order passed by the Court; but in that case also the terms of the compromise were apparently embodied in the decree. In the present case, so far from the terms of the compromise being included in the final order, its terms were not before the Court at all at the time of the final order. The conveyance by the defendants Nos. 1 to 6 to the 7th defendant was a matter altogether outside the Court. Section 52 only protects rights which are acquired under the decree or order of the Court. No authority has been shown to us under which the doctrine of *lis pendens* can be applied so as to protect a transfer of land made during the pendency of a suit, when such transaction is not embodied in the final order or decree. The case of *Hukm Singh* v. *Zauki Lal* (3) shows that the purchaser from a litigant *pendente lite* cannot go behind the decree to show that the decree proceeded upon a palpable mistake of fact. So too in the present suit, the 7th defendant cannot go behind the final order in the previous suit in order to show that the order would not have been made but for the fact that the land in dispute had been transferred to him by another party to the suit in pursuance of a compromise made out of Court. The effect of the order dismissing the Suit No. 11 of 1912 was at most to preclude the plaintiff in that suit, as the representative of the defendants Nos. 1 to 6, from bringing a fresh suit against the 7th defendant upon the same cause of action; and by the doctrine of *lis pendens* the present plaintiff would be subject to the same disability, *i.e.*, the plaintiff could not sue the 7th defendant in ejectment as being a tenant of this land and as being liable to ejectment at the time that suit was instituted. It does not preclude the plaintiff from suing the 7th defendant upon a mortgage of the land. In this case one of two innocent purchasers has to suffer; and there is nothing in section 52 of the Transfer of Property Act under which the claim of the subsequent purchaser can be preferred to the plaintiff's title which was prior in time. The appeal is, therefore, allowed. The decree of the lower Court is set aside as regards defendants Nos. 7 and 8 and the mortgage decree given to the plaintiff will be altered so as to include the paddy land mentioned in item No. 5 of the plaint. The order of costs in the lower Court in favour of the 7th and 8th defendants is set aside. The value of the plaintiff's security as regards the land in item No. 5 may be taken to be Rs. 2,680 and the plaintiff-appellant will get his costs in both Courts on that amount as against the 7th and 8th defendants.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1813 OF 1917.

October 25, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Phillips.

GADDAM PARAMASIVUDU—PLAINTIFF—APPELLANT

versus

MULAKALA SUBBANNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of 1908*), *s.* 11, *O XLI*,

(1) 29 M. 426 (F. B.); 1 M. L. T. 145; 16 M. L. J. 372.

(2) 18 C. 188; 9 Ind. Dec. (N. S.) 126.

(3) 6 A. 506; A. W. N. (1884) 177; 4 Ind. Dec. (N. S.) 153.

r. 27—*Appeal, second, whether trial*—Res judicata, *doctrine of, applicability of, to second appeals—Admission of fresh evidence—Copy of judgment of High Court, admissibility of.*

There is no objection on grounds of principle or convenience to the admission in second appeal of a document, such as the judgment of a High Court, which could not be produced earlier because it was not in existence, and which requires no further evidence to explain it. No general rule, however, can be laid down and each case must be dealt with with reference to its own merits, and the existence of the sufficient cause referred to in Order XLI, rule 27, of the Civil Procedure Code. [p. 626, col. 2; p. 627, col. 1.]

Section 11 of the Civil Procedure Code is not confined in its application to suits and first appeals. Its provisions apply equally to a second appeal, the hearing of which is a trial within the meaning of that section. [p. 627, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cocanada, in Appeal Suit No. 27 of 1917, preferred against the decree of the Temporary District Munsif, Ramachandrapur, in Original Suit No. 302 of 1916.

Mr. *B. Narasimha Row*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—The plaintiff, here appellant, sued in ejectment alleging that 1st and 2nd defendants had attorned to him as tenants by paying him rent for one year, 3rd defendant being their sub-tenant, and that they had subsequently set up the title of 4th defendant. Plaintiff set up his own title as by purchase from Sattemma, who claimed under the Will of Rajasekharadu. Defendants denied the title of both the last mentioned and contended that the decisions in Original Suits Nos. 212 of 1905 and 133 of 1915 were *res judicata* in their favour. The District Munsif accepted this contention. The lower Appellate Court confirmed his decision, relying solely on the judgment in Original Suit No. 212 as the judgment in Original Suit No. 133 was the subject of a pending second appeal in this Court. It has since been confirmed here in Second Appeal No. 1057 of 1917.

Plaintiff argues first that, even if this Court's judgment can be looked at, it will be decisive only as between himself and 4th defendant, who were parties to it, not in favour of 1st, 2nd and 3rd defendants, who were not and of whom 1st and 2nd defendants have paid rent to him for one year and are, therefore, (together with 3rd defendant who holds under them estopped from denying his title or pleading, as they did, the title of 4th defendant. But, although this estoppel is mentioned in the plaint, it has apparently been relied on only at the hearing before us, not in the grounds of second appeal or in either of the lower Courts; for, although the payment of rent, on which the estoppel depended, was denied, no issue was framed regarding it. Plaintiff, having impleaded 4th defendant, clearly sought a decision against his permanent title and against the claims of the other defendants only as based on it. In the circumstances he must be taken to have waived his plea of estoppel against 1st, 2nd and 3rd defendants and thus, the only objection to the character of this Court's judgment as *res judicata*, therefore, fails.

Plaintiff argues next that the judgment cannot be looked at, because it is not on the record and we cannot admit it or any other evidence in second appeal. This argument is answered by reference to Order XLI, rule 27, and Order XLII, rule 1. For there is no reason for holding that the former provision is not applied by the latter to second appeals; and the substantial cause referred to in Order XLI, rule 27 (1) (*b*), is available in the possibility that, if this Court's decision is not considered, the result may be two conflicting decrees between the same parties. Plaintiff relies on *Ramachandra* v. *Krishnaji* (1) and the judgment of Sadasiva Aiyar, J., in *Raman Menon* v. *Mammali* (2), the suggestion in both cases being that the proper course is not to ask the Court to accept newly discovered evidence in second appeal, but to apply to the trial Court for a review in order to its consideration. But there is nothing in the wording of the rule, above referred to, to warrant a distinction between newly discovered and other fresh evidence, and we have not been shown that the practice of this Court to refuse to deal with the former is as clearly established as it is apparently in Bombay or was supposed to be by Sadasiva Aiyar, J., here. We see no objection, on grounds of principle or convenience, to the admission in second appeal of a

(1) 28 B. 4; 5 Bom. L. R. 615.
(2) 39 Ind. Cas. 954; (1917) M. W. N. 560.

document such as this Court's judgment which could not have been produced earlier because it was not in existence, and which requires no further evidence to explain it. There is no resemblance between these circumstances and those dealt with in the cases relied on, since the evidence offered in them related to a question of fact and, the sole ground on which Spencer, J., concurred in Sadasiva Aiyar, J.'s decision in the Madras case was that, it would have been inconvenient to receive it. The conclusion must be that no general rule as to the party's right to have newly discovered evidence taken in second appeal can be laid down, but that each claim must be dealt with on its merits with reference to the existence of the sufficient cause referred to in Order XLI, rule 27, and that such cause has been shown in the present case.

Plaintiff's remaining objection is that section 11 of the Code of Civil Procedure prohibits the trial of an issue, in which the matter in issue has been in issue in a former suit between the same parties, and as this Court is not holding a trial it is not affected by the prohibition. The question raised in effect is whether the hearing of a second appeal is not a trial. We have been referred to no authoritative definition of a trial and plaintiff's proposal to apply the term only to proceedings in which evidence is or can be taken and questions of fact can be decided, that is, to proceedings before Courts of first instance and first appeal, cannot be accepted. For apart from the anomaly involved in treating a decision reached on the pleadings as a trial, when it is reached by the Courts last specified, but as other than a trial when, although it would have been reached earlier, it is actually reached on the same materials only in second appeal, the distinction is not maintained in the two cases on which plaintiff relies. For in them the proceedings of a Court of first appeal were in question. In *Abdul Majid* v. *Jew Narain Mahto* (3) the High Court, no doubt, held that the Appellate Court "was not holding a trial and, therefore, section 13 of the Code then in force" could not apply and that Court's decision founded on *res judicata* could not be sustained; and this decision was approved by a Full Bench of this Court in *Panchanada Velan* v. *Vaithinatha Sastrial* (4). But the contrary view is implied in *Balkishan* v. *Kishan Lal* (5), which was approved in this Court in *Venkata Narasimha Appa Row* v. *Sobhanadri Appa Row* (6), and in Calcutta in *Midnapore Zemindary Co., Ltd.* v. *Nitya Kali Dasi* (7), in which dissent from *Abdul Majid* v. *Jew Narain Mahto* (3) in that decision is unconnected with the preceding statement of the reason for it, that "the doctrine of *res judicata* did not apply", when, as in the case before the Court, "the very object of the appeal in substance, if not in form, was to get rid of the adjudication which was said to render the question which the Appellate Court was asked to decide *res judicata*. That observation is, it may be respectfully suggested, intelligible with reference to the case before the Court and to the case in *Abdul Majid* v. *Jew Narain Mahto* (3), because *res judicata* was pleaded in both in respect of a decision in another suit decided on the same evidence as that with which the appeal was connected. Here that is not the case; and it is, therefore, unnecessary for us to treat *Panchanada Velan* v. *Vaithinatha Sastrial* (4) as conclusive or the reference in it to *Abdul Majid* v. *Jew Narain Mahto* (3) as an endorsement of all the *dicta* contained therein or of that on which plaintiff relies. In accordance with the other decisions above referred to, which include one of this Court, plaintiff's objection to the consideration of this Court's judgment in Second Appeal No. 1057 of 1917 must be disallowed.

The foregoing exhausts plaintiff's arguments. The result is that the second appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

(3) 16 C. 233; 8 Ind. Dec. (N. S.) 154.

(4) 29 M. 333; 16 M. L. J. 63.

(5) 11 A. 148; A. W. N. (1889) 42; 13 Ind. Jur. 309; 6 Ind. Dec. (N. S.) 523.

(6) 13 M. L. J. 134.

(7) 24 Ind Cas. 243.

ALI HUSSAIN *v.* MOHAMED HUSSAIN.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 38 OF 1919.

July 30, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

ALI HUSSAIN—DEFENDANT—APPELLANT

versus

MOHAMED HUSSAIN—PLAINTIFF—RESPONDENT.

Muhammadan Law—Waqf—Mutwalli, *transfer of office of—Liability of old* mutwalli—*Power of* mutwalli *to restrain co-*mutwalli *from committing waste—Civil Procedure Code (Act V of 1908), s. 92, scope of—Declaration that plaintiff and defendant are co-*mutwallis, *suit for, whether falls within section.*

Where the *mutwalli* of *waqf* property appoints another *mutwalli*, his responsibility remains unimpaired, unless such appointment or the transfer of the trust is confirmed by authority. Being so responsible, he is entitled to restrain his co-trustee from aliénating or wasting any part of the *waqf* property. [p 628, col 2; p. 629, col. 1.]

Section 92 of the Civil Procedure Code has no application to a suit for a declaration that the plaintiff and defendant are the *mutwallis* of *waqf* property and are entitled to manage it jointly. [p. 629, col. 1.]

Appeal from an order of the Subordinate Judge, Moradabad, dated the 29th January 1919.

The Hon'ble Mr. *S. Raza Ali*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises relates to a grove which originally belonged to one *Musammat* Muniran. She made a *waqf* of this grove in the year 1890 and appointed herself the first *mutwalli*. The deed of *waqf* provided that after her death the *mutwallis* should be her grandsons, namely, the plaintiff Muhammad Husain and the defendant Ali Husain. The present suit was brought by the plaintiff for a declaration that the grove was *waqf* property in which the plaintiff and the defendant Ali Husain had no other rights than those of *mutwallis*. He asked for an injunction restraining Ali Husain from transferring the trees in the grove. He was allowed to amend the plaint and to claim a certain sum of money as the price of trees which were alleged to have been cut down. It appears that on the 15th of June 1917 the plaintiff Muhammad Husain executed a document whereby he transferred his rights as *mutwalli* to his father Allah Baksh and appointed him *mutwalli* in his own place. Allah Baksh applied for mutation of names, but his application was refused and he has taken no part in the management of the property nor has he asserted any right in respect of it. The defendant contended that as the plaintiff had transferred his rights to his father he was not entitled to maintain the suit and that he had ceased to be *mutwalli*. The decision of the question thus raised depended on the terms of the *waqfnama* executed by the creator of the *waqf*. In the fourth paragraph of that document she provided that the *mutwallis* could appoint a member of her family as *mutwalli* in their own place. The learned Subordinate Judge held that this was not a general power enabling each one of the *mutwallis* to appoint a substitute in his own place but power was given to both the *mutwallis* jointly to appoint a substitute in place of both of them. We think that this interpretation of the clause the in *waqfnama* is a proper interpretation and apparently represents the intention of the *waqif*. If this was so (and we think that this is what was intended by the *waqif*), the appointment of the plaintiff's father by the plaintiff was invalid. As we have said above, the appointment has never taken effect and the plaintiff's father has after the decision of the mutation case not asserted any right under the document executed in his favour. It is urged before us that the effect of the appointment of the plaintiff's father by the plaintiff was that the plaintiff relinquished his rights as *mutwalli*, and in support of this contention reliance is placed upon the following passage in Mr. Ameer Ali's Muhammadan Law, Volume I, Fourth Edition, page 456:—"The appointment of another *mutwalli* by one who does not possess general powers, without the leave of the *Qazi*, is tantamount to a withdrawal of the incumbent from office, yet he remains responsible, unless the appointment or transfer of the trust is subsequently confirmed by the *Qazi*." This passage, in our opinion, so far from supporting the case of the appellant, is against him. The plaintiff, notwithstanding the appointment by him of his father, remained responsible inasmuch as the appointment of the father or the transfer of the trust was never confirmed by any authority. Being

so responsible he is entitled to restrain the defendant, his co trustee, from alienating or wasting any part of the *waqf* property. A reference was made in the course of the argument to section 92 of the Code of Civil Procedure and it was urged, though no plea has been taken on the point in the memorandum of appeal before us, that the plaintiff was seeking by this suit to obtain the remedy which could be granted by section 92. It is clear from the prayer in the plaint that such was not the intention of the plaintiff. He was not seeking to remove the defendant from the management of the trust property. On the contrary he is asking for a declaration that both he and the defendant are the *mutwallis* and are entitled to manage the *waqf* property jointly. We think the appeal is without force. We dismiss it with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 94 OF 1918.

February 3, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

HARI PRU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MI AUNG KRAW ZAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—*Co-sharers—Adverse possession—Overt act.*

The entry on, and possession of, land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all the co-owners, for the reason that the possession of one co-owner is in itself rightful and does not imply hostility as does the possession of a mere stranger. A co-owner might, however, establish a plea of adverse possession, if it is clearly shown that he repudiated the title of his co-owners by an overt claim to exclusive ownership more than twelve years before the institution of the suit. [p. 630, col 2.]

Mr. *J. R. Das*, for the Appellants.

Mr. *May Aung*, for Respondents Nos. 1 to 3 and 5 to 8.

JUDGMENT.

TWOMEY, C. J.—The Supari Bazaar, a piece of land with bazaar buildings on it in Akyab town, was jointly owned in 1900 by six persons in various shares. One of these joint owners was the defendant-appellant, Hari Pru, who had inherited certain shares and bought others so that he held 62 14/15 shares in all out of the total 101⅓. Another of the share-holders was one Mi San U, who had 24 shares. Hari Pru subsequently sold his shares and they now belong to the Bank of Bengal. The present suit was brought by the plaintiffs as heirs of Mi San U for a declaration of their title to Mi San U's 24 shares, the alleged cause of action being that the Bank had attached the whole property in execution of a decree as belonging to Hari Pru. The first two defendants are Hari Pru and his wife, the Bank of Bengal is the third defendant and the remaining defendants Nos. 4 to 7 are representatives of the remaining joint owners (of 101⅓ *minus* 62 14/15 *minus* 24 shares). The defendants Nos. 3 to 7 did not contest the plaintiffs' claim. The Bank put in a written statement stating that they claimed only the shares which belonged to Hari Pru, 62 14/15. The defendants Nos. 4 to 7 admitted the plaintiffs' claim and asked that a declaration might also be passed as to their shares (101⅓ *minus* 62 14/15 *minus* 24). The defendants Nos. 1 and 2, Hari Pru and his wife, contested the plaintiffs' claim and alleged that they had been in adverse possession of the whole property from 1900, *i.e.*, upwards of 12 years.

The District Court found that Hari Pru's possession was not adverse as against the co-sharers and granted declarations as prayed for by the plaintiffs and by the defendants Nos. 4 to 7. Hari Pru and his wife appeal.

The first question raised in appeal is whether the District Court should not have refused the declaration under section 42, Specific Relief Act, as the plaintiffs omitted to seek further relief. This question was not raised in the District Court. The plaintiffs claimed that they were in possession of their 24 shares. But Hari Pru in his written statement denied their possession, and having regard to the provisions of section 42, Specific Relief Act, the Court should thereupon have framed a preliminary issue and determined the question whether the plaintiffs were at the time of instituting the suit in possession of the 24 shares so as to

make it unnecessary for them to seek further relief beyond the mere declaration of title. Instead of following this course the learned Judge framed the single issue: "Have defendants Nos. 1 and 2 come to be owners by adverse possession of all the interest in this land which has not been bought by the Bank of Bengal?" As a matter of fact the learned Judge held that although Hari Pru was not in adverse possession from 1900 as claimed by him, he did set up a claim to be in adverse possession in a certain letter, Exhibit G, sent by him to the plaintiffs' legal advisers in November 1915. For reasons which will be stated presently we are unable to regard this letter as a claim to be in adverse possession of the plaintiffs' shares in the property. The facts of the case are not really in dispute. It has always been the practice for one of the co sharers to act as manager of the property, and when Hari Pru acquired the shares of a former co-sharer named Tha Zan who had been managing the bazaar, Hari Pru with the assent of the other co-sharers became manager in 1900. The learned Judge says: "there is no doubt that Hari Pru has been dealing with this bazaar as though it was his own," but the judgment clearly shows that in the Judge's opinion Hari Pru was regarded by the other co-sharers only as manager, and this view is borne out by the evidence. There was no definite refusal to render accounts. The co-sharers demanded accounts and Hari Pru made excuses and put them off.

Hari Pru received all bazaar rents and spent considerable sums on repairs and improvements, but at least in some cases he consulted the co-sharers. The profits are said to have amounted to only Rs. 300 to Rs. 500 a year and some heavy expenditure appears to have been incurred in building a *pucca* sea wall and in re-roofing and re-flooring the buildings. It may well be, as the Judge suggests, that the co-sharers accepted Hari Pru's assurances that there was no surplus.

It is not disputed that Tha Zan and former managers were in possession of the whole property for themselves and the co sharers. The latter were in possession of their shares through the managing co-sharer. There is nothing to show that a different state of things arose when Hari Pru became manager. It must be taken that he entered into possession for himself only as regards his quota of the shares, and that his possession was the possession of the co-sharers as regards their respective quotas. In these circumstances the burden was on Hari Pru to show how and when his possession of the co-sharers' quotas became adverse. The fact that he exclusively managed the property counts for next to nothing. The following passage from a recent judgment of the Privy Council has a bearing on this point:—"It is important to bear in mind certain facts with regard to the possession of joint property, which distinguish it from property separately held. In the former case the phrase 'exclusive possession' has an equivocal meaning; in the latter it has not. If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members:" *Hardit Singh* v. *Gurmukh Singh* (1). The same principle would apparently apply to joint owners generally. The appellants' learned Counsel relies on the Calcutta case *Jogendra Nath Rai* v. *Baladeo Das* (2) as showing that one co-owner may hold adversely to his co-parceners, and if his possession is continued uninterruptedly for the statutory period he will acquire an indefeasible title. The fundamental rule is stated to be that the entry and possession of land under the common title of one co-owner will not be presumed to be adverse to the others but will ordinarily be held to be for the benefit of all, the obvious reason being that the possession of one co-owner is in itself rightful and does not imply hostility as would the possession of a mere stranger. But the learned Judges considered that a co owner might establish a plea of adverse possession if it was clearly shown that he had expressly repudiated the title of his co-owner. Assuming that this is a correct statement of the law (and it is con-

(1) 47 Ind. Cas. 626; 20 Bom. L. R. 1064; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 28 C. L. J. 437; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).

(2) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

sistent with the passage from the Privy Council judgment above cited), Hari Pru would have to show that he repudiated the plaintiffs' title by an overt claim to exclusive ownership more than twelve years before the institution of the suit, and he has clearly failed to show this.

This finding would be sufficient to dispose of the appeal were it not for the plea raised with reference to section 42, Specific Relief Act. In view of that plea we have to decide the further question whether Exhibit G, dated 12th November 1915, had the effect of dispossessing the plaintiffs of their 24 shares and thus rendering it incumbent on them to sue for possession. The following is a translation of the letter:—"Exhibit G, for the plaintiff. Akyab, 12th November 1915, to U Tun Chan, Advocate. I have received your notice, dated 6th November 1915, and its amendment, dated 11th November 1915. As I have been enjoying the profits and standing the losses of the said property since 1260, I write to say that whether the property in question is sold or not, or pulled down and re-built or not, it has nothing whatever to do with the persons referred to. (Sd.) Haree Pru." It was sent by Hari Pru in reply to a notice from the plaintiffs pointing out that Hari Pru had sold his 62 shares, and, therefore, that he had no further concern with the property, objecting to Hari Pru's action in letting out the property to a tenant, and directing him to refrain from pulling down or re-building any of the buildings. The letter of November 12th, 1915, does not expressly repudiate the claims of the co sharers. It does not expressly claim that Hari Pru is in exclusive separate possession of the property. It is capable of being read as a claim by Hari Pru to continue the exclusive *management* of the bazaar (whether in his own right or on behalf of those who purchased his former shares). The concluding words, "it has nothing whatever to do with the persons referred to" (*i. e.*, the plaintiffs), do not necessarily mean that the writer is claiming anything more than the right to go on managing the property without interference from the plaintiffs. We do not agree with the learned Judge in regarding this letter as a definite claim by Hari Pru to hold the whole property as his own. It must be held that this letter made no change in the character of Hari Pru's possession, and that the co-sharers, including the plaintiffs, continued in possession through him. Consequently, the frame of the suit did not contravene the provisions of section 42, Specific Relief Act.

The learned Judge, in our opinion, erred in granting declarations of title to the defendants Nos. 4 to 7. It is admitted that there is no provision of law under which declarations could be granted to the defendants in this case.

The decree will be modified by striking out the declarations in favour of defendants Nos. 4 to 7 and the order for the payment of these defendants' costs by the co-defendants Nos. 1 and 2 is set aside. Otherwise the decree of the lower Court is confirmed and the appellants will pay the costs of the respondents Nos. 1 to 3 in this Court.

ORMOND, J.—I concur.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1288 OF 1918.

February 11, 1919.

Present:—Mr. Justice Bakewell and Mr. Justice Phillips.

HAMMAKKE HENGSU—DEFENDANT—APPELLANT

versus

KOCHAPPA RAI—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Profits of land, claim for—Profits consisting of rent and being fixed sum—Jurisdiction of Small Cause Court.

A suit for a specific sum as profits of land without asking for an account of profits is a suit of a Small Cause nature, and is not exempt from the cognizance of a Small Cause Court under Article 31 of Schedule II to the Provincial Small Cause Courts Act. [p. 632, col. 1.]

Second appeal against the decree of the District Court, South Kanara, in Appeal Suit No. 296 of 1917, preferred against the decree of the Court of the District Munsif, Puttur, in Original Suit No. 600 of 1916.

Mr. *K. Y. Adiga*, for the Appellant.

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondent.

JUDGMENT.—The plaint claims a specific sum as a half share of the profits of land, and does not pray for an account of profits. No issue was raised as to the amount of profits, and apparently they are a fixed sum and probably, therefore, consist of rent. It must be taken, from the course of the proceedings, that the suit was properly framed and that an account was unnecessary to ascertain the profits of the land. The suit, therefore, does not fall within the Provincial Small Cause Court Act, Article 31, and is of a small cause nature and no second appeal lies.

The second appeal is dismissed with costs.

M. C. P

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 944 OF 1917.

July 18, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Wallach.

ALAYAR KHAN—PLAINTIFF—APPELLANT

versus

Musammat BIBI KUNWAR—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 61—Suit to recover revenue paid by plaintiff in respect of property of which he has been dispossessed—Limitation, commencement of.

The period of limitation for a suit to recover revenue paid by the plaintiff while in possession of immoveable property, but of which he subsequently relinquished possession, is contained in Article 61 of Schedule I to the Limitation Act, and the period commences to run from the date on which the last payment was made. [p. 633, col. 1.]

Second appeal against the decision of the District Judge, Bareilly, dated the 17th April 1917.

The Hon'ble Mr. *Raza Ali*, for the Appellant.

Mr *Lakshmi Narain*, for Mr. *Iswar Saran*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was brought under the following circumstances. One Jai Ram was the owner of certain immoveable property. Upon his death in 1910 disputes arose between his widow *Musammat* Bibi Kunwar and his nephew Baijnath. The former alleged that Jai Ram was separate and that she, as his widow, was entitled to his property. Baijnath, who was the brother's son of Jai Ram, asserted that he and Jai Ram were members of a joint family, and that, therefore, upon Jai Ram's death he succeeded to the property by right of survivorship. These disputes were raised in mutation proceedings. The Court of first instance held that the family was joint and ordered the name of Baijnath to be entered in the revenue papers. This order was passed on the 23rd of December 1910. On appeal the aforesaid order was set aside and the Appellate Court held on the 18th of April 1911 that Bibi Kunwar was entitled to the property, her husband having been separate from his nephew, and directed her name to be entered. Upon the passing of the order of the Court of first instance Baijnath took possession and between the date of the order of the first Court and that of the order of the Appellate Court he collected rents and profits to the extent of Rs. 1,218-14-8 from tenants and paid Rs. 1,226 8 3 on account of Government revenue. After the passing of the order of the Appellate Court he had to relinquish possession as he apparently acquiesced in the decision of that Court. Some of the tenants sued him for a refund of the rents which he had realised from them and obtained decrees. He thereupon assigned to the plaintiff his alleged right to recover from the defendant the revenue which he had paid in respect of the property. The plaintiff by virtue of this assignment brought the present suit for recovery of Rs. 1,226-8-3 and interest thereon. He alleged his cause of action to have arisen when the tenants obtained a decree against Baijnath on the 29th of March 1913. The suit was instituted on the 28th of March 1916. The defendant pleaded limitation and the question

was what Article of the Limitation Act governs the present suit. The Court of first instance decreed a part of the claim. It did not decide what article of the Limitation Act applied to the case. The lower Appellate Court was of opinion that Article 97 was applicable and that limitation was to be computed under that article from the 18th of April 1911, the date of the decision of the Appellate Court when Baijnath relinquished possession. That Court dismissed the suit as time barred. In our opinion Article 97 has no application to the present case. That article provides for suits for money paid upon an existing consideration which afterwards fails. The consideration for payment of the revenue could not be the realisation of rents from the tenants. The revenue was paid because the property was liable for revenue and demand was made for it. It was payable by the person in possession, whether he had collected rents or not. Therefore, the collection of rents was not the consideration for the payment of the revenue, as held by the Court of first instance and contended for by the learned Vakil for the appellant, and a refund of the rents cannot be said to be a failure of the consideration or part thereof. The learned Vakil for the appellant has asked us to apply Article 97 or Article 120. We do not think that Article 97 is applicable. If we assume that the consideration for the payment of revenue was possession by Baijnath of the property of the defendant that consideration failed, as the learned Judge says, when possession was removed in April 1911. We do not, however, think that it could be said that the consideration for the payment of revenue was the fact that Baijnath was in possession. In our judgment the article applicable is Article 61, which clearly applies to cases of this kind. That article provides for suits "for money payable to the plaintiff for money paid for the defendant" and limitation runs from the date on which the money was paid. Baijnath, the vendor of the plaintiff, paid the revenue which in reality was payable by the defendant. Therefore, the money which he paid was money paid for the defendant and it is this money which is sought to be recovered by the present suit. As limitation for a suit of this kind should run from the date of payment and in the present case the last date of payment was some prior to the 18th April 1911, the present suit brought on 28th March 1916 is time-barred. It is urged that if Baijnath had sued for the revenue which he had paid, it might have been contended on the defendant's behalf that as he had realised rents from the tenants he was not entitled to get anything more than the difference between the amount realised by him and the amount paid as revenue and that the present suit could not have been instituted unless Baijnath had refunded any part of the rents realised from the tenants.

We do not think that this is a valid contention. Baijnath could have sued, if at all, for the balance of revenue due to him after giving credit for what he had realised. In that case the defendant could not have recovered the rent twice over from any of the tenants and the tenants could not have obtained a refund of the rents from Baijnath. If Baijnath has under the present circumstances sustained any loss, it is in consequence of his laches in not bringing his suit within the period of limitation prescribed for a suit of this kind. The learned Vakil for the appellant in support of his contention that Article 97 applies referred to the case of *Koji Ram* v. *Ishar Das* (1). In our opinion that case has no bearing on the present case and its facts are wholly distinguishable from the facts of this case, as in our opinion, Article 61 is the Article applicable to the present suit and, therefore, Article 120 cannot apply. The Court below was, therefore, right in dismissing the suit on the ground of limitation, though its reasons are not the reasons for which we hold the suit to be time-barred. We dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

(1) 8 A. 273; A. W. N. (1886) 95; 5 Ind. Dec. (N. S.) 61.

RAMASWAMI GOUNDAN *v.* KALI GOUNDAN.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 111 OF 1918.

October 31, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

RAMASWAMI GOUNDAN—PETITIONER

versus

KALI GOUNDAN—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 131, 192, 205--Civil Procedure Code (Act V of 1908), s. 115—Order under s. 131—Revision—High Court, power of interference of - Deposit required by s. 131 not made on last day owing to absence of presiding officer--Delay, whether can be excused.

Section 192 of the Madras Estates Land Act renders section 115 of the Civil Procedure Code applicable to all suits, appeals and other proceedings under the former Act, and thus vests the High Court with the power of revision in respect of orders passed under that Act. [p. 634, col. 2.]

The exercise of this power, however, is always discretionary, and where the petitioner has already applied to the Revenue Authorities without success, the High Court will decline to exercise its power of revision unless imperatively called upon to do so to prevent a miscarriage of justice. [p. 635, col. 1.]

Where the deposit required by section 131 of the Madras Estates Land Act cannot be made on the last day of the time allowed owing to the absence of the presiding officer, a deposit made the next day will satisfy the requirements of the section. [p. 635, col. 2.]

Petition, under section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Collector, Trichinopoly, dated the 16th August 1917, in D. Dis. No. 2408 Rev. of 1917, affirming the order of the Deputy Collector, Namakkal, dated 3rd June 1917—Miscellaneous Petitions Nos. 95 and 96 of 1917.

FACTS appear from the judgment.

Mr. *L. S. Veeraraghava Aiyar*, for the Respondent, raised the preliminary objection that no revision petition lay against an order under section 131 of the Madras Estates Land Act. Under section 205 of the Act powers of revision are granted to the Collector and the Board of Revenue. Petitioner applied to both those tribunals, but without success.

Mr. *K. V. Sesha Aiyangar*, for the Petitioner.—The preliminary objection cannot stand. Section 192 of the Estates Land Act makes section 115, Civil Procedure Code, applicable to all suits, appeals and other proceedings under the Act. The fact that separate powers of revision are vested in the Collector and the Revenue Board does not oust the jurisdiction of the High Court.

The respondent has not made the deposit within the time allowed. He cannot claim any indulgence. Act I of 1908 is a self-contained Act and the provisions of section 5 of the Limitation Act do not in terms apply. The absence of the Deputy Collector from the office did not prevent the respondent from lodging the money in the Sub-Treasury. *Vide* Government Notification No. 145 Rev., dated 27th March 1912.

There was no notice to the auction-purchaser of the intended cancellation of the sale That vitiates the whole proceedings.

Mr. *L. S Veeraraghava Aiyar*, for the Respondent.—The failure of respondent to deposit the amount in time was not due to any wilful default on his part. If the Deputy Collector was absent and money could not be received, the default was due to an act of Court. Under the Act the payment is to be made to the Collector and petitioner was not bound to adopt any other course.

Absence of notice to the auction-purchaser is only an immaterial irregularity. It does not vitiate the proceedings.

JUDGMENT.

AYLING, J.—This petition arises out of an order of the Deputy Collector of Namakkal under section 131, Madras Estates Land Act, setting aside a sale for arrears of rent.

The preliminary objection is taken that this Court has no power to revise such an order. I do not think this objection can be upheld. It is true that section 205 of the Act (read with the Schedule, Part B, No. 19) gives a power of revision to the Board of Revenue or the District Collector in the case of such an order and in the present case, petitioner has invoked the interference of both the authorities named without success. But section 192 renders section 115 of the present Code of Civil Procedure (old section 622) applicable to all suits, appeals and other proceedings under the Madras Estates Land Act. It may seem undesirable that the power of revising the same order should vest in two authorities so different in their constitution and ordinary procedure as this Court and the Board of Revenue, and one

may wonder whether such a result was deliberately intended by the Legislature or arrived at by inadvertence. Nevertheless we have to interpret the Act as it stands. It is impossible to say that the grant of the power of revision to this Court is inconsistent with the grant of similar power to the Collector and Board of Revenue: and I think it must be held that section 192 vests this Court with the power of revision, which petitioner invokes.

Its exercise is, of course, always discretionary, and where, as in the present case, the petitioner has previously applied to the Revenue Authorities under section 205 without success, I think this Court might reasonably decline to exercise it unless imperatively called upon to do so to prevent a miscarriage of justice.

The facts of the case are clearly set forth in the order of the District Collector declining to interfere, which runs thus:

"On the 24th May, the last day open to him, the counter petitioner appeared with the deposit and applied to have the sale set aside. The Divisional Officer was absent on casual leave; the clerk, therefore, told him to come on the 26th which he did. In the circumstances, I cannot say that the sale was improperly cancelled even though no notice was given as it ought to have been to the purchaser.

"I decline to interfere on revision and dismiss the petition."

Petitioner's main contention is that the deposit of the amount by the defaulting ryot within the period of 30 days from the sale is a condition precedent to the passing of an order setting aside the sale, and that unless it is strictly complied with, no matter what the circumstances may be, an order setting aside the sale is *ultra vires* and illegal. The admitted failure to give notice to the auction-purchaser before passing the order is also said to be an infringement of Order XXI, rule 92, and to equally invalidate the order.

As regards the first objection, however strict the wording of section 131 may seem to be, and although section 5, Indian Limitation Act is not in terms applicable, authority is not wanting for a more reasonable and liberal interpretation of the section. *Shooshee Bhusan Rudro* v. *Gobind Chunder Roy* (1) was a precisely similar case to the present one under the Bengal Tenancy Act; the learned Judges held that, on general principles, when a fixed period is given to do a certain act, and the person bound to perform it is, from no act of his own, but from some act or order of the Court, prevented from carrying it out, he gets the advantage of the next open day. This ruling was followed and the same principle applied in other cases in the same Court [*vide Peary Mohun Aich* v. *Anunda Charan Biswas* (2) and by a Bench of this Court in *Sambasiva Chari* v. *Ramasami Reddi* (3)] to a case under the Rent Recovery Act. It has been embodied in a statutory rule in section 10 of the General Clauses Act as regards cases where the Court or office is actually closed. In the present case it may be said that the office or Court of the Deputy Collector was not closed on the last day of performance, but only the presiding officer, the Deputy Collector himself, was absent on leave. This makes no difference. In consequence of his absence respondent found it just as impossible to get his deposit received as if the office or Court had been shut up, and his failure to perform the act required of him within the time specified was equally occasioned by the act of the Court and by no act of his own.

I find nothing inconsistent with this in *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (4). In that case it was not shown that the judgment debtor's failure to deposit the full amount within the prescribed period was due to any act or mistake of the Court: and the learned Judges are at pains to make it clear that, if it had been, their decision might (not to say, would) have been different. In another case quoted as *Bibi Sharofan* v. *Mahomed Habibuddin* (5), there is nothing to indicate that the failure to deposit within the prescribed time was due to any act of the Court: and the learned Judge whose judgment is relied on (Mookerjee, J.) had subscribed to the general principle laid down in

(1) 18 C. 231; 9 Ind. Dec. (N. S.) 154.
(2) 18 C. 631; 9 Ind. Dec. (N. S.) 421.
(3) 22 M. 179; 8 M. L. J. 265; 8 Ind. Dec. (N. S.) 127.
(4) 26 C. 449; 3 C. W. N. 283; 13 Ind. Dec. (N. S.) 890.
(5) 10 Ind. Cas. 148; 13 C. L. J. 535; 15 C. W. N. 685.

Shooshee Bhusan Rudro v. *Gobind Chunder Roy* (1): *vide* his judgment in *Mahomed Akbar Jaman Khan* v. *Sukhdeo Panday* (6).

Appellant's Vakil drew our attention to Government Notification No. 145, Revenue, dated the 27th March 1912, under which a deposit under section 131 is allowed to be paid into any Sub Treasury; and suggested that, as this alternative course was open to him, respondent should not be allowed the benefit of the general principle. The course prescribed by the Act is payment to the Collector, and we are in no position to say that when respondent found the latter's office closed against him, he was in a position to avail himself of the alternative course.

In my opinion it was competent to the Deputy Collector to set aside the sale in the circumstances, although the deposit was not made within the prescribed time.

Coming to the second point, whether failure to give notice is a mere irregularity, or vitiates the whole proceedings is open to argument. But taking the view most favourable to appellant, I should not be prepared to exercise our revisionary powers in this case on that ground alone. If the objection were allowed, our only course would be to set aside the Deputy Collector's order, and remand the application for disposal after due notice to appellant. But we have now had the advantage of hearing the case fully argued in all its aspects; and it is clear that appellant could bring forward no tenable objection to the setting aside of the sale, and that the Deputy Collector's order was a perfectly just, reasonable and proper one (apart from the omission to give prior notice). To remand the case in such circumstances would be futile.

I would dismiss the petition with cost.

KRISHNAN, J.—I agree and have nothing further to add, except that I have already dealt with the revisional power of the High Court in my judgment in *Paramaswami Ayyangar* v. *Alamu Nachiar* (7) which may be referred to.

M. C. P.

Petition dismissed.

(6) 10 Ind. Cas. 51; 13 C. L. J. 467.
(7) 49 Ind. Cas. 11; 35 M. L. J. 632; 9 L. W. 26; 42 M. 76; (1918) M. W. N. 107.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1036 OF 1918.

August 8, 1919.

Present:—Justice Sir P. C. Banerji, Kt., and Mr. Justice Piggott.

Thakur GANESHI SINGH—DEFENDANT—APPELLANT

versus

SHYAM SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 456—Guardian ad litem, *appointment of—Notice to minor, whether necessary—Civil Procedure Code (Act V of 1908), O. XXXII, r. 4—Guardian* ad litem *—Adverse interest, what is—Suit attacking mortgage—Father mortgagor, interest of, whether adverse to minor son.*

Where a suit was instituted and a guardian *ad litem* appointed of the minor defendants when the Civil Procedure Code of 1882 was in force, objection cannot be taken to the appointment of the guardian on the score of want of notice to the minors, as section 456 of that Code did not require that notice should go personally to, and be served personally upon, the minors [p. 637, col. 1.]

Where the guardian *ad litem* of minor defendants is their father and is also the mortgagor of the suit property, it does not necessarily follow that his interests are adverse to the minors who with him form a joint family of which he is the managing member. [p. 637, cols. 1 & 2.]

Second appeal against the decision of the Officiating First Additional Judge, Aligarh, dated the 17th April 1915.

The Hon'ble Mr. *N. P. Asthana*, for the Appellant.

Messrs. *J. K. Mukerjee* and *Kanhaya Lal*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are these:—One Yad Ram made a mortgage of joint ancestral property in favour of Ganeshi Singh appellant on the 8th of February 1897. On the 7th of February 1908 a suit was brought by the mortgagee to enforce the mortgage and the defendants to the suit were Yad Ram and his four sons, two of whom, Shib Dayal and Shib Singh, were of full age and the other two, namely, Shyam Singh and Sheo Dan Singh were minors. An application was made to the Court, supported apparently by an affidavit, praying that Yad Ram should be appointed guardian *ad litem* of the two minor defendants. This application was granted by the Court and Yad Ram was appointed guardian of the minors for the suit. This proceeding took place under the provisions of the Code of Civil Procedure

which was in force at the time when the suit was filed. The suit was not defended and an *ex parte* decree was made in favour of the mortgagee on the 10th of March 1909. The present suit was brought on the 5th of November 1914 by the four sons of Yad Ram for a declaration that the decree obtained by the mortgagee, Ganeshi Singh, on the 10th of March 1909 was not binding on them. The grounds upon which they brought the suit were that the decree was obtained fraudulently: that the minors were not properly represented in the suit. The Court of first instance dismissed the suit, finding that there was no fraud and that the minors were properly represented by their father, who was the manager of the joint family of which he and his sons were members. The lower Appellate Court agreed with the Court of first instance in finding that there was no fraud and that the allegation of fraud was not established. It dismissed the appeal of the two adult sons of Yad Ram but decreed the appeal and the suit of the minors on two grounds, first, that the appointment of the guardian was in contravention of the provisions of Order XXXII, rule 3, of the present Code of Civil Procedure, and, secondly, that Yad Ram was not a fit and proper person to be appointed guardian of the minors.

As regards the first ground of the lower Appellate Court's decision it seems to us to be erroneous. As we have stated above, the suit was filed and the guardian was appointed when the Code of Civil Procedure of 1882 was in force. Section 456 of the Code provided the procedure for the appointment of a guardian *ad litem*. It did not require that notice of the application for the appointment of such a guardian was to go to the minors personally and was to be served on them personally. Therefore, the procedure adopted by the Court was in accordance with the provisions of section 456. Then remains the question whether the guardian appointed was a fit and proper person to be appointed having regard to the provisions of section 457. It is contended that Yad Ram had an interest adverse to that of the minors. It does not necessarily follow that because he was the mortgagor, his interests were adverse to those of his sons who with him formed a joint family of which he was the managing member. It is not suggested in the plaint that the debt was incurred for immoral purposes. All that is said is that it was not a lawful debt. By this we suppose it is meant that the debt was not incurred for family necessity. If that had been a true defence to the suit of the mortgagee, one would have expected the adult sons of Yad Ram to have appeared and put forward that defence. They did not do so but allowed a decree to be passed against them. Upon the findings of both the Courts below the service of summons was duly effected and the allegations of the plaintiffs that they had no notice of the suit is untrue. We think that the learned Additional Judge was not right in holding that because Yad Ram was the mortgagor his interest was necessarily adverse to that of his minor sons. The proceedings in the previous suit were not, therefore, vitiated by any defect in the appointment of the guardian *ad litem* of the minor plaintiffs to this suit and their claim was rightly dismissed by the Court of first instance. We allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts.

We may mention that the respondent No. 2, Sheo Dan Singh, who has not appeared in this appeal was at the front when the appeal was filed, but he was subsequently served when he was in this country but has not chosen to appear. The appeal was, therefore, heard in his absence.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 35 OF 1917.

January 30, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

SANKARALINGA MUDALIAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KUTHALINGA MUDALIAR (DEAD) AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Arts. 131, 142 *—Suit for possession of temple—Limitation.*

RAM SARUP *v.* TIKA RAM.

The period of limitation applicable to a suit for possession of a temple, the value of the temple itself being included in the plaint valuation of the suit, is contained in Article 142 of Schedule I to the Limitation Act.

Eshan Chunder Roy v. *Monmohini Dassi*, 4 C. 683; 2 Ind. Dec. (N. S.) 434, distinguished.

Appeal against the decision of the Court of the Subordinate Judge, Tinnevelly, in Original Suit No. 35 of 1914.

Messrs. *K. R Gurusami Aiyar* and *Mr. A. Subbaram Aiyar*, for the Appellants.

Mr. *M. D. Devadass*, for the Respondents.

JUDGMENT.—We agree with the lower Court that the suit is barred by limitation, although in our opinion the appropriate Article is Article 142, and not Article 131 of the Limitation Act. The suit is in effect for possession of the temple and the value of the temple itself is specifically included in the plaint valuation of the suit. The judgment in *Eshan Chunder Roy* v. *Monmohini Dassi* (1), which is relied on by appellants' Vakil, proceeds on the basis that no interest in immoveable property was involved and *Ramanathan Chetty* v. *Murugappa Chetty* (2), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (3) and *Charapattada Siddalinga Swamulu* v. *Sondur Ramachandra Charlu* (4) all support the view that Article 142 is the proper article to apply in the present case.

But this makes the case of plaintiffs worse, for under Article 142 the burden of proof must rest on plaintiffs, and on the meagre evidence on record we have no hesitation whatever in holding that they have not discharged it.

The appeal is dismissed with costs as also the memorandum of objection.

M. C. P.

Appeal dismissed.

(1) 4 C. 683; 2 Ind. Dec. (N. S.) 434.
(2) 27 M. 192; 13 M. L. J. 341.
(3) 23 M. 271 (P. C.); 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591.
(4) 35 Ind. Cas. 646; 31 M. L. J. 857; 4 L. W. 186.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS No 325 OF 1919.

August 12, 1919.

Present:—Justice Sir P. C. Banerji, KT., Mr. Justice Rafique and Mr. Justice Piggott.

RAM SARUP—PETITIONER

versus

TIKA RAM, VAKIL—OPPOSITE PARTY.

Allahabad High Court Rules, Part II, r. 26—Carrying on family business, whether amounts to entering into trade or business.

The carrying on of a family business by a Vakil, which has been in existence for a long time, does not amount to entering into any trade or business within the meaning of the second paragraph of rule 26, Part II, of the Allahabad High Court Rules. [p. 639, col. 1.]

Before a Vakil embarks on any commercial transactions he should give notice to, and obtain the permission of, the High Court. [p. 639, col. 1.]

Civil Miscellaneous under rule 26, Part II, of the High Court Rules.

Mr. *Nehal Chand*, for the Opposite Party.

JUDGMENT.—This is an application by one Ram Sarup praying that notice be taken of the conduct of Babu Tika Ram, a Vakil of this Court, now practising at Agra, it being alleged that he is guilty of professional misconduct. The misconduct imputed to the Vakil is a violation of rule 26, Part II, of the High Court Rules. The first paragraph of that rule provides that if an applicant for admission as a practitioner holds any appointment or carries on any trade or other business the High Court may refuse to admit him, or pass such orders on his application as it thinks proper. That paragraph has no bearing on the present case, inasmuch as in the petition before us it is not asserted that at the time when the Vakil applied in 1894 for admission, he was carrying on any trade or business. It is the provision of the second paragraph of the rule which the Vakil is alleged to have contravened. That paragraph requires that any person who, having been admitted as a legal practitioner, shall accept any appointment or shall enter into any trade or other business, shall give notice thereof to the High Court. It is said that this Vakil has, since his enrolment, been carrying on business in grain and other articles and has not given notice of his having entered

into such business to this Court. The Vakil has filed an explanation and in this explanation he states that there was a joint family business which used to be carried on from the time of his grandfather, that he and his father and uncle were members of the joint family and that he as a member of that faimly had an interest in that business. That business, according to his allegation, has long been closed and this is not denied by the applicant. We do not think that the carrying on of a family business, which has been in existence for a long time, may be regarded as entering into any trade or business within the meaning of the rule. The Vakil has admitted that from time to time he entered into transactions for the sale of grain, salt, cotton, seeds, etc., by way of speculation, but he has not done so habitually. He has mentioned eight instances, seven of which were instances of business carried on in the years 1915, 1916 and 1917. It does not appear that he has habitually or systematically exercised the profession of a trade in addition to his work as a Vakil. We do not think, therefore, that he can be held to have violated the provisions of the rule to which we have referred. We think, however, that it was not proper for him to have entered into the alleged transactions while he was carrying on the business of a Vakil, although those transactions were only isolated ones. We do not think that the fact that he helped his son in borrowing money for the business which his son is alleged to have carried on on his own account would amount to a violation of rule 26. Under those circumstances we are of opinion that further action is not called for in this case. At the same time we think that the Vakil should give an undertaking to the Court that he will not enter into any business or trade without giving notice to the Court and obtaining its permission. Such undertaking has been given to us by Mr. Nehal Chand who appears on behalf of the Vakil and by the Vakil who is himself present in Court. The Rule issued to the Vakil is accordingly discharged.

Rule discharged.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 261 OF 1918.

January 28, 1919.

Present: - Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

RALLABANDI VEERAMMA—PETITIONER — APPELLANT

versus

RALLABANDI SUBBA RAO AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 9 —Probate and Administration Act (V of 1881), s. 83 —Probate application—Dismissal for default—Restoration, application for, maintainability of.

Order IX, rule 9, of the Code of Civil Procedure is applicable to the dismissal of an application for Probate which has, under section 83 of the Probate and Administration Act, been treated as a suit. The applicability of the latter portion of rule 9 is not conditional on that of the former. [p. 640, col. 1.]

Appeal against the order of the District Court, Godaveri at Rajahmundry, in I. A. No. 275 of 1918, in Original Petition No. 55 of 1917.

FACTS appear from the judgment.

Mr. *P. Somasundram*, for the Appellant.—Order XXI, rule 9, governs proceedings under the Probate Act. Section 55 of the latter Act lays down generally that the provisions of the Civil Procedure Code shall, as far as possible, govern proceedings under the Act. Under section 83 of the Act the application has to be treated as a suit. Applying the 2nd part of Order IX, rule 9, Civil Procedure Code, the order of dismissal of the probate application may be set aside.

Mr. *A. Vencatachellam*, for the Respondents.—The latter part of Order IX, rule 9, Civil Procedure Code, can be applied only when the first part debarring plaintiff from a second suit can be applied, otherwise not. See *Ramani Debi* v. *Kumud Bandhu* (1).

JUDGMENT.—The question is whether Order IX, rule 9, of the Code of Civil Procedure, is applicable to the dismissal of an application for probate which has under section 83 of the Probate and Administration Act, V of 1881, been treated as a suit. That section directs that the proceedings shall take, as nearly as may be, the form of a suit according to the provisions of the Code of Civil Procedure. Section 55 of the same Act also applies

(1) 7 Ind. Cas. 126; 14 C. W.N. 924; 12 C. L. J. 185.

these provisions to proceedings in relation to the grant of probate so far as the circumstances of the case admit. And we cannot find anything in the latter part of Order IX, rule 9, which is the relevant provision in the present connection, which cannot be conveniently applied.

Respondents, however, argue, firstly, that that part of the rule can be applied only when the first part debarring the plaintiff from a second suit can be applied also, and they rely on *Ramani Debi* v. *Kumud Bandhu* (1) for the position that it cannot. This decision met with some criticism in the referring order of Beaman, J., *Kalyanchand Lalchand* v. *Sitabai Dhanasa* (2), but we do not think it necessary at present to consider whether it is correct. For we can see no reason for treating the applicability of the latter portion of Order IX, rule 9, as conditional on that of the former or refusing effect to section 55, Probate and Administration Act, on account of it. We, therefore, set aside the decision under appeal and remand the petition for re admission and disposal on its merits. Costs to date will abide the result and be provided for in the order to be passed.

M. C. P.

Appeal allowed.

(2) 23 Ind. Cas. 325; 38 B. 309; 16 Bom. L. R. 5 (F. B.).

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 143 OF 1918.
August 13, 1919.
Present:—Mr. Justice Rafique and
Mr. Justice Wallach.
POHKAR—DECREE HOLDER—APPLICANT
versus
RAM LAL—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), s. 167—Restitution, application for, dismissal of—Revision—High Court, whether can interfere.

An order made by an Assistant Collector rejecting an application for restitution, however erroneous, is not open to revision by the High Court. [p. 640, col. 2.]

Civil revision against an order of the Assistant Collector, First Class, Muttra, dated the 16th April 1918.

Mr. *S. N. Mukerji*, for the Appellant.

The Hon'ble Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This is an application in revision from an order of an Assistant Collector rejecting the application of the applicant for restitution. It appears that a suit was brought against the applicant for recovery of profits. The learned Assistant Collector, in whose Court the suit was filed, decreed the claim of the opposite party for about Rs. 700. On appeal the decree in favour of the plaintiff was increased by a few hundred rupees on account of interest. In second appeal to this Court the decree was reduced to about Rs. 200. In the meantime the opposite party had executed the decree of the first Appellate Court. After the decision of the case in this Court, the applicant before us presented a petition to the Assistant Collector for restitution, namely, for the recovery of the difference between the decree of the first Appellate Court and the decree of this Court. The Assistant Collector rejected the application and directed the applicant to file a regular suit. There can be no doubt that the order of the Assistant Collector is erroneous and must have been passed under a misapprehension. No remedy is open by way of a regular suit to the applicant to recover the balance of the money that was realised by the opposite party in execution of the decree of the first Appellate Court. A preliminary objection is taken on behalf of the opposite party to the application in revision to this Court on the ground that no revision lies. This objection is supported by authority and we need only mention one case, *vide Damber Singh* v. *Sri Kishun Das* (1). On behalf of the applicant great stress is laid on the fact that if the present application is rejected, he, the applicant, has no remedy anywhere. We think that the application for restitution made by the applicant, though rejected by the learned Assistant Collector, does not prevent him, the applicant, from making another application before the Revenue Court. We

(1) 2 Ind. Cas. 377; 6 A. L. J. 552; 31 A. 445.

have no doubt that if the matter is properly put before the learned Assistant Collector he will take action upon it. In any case the present application is not maintainable. We, therefore, dismiss it but in the circumstances of the case make no order as to costs.

Application dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 4 OF 1918.

January 6, 1919.

Present:—Mr. Justice Seshagiri Aiyar.

KOPPAKA CHANDRAYYA—

PETITIONER

versus

F. W. R. ROBERTSON, TRUSTEE TO THE MAHARAJA OF VIZIANAGARAM,

AND OTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, rr. 89, 90—Execution of decree—Sale—Application by prior vendee of portion of property to set aside sale, maintainability of—Order dismissing application—Revision—High Court, interference by.

A purchaser at a private sale from a judgment-debtor of a portion only of certain properties, which are subsequently sold in execution of a decree, is not entitled to ask that the execution sale be set aside on the ground that the amount of the decree has been fully paid by himself and other purchasers of the rest of the property

Karunakara Menon v. *Krishna Menon*, 27 Ind Cas. 952; 2 L. W. 196; 28 M. L. J. 262; 39 M. 429, followed.

An order dismissing such an application does not give rise to any question of jurisdiction and is not open to interference by the High Court on revision.

A mere wrong decision on a question of law is not a ground for revision under section 115, Civil Procedure Code.

Balakrishna Udayar v. *Vasudeva Aiyar*, 40 Ind. Cas. 650; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 44 I. A. 261, (P. C.), followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the District Judge, Vizagapatam, in Civil Miscellaneous Appeal No. 3 of 1917, preferred against the order of the Court of the District Munsif, Chodavaram, in I. A. No. 1104 of 1916, in Execution Petition No. 13 of 1916, in Original Suit No. 422 of 1907.

Mr. *R. Narasimham*, for the Petitioner.

Mr. *V. Ramesam*, for the Respondent.

JUDGMENT.—In this case the petitioner purchased the property privately from the judgment-debtor. Other persons had purchased portions of the property before him; the 2nd counter-petitioner is an auction-purchaser. The contention of the petitioner is that as he himself and the previous vendees have paid the full amount of the decree the sale should be set aside. The lower Appellate Court held, following the decision of this Court in *Karunakara Menon* v. *Krishna Menon* (1), that as the petitioner paid only a portion of the amount he is not entitled to ask that the auction should be set aside. That decision has been sought to be distinguished before me. In my opinion the lower Appellate Court is right in holding that the present case is covered by the authority cited by the lower Appellate Court. Even apart from this view I fail to see what question of jurisdiction there can be for interference under section 115 of the Code of Civil Procedure. As was pointed out by the Judicial Committee in *Balakrishna Udayar* v. *Vasudeva Aiyar* (2), the mere fact that a wrong decision has been given on a question of law would not enable an Appellate Court to interfere with the order of the Court below under section 115. For both these reasons I uphold the judgment of the Court below and dismiss the petition with costs of the 2nd respondent.

M. C. P.

Petition dismissed.

(1) 27 Ind. Cas. 952; 28 M. L. J. 262; 2 L. W. 196; 39 M. 429

(2) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 26 (P. C.).

PARTAP SINGH *v.* JASWANT SINGH.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 163 OF 1918.
July 31, 1919.

Present:—Mr. Justice Rafique and Mr. Justice Wallach.

PARTAP SINGH AND ANOTHER—JUDGMENT-DEBTORS—APPLICANTS

versus

JASWANT SINGH AND ANOTHER—DECREE HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 190-), O. XLVII, r. 1—Review, application for—Appeal, filing of, pending review, whether affects review.

Where, during the pendency of an application for review, the applicant files an appeal against the order of which he is seeking a review, the fact that such appeal is pending is no bar to the disposal of the application for review. [p. 643, col. 1.]

Civil revision against the order of the District Judge, Farrukhabad, dated the 9th of May 1918.

Mr. *Gulzari Lal*, for the Applicants.

Mr. *J. N. Mukerji*, for the Respondents.

JUDGMENT.—This is an application in revision from an appellate order of the learned District Judge of Farrukhabad setting aside an order of the Munsif passed on an application for review. It appears that the opposite party obtained a decree against the applicants on the 3rd of August 1911. The first application for execution was made on the 26th of August 1914. It was obviously time-barred. Notice was issued on the application to the judgment-debtors but nobody appeared. The judgment-debtors were minors then and are minors still. Notice was issued to their guardian. No steps were taken on that application. Subsequently other applications were put in and the execution of the decree was allowed. The property of the judgment debtors, the applicants before this Court, was attached and was advertised for sale. They object to the execution proceedings on the ground of limitation. Their objection was disallowed on the 9th of January 1917 and again on the 24th of March 1917. On the 2nd of April 1917 they filed an application for review before the Court executing the decree. Before the application for review could be disposed of, they preferred an appeal on the 9th of May 1917. Before the disposal of the appeal, the learned Munsif who was executing the decree disposed of the application for review. Thereupon the appeal was withdrawn. On the review application the learned Munsif allowed the objection of the judgment-debtors with regard to limitation, holding that the decree sought to be executed was barred. The decree-holders preferred an appeal from the order of the learned Munsif passed upon the review application. The learned District Judge held that the application for review could not be made when an appeal had been filed, though subsequently, to his Court. He allowed the appeal and set aside the order of the Munsif passed on the application for review. The judgment-debtors have come up in revision to this Court. They contend that the learned District Judge could only set aside the order of the first Court that was passed on the application for review for reasons given in Order XLVII, rule 7, on the ground of want of jurisdiction. No case was put forward by the decree-holders under Order XLVII, rule 7. They, however, objected to the order of the first Court on the ground that it was passed without jurisdiction inasmuch as an appeal was pending at the time the Munsif disposed of the application for review. The view taken by the learned District Judge that the application for review could not be entertained as an appeal was pending in his Court, is challeged by the judgment-debtors who say that under the law their application could be entertained by the Munsif. They contend that the application was made before the filing of the appeal and that the reasoning of the learned District Judge does not cover their case. The learned Judge relies upon the language of Order XLVII, rule 1 (*a*), which is to the effect that any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, may apply for a review of the decree or the order. The application of the judgment-debtors was made before the appeal was filed, and, therefore, it is contended that the words of Order XLVII, rule 1 (*a*), do not cover their case. The contention for the applicants before us is supported by the cases of *Chenna Reddi* v. *Pedda Obi Reddi* (1) and *Narayan Pur-*

(1) 2 Ind. Cas. 802; 32 M. 416; 19 M. L. J. 388; 6 M. L. T. 135 (F. B.).

shottam v. *Laxmibai* (2). In view of the case-law we must accept the contention of the applicants. We, therefore, allow the application and set aside the order of the lower Appellate Court with costs.

Application allowed.

(2) 23 Ind. Cas. 513; 38 B. 416; 16 Bom. L. R. 189.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 395 OF 1918.

May 12, 1919.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J.C.

RAM DEO SINGH—PLAINTIFF—APPELLANT

versus

DEPUTY COMMISSIONER OF SULTANPUR, MANAGER, COURT OF WARDS, DERA ESTATE—DEFENDANT—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 111 (b)—U. P. Court of Wards Act (IV of 1912), s. 54—Order by Revenue Officer directing institution of civil suit—Notice to Court of Wards—Suit brought before expiry of two months, maintainability of.

The appellant, who filed objections in a partition case instituted by the Court of Wards, was on 4th March 1918 ordered, under section 111 of the Land Revenue Act, to institute within three months a suit in the Civil Court for the determination of the question in dispute. On 20th May 1918 he gave notice to the Collector as required by section 54 of the U. P. Court of Wards Act and nine days later instituted the suit in the Civil Court:

Held, that there was no reason for dispensing with the express provisions of section 54 of the U. P. Court of Wards Act, and as it was in no way impossible for the appellant to have complied with that section and yet have brought his suit within the time allowed, the suit was rightly dismissed. [p. 644, col. 1.]

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 2nd September 1918, upholding the decree of the Additional Munsif, Sultanpur, dated the 1st July 1918.

Mr. *Rudra Datta Sinha*, for the Appellant.

Rai *N. N. Ghoshal* Bahadur, for the Respondent.

JUDGMENT.—This is a second appeal in a suit against the Court of Wards, which has been dismissed on the ground that the plaintiff-appellant failed to comply with the provisions of section 54 of the U. P. Court of Wards Act of 1912. The facts are admitted. The appellant filed objections in a partition case instituted by the Court of Wards. On 4th March 1918 an order was passed by the Assistant Collector, under section 111 of the Land Revenue Act of 1901, requiring the plaintiff to institute within three months a suit in the Civil Court for the determination of the question in dispute. On 20th May 1918 he gave notice to the Collector as required by section 54 of the Court of Wards Act. On 29th May, nine days later, he filed a suit out of which this appeal arises, instead of waiting for two months as required by the section. The case is a hard one, as, if the plaintiff had waited for the expiry of two months after he gave notice, his suit would have been beyond the period of three months allowed in the order passed under section 111 of the Land Revenue Act. In fact where such a suit is brought against the Court of Wards, the effect of section 111 read with section 54 of the Court of Wards Act is to compel the plaintiff to give notice to the Collector within one month of the order being passed. It is true that there is no reason why he should not give notice promptly, as he knows that he has only three months within which to bring the suit and that if he fails to bring it within that time the objection will be decided against him. At the same time we think that this was a result not contemplated when section 54 was enacted and that an amendment of the section to provide for special cases like this is urgently needed. Section 15 of the Limitation Act does not apply to the case, as the period of limitation is not one prescribed by the Limitation Act itself and, therefore, section 29 of the same Act excludes its application. The lower Courts have cited certain cases in which the requirements of section 80 of the Code of Civil Procedure have been dispensed with in the case of a suit for an injunction. These cases are not, however, analogous, as they were all cases in which there was an imminent danger of

the subject matter of the suit being destroyed or of irreparable injury being done to the plaintiff if the suit was not brought at once. We are unable in this case to find any reason for dispensing with the imperative provisions of section 54, and, as we have pointed out, it was in no way impossible for the appellant to have complied with that section and yet to have brought his suit within the three months allowed by the order of the Assistant Collector.

We, therefore, dismiss the appeal but under the circumstances we direct that the parties bear their own costs in this Court.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 11 OF 1919.

July 31, 1919.

Present:—Mr. Justice Stuart.

MESSRS. SHUDARSHAN MAHARAJ-NAND RAM THROUGH NAND RAM—PLAINTIFFS—APPLICANTS

versus

THE EAST INDIAN RAILWAY COMPANY—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 75—Liability of Railway Company, extent of—Exemption from liability—Burden of proof—Interpretation of Statutes—Legislative discussions, whether can be looked at.

In order to avoid liability under section 75 of the Railways Act, a Railway Company must establish, first, that the articles composing the consignment were articles mentioned in the Second Schedule to the Act, and secondly, that the total value of the consignment exceeded Rs. 100. There is no justification for reading the section as though it meant "when any articles mentioned in the Second Schedule are articles of intrinsic value and contained in a parcel or package delivered to a railway administration for carriage by railway" [p. 645, cols. 1 & 2.]

In interpreting the meaning of a word in a legislative enactment, it is the duty of the Court to refrain from examining the discussion and the views of the legislative authority which enacted the Statute. It has to look at the meaning of the word only. [p. 645, col. 1.]

Civil revision against the order of the Judge, Small Cause Court, Cawnpore, dated the 19th December 1919.

Mr. *K. N. Katju*, for the Applicants.

Mr. *C. U. Sastry*, for the Respondent.

JUDGMENT.—This application raises a point of some little interest. The plaintiff sued the East Indian Railway Company for damage done to a consignment containing machine made lace. The consignment was of over the value of Rs. 100, but the value and the contents had not been declared and no extra freight had been paid by way of compensation for increased risks.

The Railway Company pleaded that under the provisions of section 75, Act IX of 1890, it was not liable

The contention on the other side is that the word "lace" in the Second Schedule of Act IX of 1890 means hand made lace and not machine made lace. In support of this contention their learned Counsel has referred to 28 and 29 Victoria, Cap. 94, section 1. This was an Act to amend the Carriers Act in England and this section laid down that where the word "lace" was used in the Carriers Act it was to be construed as not including machine made lace, but the fact that this Amending Act was passed is no authority for an interpretation that the word "lace" standing by itself does not include machine made lace. As I interpret the Amending Act, it simply excludes from the provisions of the Carriers Act machine made lace. Had the Act not been passed, machine made lace would have been included in the provision. The passing of the Amending Act excludes machine made lace from the operation of the Carriers Act in England, but in the Indian Railways Act the word "lace" must necessarily include both hand made lace and machine made lace. If the Act contained the word "boots", it could hardly be contested seriously that the word "boots" means only hand made boots and excludes machine made boots. Applying the ordinary meaning of the word "lace" both in colloquial and in business and technical senses, machine made lace is as much lace as hand made lace.

The learned Counsel for the applicants has further pressed that his clients should succeed unless it be found that the lace in question is of exceptional value. In support of his argument he relied on the decision in *Sarat Chandra Bose* v. *Secretary of State for India* (1), in which a Bench of the Calcutta High Court laid down that the word

(1) 14 Ind. Cas. 726; 39 C. 1029.

"shawls" in the Second Schedule of Act IX of 1890 could only refer to Indian shawls of special value and could not be taken to apply to shawls of inferior value. If the principle in that decision be accepted, it would be possible by analogy to infer that the word "lace" in the Second Schedule meant only lace of high value. But I regret that I am unable to accept either the reasoning or the conclusion of the learned Judges who formed that Bench. They had to interpret the meaning of the word "shawl". They found what the interpretation of the word "shawl" was in the English language, but they proceeded to consider what was the probable meaning which the Legislature intended to apply to such a term when the schedule was first drawn up and how far its meaning was to be determined by reference to the other items in the schedule. With due respect to the learned Judges who decided that appeal, I would point out that their first principle of interpretation is not in accord with the principles of interpretation known to the law. It is the duty of a Court interpreting the meaning of a word in a legislative enactment to refrain usually from examining the discussions and the views of the legislative authority which enacted the Statute. It has to look at the meaning of the word only. In the next place, I cannot find the slightest authority for supposing that those who enacted the Statute intended the word 'shawls' to mean only expensive shawls. It is quite clear from the schedule that many articles were included which were necessarily of small intrinsic value, for example, watches, clocks and time-pieces of any description. This must include the cheapest watches, clocks and time pieces. *Government stamps* will equally include a Government stamp valued at half anna and a Government stamp valued at Rs. 1,000. In order to avoid liability under the provisions of section 75, Act IX of 1890, a Railway Company has to establish two conditions. The first is that the articles composing the consignment are articles mentioned in the Second Schedule. The second is that the total value of the consignment exceeds Rs. 100. There is nothing from which an inference can be drawn that each article in the consignment must be of value. The railway would be equally protected in the case of a consignment of Rs. 150 worth of half-anna stamps as it would be in the case of a consignment of one stamp worth Rs. 150. There is no justification for reading section 75 as though it meant "when any articles mentioned in the Second Schedule are articles of intrinsic value and contained in any parcel or package delivered to a railway administration for carriage by railway." That is how the Calcutta High Court have read the section. I regret that I am unable to adopt the same interpretation. I accept the view of the learned Small Cause Court Judge and dismiss this application with costs.

Application dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 506 OF 1917.

May 16, 1919.

Present:—Pandit Kanhaiya Lal, J. C., and Mr. Ashworth, A. J. C.

RADHE KISHAN—PLAINTIFF—APPELLANT

versus

BIKARMAJIT SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXXIV, r. 14—Attachment of property—Mortgage executed during pendency of attachment—Simple money decree obtained by mortgagee—Rateable distribution.

Where a mortgagee under a mortgage, executed while the property was under attachment, claimed rateable distribution under section 73 of the Civil Procedure Code, in respect of a simple money decree for interest due on his mortgage:

Held, that the disability imposed by Order XXXIV, rule 14, of the Code did not apply to him, and that he was entitled to rateable distribution. [p. 646, col. 2.]

Appeal against the decree of the District Judge, Sitapur, dated the 31st October 1917, upholding the decree of the Subordinate Judge, Sitapur, Tahsil Biswan, dated the 19th August 1917.

Messrs. *A. P. Sen* and *Bisheshwar Nath Srivastava*, for the Appellant.

The Hon'ble Mr. *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The plaintiff-appellant filed certain suits against Tikadas and Khushaldas for the recovery of money and obtained an attachment before judgment of certain property belonging to the debtors.

Subsequently he obtained decrees against those persons. During the pendency of this attachment Tikadas and Khushaldas made a simple mortgage of the property attached in favour of the defendant-respondent, who subsequently obtained a decree for money on account of the interest due on the said mortgage, relinquishing his lien over the mortgaged property. Meanwhile the plaintiff-appellant proceeded with the execution of his decree, but before the property attached by him could be brought to sale the defendant respondent obtained an attachment of the property and applied for a rateable distribution of the sale-proceeds under section 73 of the Code of Civil Procedure The Court which realized the sale-proceeds allowed a rateable distribution to be made. The validity of that order is challenged in the suit which has given rise to this appeal.

The Court below dismissed the claim, holding that Order XXXIV, rule 14, of the Code of Civil Procedure did not debar the defendant-respondent from claiming a rateable distribution of the sale proceeds.

Order XXXIV, rule 14, is intended for the protection of the mortgagor. It does not absolutely forbid a sale of the mortgaged property at the instance of the mortgagee. It merely indicates the method in which the sale can be effected in satisfaction of a claim arising under the mortgage. Section 73 provides a possible substitute for the method prescribed for proceeding with the sale. It aims at preventing an unnecessary multiplicity of proceedings, or as observed in *Mohan Lal* v. *Humayun Jah* (1) to secure an equitable administration of the property by making the sale-proceeds divisible in a particular manner. A mortgagee occupies for the purposes of rateable distribution a privileged position. The defendant-respondent, however, claims no privilege. He wants to be placed on the same footing as the execution creditor. In fact *qua* the execution creditor, he is not a mortgagee at all.

Section 64 of the Code of Civil Procedure lays down that where an attachment has been made, any private transfer of the property attached or of any interest therein shall be void as against all claims enforceable under the attachment. So far as the execution creditor who had made the attachment is concerned, the mortgage made by Tikadas and Khushaldas in favour of the defendant-respondent is a void transaction. The defendant-respondent cannot enforce his rights as a mortgagee on the basis of that mortgage or obtain a decree for sale so as to bind the execution creditor, so long as the attachment obtained by the execution creditor subsists. The disability imposed by Order XXXIV, rule 14, of the Code does not, therefore, apply to him.

On behalf of the plaintiff-appellant reliance is placed on certain observations in *Bithal Das* v. *Nand Kishore* (2) emphasizing that section 295 of the old Code, corresponding with section 73 of the present Code, was not designed to enlarge in any way the rights of the decree holders or place at their disposal the proceeds of property which they could not have themselves attached and sold. But as explained in *Ram Das* v. *Munna* (3), *Gouri Sunker Panday* v. *Abhoyeswari Dabee* (4) and *Nathubhai Motilal* v. *Bai Ujam* (5) Order XXXIV, rule 14, does not prevent an attachment being made, though the property may not be capable of immediate sale. Section 73 recognises the right of the prior and subsequent incumbrancers to share in the sale-proceeds in certain circumstances.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 8 Ind. Cas. 372; 13 O. C. 291,

(2) 23 A. 106 at pp. 110, 111.
(3) 18 Ind Cas. 201; 4 O. L. J. 571.
(4) 25 C 262; 13 Ind Dec. (N. s.) 176.
(5) 32 B. 205; 4 Bom. L. R. 274.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 891 OF 1917.

July 16, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Wallach.

Musammat IMAM BANDI—PLAINTIFF —APPELLANT

versus

PURAN PRASAD AND ANOTHER —DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—

SAHI DIN v. ABU SAID.

Declaration that property is not liable to sale in execution of mortgage decree, suit for—Limitation, commencement of.

M. and *A.* mortgaged the suit property to *P.* *B.* brought a suit against *M.* and *A.* to recover possession of the property mortgaged and to this suit *P.* was not made a party. *B.* obtained a decree. *P.* then brought a suit on the basis of his mortgage against *M.* and *A.* in which *B.* was joined as a party, but the suit against *B.* was dismissed. *P.* applied in execution for the sale of the mortgaged property, but *B.* claimed it as her own and brought the present suit for a declaration that the property was hers and was not liable to sale in execution of *P's* decree. The suit was dismissed as barred by limitation, the trial Court holding that the cause of action accrued to the plaintiff on the date the mortgage was made, *i. e.*, on the 20th September 1907. On appeal to the High Court:

Held, that the fact of the mortgage having been made did not affect the plaintiff so long as no effort was made to sell the property in enforcement of the mortgage, and that the cause of action accrued to the plaintiff on the date on which the defendant attempted to sell the property, and that as the suit was instituted within six years of that date, it was not time-barred.

Second appeal against the decree of the District Judge, Moradabad, dated the 3rd of April 1917.

Mr. *S. A. Haidar*, for the Appellant.

The Hon'ble *S. Raza Ali*, for the Respondents.

JUDGMENT.—The judgment of the Court below cannot, in our opinion, be supported. The learned Judge has dismissed the suit on the ground that it is barred by limitation. The facts of the case are set forth in his judgment. It appears that Muhammadi Begam and one Agha Meer mortgaged the property in suit on the 20th of September 1907 to the respondents. After this mortgage the plaintiff brought a suit on the 14th of December 1907 against the respondents' mortgagors to recover possession of the property mortgaged. She obtained a decree from the Court of first instance and that decree was affirmed by the High Court. To that suit the present respondents were not parties, and, therefore, the decree in that suit is not binding on them. They brought a suit on the basis of their mortgage and obtained a decree against the mortgagors on the 5th of August 1912. They made the present plaintiff a party to that suit but the suit was dismissed against her with costs. However, in execution of that decree they have applied for sale of the mortgaged property which the plaintiff claims to be her own property. The plaintiff has brought this suit for a declaration that the property is hers and is not liable to sale in execution of the defendants' decree. The learned Judge holds that the plaintiff's cause of action arose on the 20th of September 1907 when the mortgage in favour of the defendants respondents was made. This view is clearly erroneous, The fact of a mortgage having been made did not affect her so long as no effort was made to sell the property in enforcement of the mortgage. This has now been done and the plaintiff's cause of action accrued on the date on which attempt was made by the defendants to sell the property. The suit is admittedly within six years from that date and, therefore, is not time-barred. We allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it under its original number in the register and to dispose of it on the merits. The appellant will have her costs of this appeal, including fees on the higher scale. Other costs will abide the event.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 60 OF 1919.

May 19, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C.

SAHI DIN—DEFENDANT—APPLICANT

versus

Hakim ABU SAID AND ANOTHER—PLAINTIFFS—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 35—Ex parte decree passed by Small Cause Court—Application to set aside decree disposed of by Court not having Small Cause Court powers—Order, legality of—Procedure.

An application was made to a Subordinate Judge to set aside an *ex parte* decree passed by him in the exercise of the powers of a Small Cause Court. Before the Judge could proceed with the hearing of the application, he was transferred and was succeeded by another Judge who possessed no Small Cause Court powers. The latter proceeded to hear the application on the merits, though there was a

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Munsif possessing Small Cause Court powers in the district who had jurisdiction to hear the application under section 35 of the Provincial Small Cause Courts Act:

Held, (1) that as there was a Court possessing Small Cause Court powers, all pending proceedings which were within the cognizance of that Court should have been transferred to it; [p. 648, col. 2.]

(2) that the Subordinate Judge's order dismissing the application was *ultra vires*, as he had no jurisdiction to hear the application. [p. 648, col. 2.]

Revision against the decree of the Officiating District Judge, Rae Bareli, dated the 8th February 1919, setting aside the decree of the Officiating Subordinate Judge, Partabgarh, dated the 2nd November 1918.

Mr. *J. P. C. Bhattacharji*, for the Applicant.

Mr. *Zahur Ahmad*, for the Opposite Party.

JUDGMENT.—On the 13th February 1913 the opposite parties obtained an *ex parte* decree against the applicant, who is a resident of the Mirzapur district, for Rs. 92 and costs. The decree was passed by the Subordinate Judge of Partabgarh, exercising the powers of a Small Cause Court. The decree was sent for execution to Mirzapur, with the result that the judgment-debtor was brought under arrest. On the application of the judgment-debtor time was granted to him by the Court executing the decree to get the *ex parte* decree set aside. He filed, it is said, security in that Court for complying with the decree in case he was not successful.

On the 12th July 1916 he applied to the Subordinate Judge of Partabgarh, exercising Small Cause Court powers, to have the *ex parte* decree set aside. The Subordinate Judge directed him to file security as required by section 17 of the Provincial Small Cause Courts Act (IX of 1887). The judgment-debtor filed that security on the 9th August 1916. His application was thereupon admitted but before the learned Judge could proceed with the hearing of the application, he was transferred and was succeeded by another Subordinate Judge who, in his capacity as a Subordinate Judge, possessed no Small Cause Court powers. The latter proceeded to hear the application on the merits, though there was a Munsif possessing Small Cause Court powers in the district, who had jurisdiction to hear the application under section 35 of the Provincial Small Causes Courts Act. He eventually dismissed the application on the merits. On appeal his order was set aside by the District Judge, who directed the judgment-debtor to take the application and present it to the proper Court.

It is argued on behalf of the opposite parties that the application made by the judgment debtor to have the *ex parte* decree set aside ought to have been summarily rejected, as it was not accompanied by the security required by section 15 of the Provincial Small Causes Courts Act. But it is not necessary to go into that matter at this stage. The question at present for consideration is whether the successor of the Subordinate Judge who passed the decree had jurisdiction to hear the application, when he did not possess any Small Cause Court powers and a Munsif who had jurisdiction over the cause had it. Where there is a Court possessing Small Cause Court powers, all pending proceedings which are within the cognizance of that Court should be transferred to it. This was not done in this case. The Subordinate Judge who succeeded proceeded to hear the matter as if it was proceeding on the regular side. His order was clearly *ultra vires* and was rightly set aside.

The next question is whether the hearing of the application should now proceed in the Court of the Munsif of Kunda which, on the Small Cause Court side, had jurisdiction to hear the application when the Subordinate Judge who exercised the Small Cause Court powers and before whom the application was pending was transferred, or whether the proceeding should be continued in the Court of the present Subordinate Judge who has been invested with the Small Cause Court powers since the 5th March 1919.

It seems to me that the Munsif of Kunda, in the exercise of his Small Cause Court powers, has jurisdiction to hear the application, but it would be better that it should be transferred for disposal to the Subordinate Judge of Partabgarh, who now exercises Small Cause Court powers, so that the Court which originally passed the decree may decide the application on the merits. No application has yet been made by either party for the transfer of the proceeding, but it is open to this Court to do so under section 24 of the Code of Civil Procedure. The Counsel for the parties do not deny that the conclusion at which the learned

District Judge has arrived is correct, although they are not agreed as to his right to entertain the appeal. This Court can, however, discharge the order passed by the Subordinate Judge, refusing to set aside the *ex parte* decree on the ground that he had no jurisdiction to hear it.

The application is, therefore, disallowed, except in so far that the order passed by the Subordinate Judge on the 2nd November 1918 is set aside. The application pending before the Munsif of Kunda in the exercise of Small Cause Court powers is transferred for disposal to the Court of the Subordinate Judge of Partabgarh on the Small Cause Court side. No order is made as to the costs of this proceedings.

Application disallowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 949 OF 1917.

July 22, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Wallach.

GANGA SAHAI *alias* KHACHROO —PLAINTIFF—APPELLANT

versus

BANSI—DEFENDANT—RESPONDENT.

Declaration of right to half share in cultivatory holding—Mesne profits, whether can be claimed—Joinder of claims.

Where a plaintiff sues for a decree declaratory of his right to a half share in a cultivatory holding he is also entitled to ask for mesne profits, and it is open to the Court in granting a declaratory decree to also decree mesne profits.

Second appeal against the decree of the Subordinate Judge, Meerut, dated the 17th May 1917.

Mr. *K. N. Katju*, for the Appellant.

Messrs. *G. Agarwala*, *P. L. Banerji* and *H. S. Gupta*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed that he was entitled to a half share of certain cultivatory holding. He alleged that he and the defendant were each entitled to a half share of the holding and that the defendant had taken possession of a larger share than that to which he was entitled. The plaintiff, therefore, claimed a declaration that he was entitled to a half share. He also claimed possession and mesne profits. The Court below has granted him a decree declaring him entitled to a half share, but in view of the provisions of section 32 of the Agra Tenancy Act has refused to grant him possession of a half share as this might amount to a partition of the holding. A decree for mesne profits has also been granted. In this appeal, which has been preferred on behalf of the defendant, it is not urged that the declaratory decree passed in the plaintiff's favour is not a proper decree, but it is contended that a decree for mesne profits should not have been granted in a suit for a declaratory decree. We think that this contention is without force. According to the findings of the Courts below the defendant was in possession of a larger share than that to which he was entitled and he appropriated the profits of that share, thereby excluding the plaintiff from such profits as he was entitled to get from the property. The plaintiff has the right to recover from the defendant the profits which the defendant, who was wrongfully in possession, had appropriated; that is to say, he has the right to get mesne profits as defined in the Code of Civil Procedure. There is no reason why the plaintiff should not be compensated for the loss of the profits which the defendant has appropriated. Such profits could not have been claimed in the Revenue Court under any of the provisions of the Agra Tenancy Act. The parties are not co sharers in the Zemindari, but are co-sharers in a cultivatory holding only. In our opinion there is no bar to a suit of this description. We see no reason to differ from the view taken in *Ashiq Husain* v. *Asghari Begam* (1), to which one of us was a party. We dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

(1) 4 A. L. J. 809; A. W. N. (1908) 21; 30 A. C.

AUNG MYAT *v.* HLA MAY.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 83 OF 1918.

December 17, 1918.

Present:—Mr. Justice Ormond.

AUNG MYAT AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HLA MAY—DEFENDANT—RESPONDENT

Evidence Act (I of 1872), s. 114, ill. (i)—Pro-note in possession of maker—Presumption—Allegation of theft—Burden of proof.

If a pro-note is in the hands of the maker, there is a presumption that it has been paid off. If the drawee alleges that the maker came into possession of the note unlawfully, the onus is on him to prove it.

Mr. *N. N. Burjorjee*, for the Appellants.

Mr. *J. E. Lambert*, for the Respondent.

JUDGMENT.—On the 10th July 1915 the defendant executed a pro-note for Rs. 1,000 with interest in favour of the two plaintiffs and Ma Sai deceased. Ma Sai died on the 21st July 1916. The plaintiffs sued on the note and alleged that the defendant had stolen the note shortly after the death of Mai Sai. It is admitted that Ma Sai had at one time possession of the note. The defendant in her written statement admitted execution of the note and pleaded payment to Ma Sai about six or seven months before her death and denied the theft. The Sub-Divisional Court found that the plaintiffs had not proved the theft and decreed the suit because the defendant had not proved payment. On appeal the Divisional Court also found that the plaintiffs had not proved the theft, and the learned Judge says, "although it (the evidence of the defendant's three witnesses as to payment) would not be sufficient by itself, it should, I think, be held sufficient to shift the burden of proof to the plaintiffs in view of the fact that they admit that the pro-note passed into the possession of the appellant." And he set aside the decree of the lower Court and dismissed the suit. The plaintiffs now appeal.

It is clear that both the Courts are satisfied that the plaintiffs have not proved the theft; and if we assume that both Courts are also satisfied that the defendant has not proved payment, it is purely a question of presumption or onus. Mr Burjorjee for the appellants refers me to

AZMAT *v.* BISHUN PRAKAS.

the case of *Chuni Kuar* v. *Udai Ram* (1), which is a case very similar to the present case. The plaintiff there alleged that the defendant had surreptitiously abstracted the bond. The defendant alleged that he had paid up the bond and that it had been returned to him; but that the bond was with a third party who refused to give it up and who was colluding with the plaintiff. In that case the learned Judges held that the defendant having admitted execution, the onus lay on the defendant to prove payment or to produce the note. Section 114, illustration (*i*), of the Evidence Act shows that if the pro note is in the hands of the maker, there is a presumption that it has been paid off. The presumption arises from the fact of possession of the note by the maker. It is clear from the cases of both parties that the defendant was in possession of the note before suit. The presumption, therefore, arises that by that time the note had been paid off. The learned Judges in *Chuni Kuar's case* (1) did not go into that aspect of the case; and although the plaintiffs allege that the defendant only came into possession of the note after Ma Sai's death and then by means of a theft, the onus is shifted on to the plaintiffs to prove these facts; and they have failed to do so in the opinion of both the lower Courts.

I think this suit was rightly dismissed by the lower Appellate Court and this appeal is dismissed with costs.

Appeal dismissed.

(1) 6 A. 73; A. W. N. (1883) 221; 3 Ind. Dec. (N. S.) 648.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2442 OF 1909.

July 5, 1911.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Carnduff.

AZMAT—PLAINTIFF—APPELLANT

versus

BISHUN PRAKAS NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Ejectment, suit for - Zerait

AZMAT v. BISHAN PRAKUS.

land—Burden of proof—Settlement records, entry in, value of—Rebuttal of entry—Adverse possession of tenant, effect of—Rent, assessment of, suit for—Remedy of landlord.

Plaintiff, the proprietor of an estate within which were situated certain lands in the occupation of the defendants, brought a suit to recover possession thereof, alleging that they formed his *zerait* lands. The defendants resisted the claim on the ground that the disputed lands were not the *zerait* lands of the proprietor, but were part and parcel of the *raiyati* holding for which they paid rent to the landlord. The entries in the Settlement *khatian*, by which the plaintiff was not bound, were against the plaintiff and he failed to prove that the lands were *zerait* as alleged by him. The lower Appellate Court, without considering the question of the length of the time during which the defendants were in occupation, held that, although the plaintiff had failed to establish the specific case alleged by him, he should get a decree for ejectment on the ground that he was entitled to recover possession as the defendants had failed to discharge the burden that lay upon them to establish a tenancy under the plaintiff in respect of the disputed lands. The defendants appealed to the High Court and contended, first, that the lower Appellate Court had on an erroneous ground considered the Settlement proceedings to be a nullity:

Held, that though the entries in the Settlement *khatian* afforded *prima facie* evidence in support of the defendants' case, the plaintiff had, as he was bound to do, rebutted that evidence. [p. 651, col. 2; p. 652, col. 1.]

It was next urged that the burden of proof had been erroneously thrown on the defendants:

Held, that the decision of the lower Appellate Court could not be supported and the case must be remitted to it for re-decision. [p. 652, col 2.]

Lastly, it was objected that the question of the defendant's possession ought to have been tried:

Held, that the lower Appellate Court was wrong in not considering the length and character of the defendants' possession, for if they had been in possession for over twelve years and had treated the disputed lands as part of their tenancy, the only remedy of the landlord was by a suit for assessment of rent, because the claim for recovery of actual possession had been extinguished by the adverse possession of the defendants. [p 652, col. 2.]

Where the defendants in an action in ejectment are tenants of the plaintiff and the only dispute is whether the disputed lands are within or without the boundaries of that tenancy, the burden of proof depends upon the relative situation of the land in controversy and the admitted lands of the tenancy held by the defendant. [p. 652, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge of Muzafferpur, dated the 18th August 1909, reversing that of the Munsif of Motihari, dated the 18th September 1908.

Babu *Lakshmi Narain Singh*, for the Appellants.

Babu *Akshoy Kumar Banerjee*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants in an action in ejectment. The case for the plaintiff-respondent is that he is the proprietor of the estate within which the disputed lands, now in occupation of the defendants, are situated, that they form *zerait* lands and that consequently he is entitled to recover possession thereof from the defendants. The defendants resisted the claim, mainly on the ground that these lands were not the *zerait* lands of the proprietor but were part and parcel of the *raiyati* holding for which they paid rent to the landlord. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge has made a decree in favour of the plaintiff. He has found that the Settlement Khatians, the entries wherein are admittedly against the plaintiff, are not binding upon him, but he has held that the plaintiff has failed to prove that the land is *zerait* as alleged by him. The Subordinate Judge has held, however, that though the plaintiff has failed to establish the specific case alleged by him, he should get a decree for ejectment on the ground that as proprietor he is entitled to recover possession, unless the defendants establish their alleged tenancy. From this point of view, the Subordinate Judge has examined the evidence on the part of the defendants and come to the conclusion that they have failed to discharge the burden that lay upon them to establish a tenancy right under the plaintiff in respect of the disputed lands. He has not, however, considered the question of the length of time during which the defendants have been in occupation, because, in his opinion, possession even for a considerable length of time does not indicate any tenancy right in the land. On the present appeal, the defendants have contended that the judgment of the Subordinate Judge is open to objection on three grounds, namely, *first*, that he has on an erroneous ground considered the settlement proceedings to be a nullity, *secondly*, that the burden of proof has been erroneously thrown upon the defendants, and *thirdly*, that the question of possession ought to have been tried. There is no substance in the first of these contentions but the second and third grounds must prevail.

In so far as the first ground is concerned, there can be no room for dispute that the settlement records afford *prima facie* evidence in support of the case alleged by the defendants. The plaintiff is bound to rebut that

evidence: and although the conclusions of the Subordinate Judge upon this part of the case are not very accurately expressed, it is plain that he has found in substance that the plaintiff has rebutted that evidence. He has pointed out that there was no trial of the objection taken by the landlord; under a misapprehension the objection was treated by the Revenue Authorities as falling under a clause within which it could not be included; in other words, the Settlement Authorities treated the case as if it raised a question of the nature and amount of rent payable and did not involve any question of the status of the tenants and the true character of the land in dispute. There was, therefore, in substance no decision of the objections taken by the landlord; and the rejection of his objections by the Revenue Authorities was thus obviously erroneous. Under these circumstances, the Subordinate Judge has correctly held that the evidence furnished by the Record of Rights has been amply rebutted.

In so far as the second objection is concerned, it is clear that the judgment of the Subordinate Judge cannot be supported. He has held, upon the authority of the decision in *Narsing Narain Singh* v. *Dharam Thakur* (1), that the onus is upon the defendants to establish the tenancy as alleged by them. The case relied upon, however, is clearly distinguishable. In that case the landlord sued to recover possession of land. The defendant contended that he held a tenancy right in the disputed property. The burden, therefore, was rightly cast upon him to establish the tenancy as alleged by him. In the case before us the defendants are tenants of the plaintiff. The only dispute is whether the lands now in controversy are included within the boundaries of that tenancy or lie outside them. The plaintiff relies upon the decision in *Nanda Lal Goswami* v. *Jaineswar Haldar* (2) in support of the proposition that the onus is upon the tenants to establish the tenancy, while the defendants rely upon *Rajendro Kumar Bose* v. *Mohim Chandra Ghose* (3) in support of the view that the burden lies upon the plaintiff to show that the lands of which he seeks to recover possession are outside the tenancy held by the defendants. It may seem difficult, at first sight, to reconcile these two decisions. But the true rule is that laid down by Mr. Justice Banerjee in *Sheodeni Roy* v. *Chowdhury Chatoorbhuj Roy* (4), where that learned Judge pointed out that the burden of proof in a case of this description must depend upon the relative situation of the land in controversy and the admitted land of the tenancy held by the defendant. The Subordinate Judge has not examined the case from this point of view. The matter, therefore, must be reconsidered.

In so far as the third ground urged by the appellant is concerned, it is clearly well founded and must prevail. The Subordinate Judge has not considered the length of time during which the defendants have been in occupation of this land. If they have been in possession for over twelve years and have treated this land as part of their tenancy, the only remedy of the landlord is by a suit for assessment of rent, because the claim for recovery of actual possession has been extinguished by the adverse possession of the defendants. *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (5). The length and character of the possession of the defendants are from this point of view very important elements for consideration.

The result is that this appeal must be allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that these two questions may be decided. As the true bearing and importance of these questions do not appear to have been appreciated in either of the Courts below, the Subordinate Judge will be at liberty to take additional evidence; such evidence may be taken either by him or under his direction by the Court of first instance. The costs of this appeal will abide the result.

Appeal allowed; Case remanded.

(1) 9 C. W. N. 144.
(2) 6 C. W. N. 105.
(3) 3 C. W. N. 763.
(4) 8 Ind. Cas. 785; 12 C. L. J. 376.
(5) 2 C. L. J. 125.

WILSON *v.* JAGMANDIR DAS.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 173 OF 1918.
August 6, 1919.
Present:—Mr. Justice Stuart and Mr. Justice Wallach.
Mr. C. WILSON—PLAINTIFF—PETITIONER
versus
JAGMANDIR DAS BALDEO SINGH & Co.—DEFENDANTS—OPPOSITE PARTY.

Arbitration—Award—Costs including fee of arbitrators awarded to one party—Fee not fixed by Court before preparation of decree—Court, power of, to fix fee after preparation of decree.

Where an arbitration award provides for the payment by the plaintiff of the costs including the arbitrators' fee, but the Court omits to fix the fee before the decree is prepared, it is open to the Court to fix the fee after preparation of the decree.

Civil revision against the order of the Subordinate Judge of Mussoorie, dated the 17th August 1918.

Mr. *L. M. Banerji*, for the Petitioner.

Mr. *Nihal Chand*, for the Opposite Party.

JUDGMENT.—The arbitration award provided that the applicant Wilson should pay the costs. The costs included the arbitrators' fees. A decree was prepared under the terms of the award. After the decree was passed according to the findings of the learned Subordinate Judge, it was discovered that the fees of the arbitrators had not been fixed. The learned Judge fixed the fees. We see no reason not to accept the conclusions that the fees had not been fixed, and that he had a right to fix the fees. We do not consider he fixed the fees too high. Thus the case stands that, if he had fixed the fees before the decree his action would have been correct and could not have been challenged; is the case altered in any way because he fixed the fees after the decree had been passed? We cannot see that there was anything to prevent him from doing this, and there is nothing upon which we can interfere in revision. We, therefore, dismiss this application with costs, including fees on the higher scale.

Application dismissed.

TUN KYIN *v.* MA MAI TIN.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 117 OF 1918.
January 27, 1919.
Present:—Mr. Justice Ormond.
TUN KYIN, A MINOR BY HIS GUARDIAN MAUNG MYAT KYAW—PLAINTIFF—APPELLANT
versus
MA MAI TIN—DEFENDANT—RESPONDENT.

Burmese Law, Buddhist—Minor, whether competent to enter into contract of marriage—Breach of promise of marriage—Damages, suit for, maintainability of—Contract Act (IX of 1872), s. 11.

Under section 11 of the Contract Act the competency of a Burmese Buddhist youth under 18 years of age, to make a contract of marriage, must be determined by the Burmese Buddhist Law. [p. 654, col. 1.]

Under Burmese Buddhist Law, ordinarily, a promise of marriage by a minor is voidable and the marriage of a minor youth or of a girl under 20 years of age requires the consent of the parents, unless the parties are steadfastly determined to marry. [p. 654, col. 2.]

Where, however, a young man and a young woman have clandestine intercourse, the parents of the former are not at liberty to withhold their consent to the marriage, and if the young man repudiates the young woman, he must pay her his *kobo*. [p. 654, col. 2; p. 655, col. 1.]

Mr. *Ba Dun*, for the Appellant.

Mr. *Thein Maung*, for the Respondent.

JUDGMENT.—Ma Mai Tin obtained a decree for Rs. 100 as damages for breach of promise of marriage against Maung Tun Kyin, a minor, who was represented by his father as guardian *ad litem*. The defendant appeals on the ground that, being a minor, his contract was void under section 11 of the Contract Act.

The defendant, a boy between 15 and 16 years of age, promised to marry the plaintiff, a girl 19 years of age. He then seduced her and subsequently refused to marry her; and the plaintiff had a child by him. His parents objected to a marriage between their son and the plaintiff.

In *Maung Hmaing* v. *Ma Pwa Me* (1) it was assumed that a promise of marriage did not involve a "question regarding marriage" and must, therefore, be governed by the Contract Act rather than by Buddhist Law. But in Upper Burma it was held in *Kan Gaung* v. *Mi Hla Chok* (2) that a promise of marriage was a

(1) S. J. L. B. 533.
(2) 2 U. B. R. (1907-09), Contract, 5.

question of marriage and must be determined in the case of Buddhists according to the Burmese Buddhist Law. I think the validity of a contract of marriage is a question of contract, though it may involve a question regarding marriage, *e.g.*, a contract of marriage between two persons who are within the prohibited degrees of affinity; the validity of such a marriage would be determined by the personal law of the parties, and if such a marriage would be void, the contract would be void under sections 23 and 24 of the Contract Act, because the object or consideration was unlawful or immoral.

The Majority Act (section 2) does not 'affect the capacity of any person to act in the matter of marriage,' and to enter into negotiations for a marriage or to make a contract of marriage is to 'act in the matter of marriage' A person may attain majority for some purposes, *e.g*, of 'acting in the matter of marriage,' though not for other purposes. And section 11 of the Contract Act merely says:—"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." The effect of the Privy Council decision in *Mohori Bibee* v. *Dharmodas Ghose* (3) is not that all contracts made by a person under 18 years of age are void, but that a contract made by a person who by reason of infancy is incompetent to make such a contract is void.

Thus under the Contract Act the competency of a Burmese Buddhist youth under 18 years of age, to make a contract of marriage, must be determined by the Burmese Buddhist Law.

The consent of the parties is necessary for all Burmese Buddhist marriages and the Dhammathats (section 33 of the Digest, Volume II) enjoin parents to give their children in marriage before they attain the age of 16. It follows, therefore, that a person under 16 years of age, if physically competent for marriage, can give a valid consent to marry and can make a valid contract of marriage. But such a contract, though valid, may be voidable; in which case a suit for damages for breach of promise of marriage against the minor would not lie. And the consent of the 'minor's' parents or guardian may be necessary for the validity of the marriage of a 'minor', in which case, if such consent is refused, the 'minor' would not be liable in damages, because his promise must be taken to have been made subject to such consent being obtained: and the plaintiff would not be able to show that the failure of the marriage was due to the 'minors' refusal to carry out his promise, the parents having refused their consent. In a recent case in Upper Burma, *Maung Nyein* v. *Ma Myin* (4), Mr. Heald (A. J. C.) held that a Burmese Buddhist youth can contract a valid marriage without his parents' consent at any time after he is physically competent for marriage and is liable in damages for a breach of promise of marriage. Mr. Heald did not consider whether such a contract was voidable or not. And the reason for his decision that the parents' consent to the marriage of their minor son is unnecessary was that the Dhammathats do not specify any age above which sons can marry without their parents' consent, and that as a matter of fact Burmese Buddhist boys who are of an age to marry do habitually marry the girl of their choice without any regard to their parents' wishes. I do not think these reasons are sufficient for a Court to deprive parents of their control over their children. I am inclined to think that under Burmese Buddhist Law, ordinarily a promise of marriage by a minor is voidable; and that the marriage of a minor youth, or of a girl under 20 years of age, requires the consent of the parents unless the parties are "steadfastly determined to marry": See *Crown* v. *Chan Mya* (5) It is, however unnecessary to decide these questions in the present case, because the plaintiff had a child by the defendant. The Manugye says:—"If a young man and a young woman have clandestine intercourse, the parents

(3) 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374; 30 C. 539 (P. C.).

(4) 46 Ind. Cas. 421, 3 U. B. R. (1918) I 5.
(5) 1 L. B. R. 297.

of the former are not at liberty to withhold their consent to the marriage, and if the young man repudiates the young woman, he shall pay her his *kobo*"—Section 149 of the Digest, Volume II. This shows that in such a case the parents' consent is unnecessary to the marriage and that the promise is binding on the youth who has to pay the girl his *kobo*. And apparently it makes no difference whether the clandestine intercourse takes place before or after the promise of marriage.

The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 5 OF 1919.

July 29, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

NIRANJAN SINGH—DEFENDANT—APPELLANT

versus

KUNDAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Place of suing—Partnership—Suit for taking accounts—Court, proper.

In the absence of proof of an agreement that accounts should be taken elsewhere, a suit for the taking of accounts of a partnership should be instituted in the Court within whose jurisdiction he business of the partnership was carried on.

Appeal from an order of the District Judge, Jhansi, dated the 20th November 1918.

Mr. *K. N. Katju*, for the Appellant.

Mr. *T. N. Ohadha*, for the Respondents.

JUDGMENT.—The only question in this appeal is whether the Subordinate Judge's Court at Jhansi had jurisdiction to entertain the suit. The parties entered into a partnership to carry on business at a place called Jwalagunj in the District of Jalaun, which is within the jurisdiction of the Court of the Subordinate Judge at Jhansi. The partnership came to an end before the institution of the suit. The claim was that an account of the partnership be taken and the balance which might be found due may be awarded to the plaintiffs. The first defendant, who is the principal defendant in the suit, contended that there was a contract between the parties that the final accounts should be rendered at Cawnpore and payments should be made there and that the Jhansi Court had, therefore, no jurisdiction to entertain the suit. The Court of first instance found in his favour and dismissed the suit. The learned Judge set aside the order of dismissal on appeal and remanded the case. The learned Judge was, in our opinion, right in holding that as the partnership business was carried on within the jurisdiction of the Court at Jhansi, the cause of action arose within that jurisdiction and the suit was maintainable in that Court. No doubt if there was a specific contract between the parties that the rendition of accounts and the final settlement thereof should take place at Cawnpore and that payments should be made there and not at the place where the business was carried on, the Court at Jhansi would not have jurisdiction. But in the present case it has not been satisfactorily established that there was a contract of the description alleged by the defendant. The learned Judge came to no definite finding on the point, though it seems from his remarks that he was not inclined to accept the view of the learned Subordinate Judge. We have looked into the evidence and we are unable to say that the evidence is so clear and satisfactory as to warrant the conclusion that the contract between the parties was that accounts should be taken at Cawnpore and Cawnpore only and that payments should be made there. In this view we think the order of the Court below remanding the case is correct. We accordingly dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

ADIMUTHU PILLE *v.* ADIAPPA.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 183 OF 1917.

May 1st, 1918.

Present:—Mr. Justice Ormond and Mr. Justice Pratt.

A. A. ADIMUTHU PILLE—APPELLANT

versus

ADIAPPA AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Oral application to enter up partial satisfaction, whether step-in-aid of execution—Application, whether can be presumed.

An oral application to the Court to enter partial satisfaction of the decree is a step-in-aid of execution within the meaning of clause (5) of Article 182 of Schedule I to the Limitation Act.

Even where there is no actual application on the record, such an application may be presumed in cases where the order made in execution is of such a nature that the Court would not have made it except upon an application for that purpose.

Mr. *J. R. Das*, for the Appellant.

Mr. *D. N. Palit*, for the Respondents.

JUDGMENT.

PRATT, J.—The only point for consideration is whether on the 13th June 1911 there was an application in accordance with law for execution, or to take some step-in-aid of execution, within the meaning of clause 5 under Article 182 of the First Schedule to the Limitation Act.

On that date a petition was put in by the plaintiff's agent, which purported to be with consent of and signed by the 2nd defendant, to the effect that Rs. 1,000 had been paid to plaintiff in partial satisfaction of the decree from the proceeds of a consent sale of the mortgaged premises, and prayer was made that a final decree for the balance might be drawn up.

The Court on receipt of the application passed the following order:—"Enter up satisfaction to that extent (*i.e*, Rs. 1,000) and make out final decree for the balance."

It was held by the lower Courts that an application for drawing up a final personal decree, not being a proper application, could not rank as an application for a step in aid of execution.

Mr. Das for appellant admits that this finding is correct but he contends that there was an application to enter up partial satisfaction as evidenced by the fact that an order to that effect was made, and that application would rank as an application for a step in aid.

There is ample authority for holding that even where there is no actual application on the record, such an application may be presumed in cases where the order made in execution is of such a nature that the Court would not have made it except upon an application for that purpose.

In *Trimbak Bapuji Patvardhan* v. *Kashinath Vidyadhar Gosavi* (1) the authorities on the subject were fully considered and it was laid down that the application need not be in writing and that *where the law does not require a writing*, an oral application satisfies its requirements.

After citing cases the judgment proceeds: "And where an order made in aid of execution is of such a nature as that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application has been made for it."

Following that ruling it is a legitimate inference from the fact that the Judge ordered the entry of partial satisfaction that the decree-holder expressed a verbal desire to have such entry of satisfaction, although in his written petition he did not expressly ask for this to be done.

It seems clear the Court would not have entered up satisfaction, unless the decree-holder expressed a desire that it should do so.

On this view there was an application for a step-in-aid of execution on the 13th June 1911 and the application of appellant was not barred by limitation.

I would set aside the judgment and order of the lower Courts and direct that the application for execution be allowed with costs throughout.

ORMOND, J.—I agree.

Order set aside

(1) 22 B. 722; 11 Ind. Dec. (N. S.) 1034.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 579 OF 1919.

July 30, 1919.

Present:—Mr. Justice Wallach.

JABRUDDIN—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 117, 439—Proceedings under s. 110—Magistrate, powers of—Evidence, character of—Revision—High Court, power of interference of.

The High Court is not a Court of Appeal for cases under section 110 of the Criminal Procedure Code, and it is only in very rare cases that it will interfere [p. 657, col. 2.]

Section 110 of the Criminal Procedure Code, coupled with section 117 of the Code, gives very extensive powers to Magistrates and should be administered with scrupulous care, and materials ought not to be brought on to the record which are not legally admissible in evidence and which are liable, if on the record, to prejudice the accused. [p. 657, col. 2]

Specific instances of crime in which the accused is suspected, are not good evidence and do not fall within the meaning of "general repute" under section 117, because suspicion cannot take the place of proof that a man has committed an offence Similarly, history sheets are not evidence, especially where the official who produces them is not himself responsible for all the entries thereon [p. 658, cols 1 & 2.]

Where a Court disbelieves the evidence adduced by an accused person, it ought to record specific reasons for such disbelief; the mere fact that, assuming the accused is guilty, it was easy for the accused to get witnesses of fairly good status to give evidence on his behalf, is no ground for disbelieving the witnesses. [p. 659, col. 1.]

Criminal revision against the order of the Sessions Judge, Moradabad, dated the 14th June 1919.

Mr. *Nehal Chand* and Dr. *S. M. Sulaiman*, for the Applicant.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT:—Jabruddin, the applicant in this revision, has been bound over for three years under section 110 of the Code of Criminal Procedure by a Magistrate of the first class in Moradabad and, on reference under section 123 of the Code of Criminal Procedure, the learned Sessions Judge of Moradabad has confirmed this order. The applicant has come to this Court in revision, and I have been asked by his learned Counsel to take into consideration the evidence which has been produced on behalf of the prosecution as well as that produced on behalf of his client. It has been remarked more than once by learned Judges of this Court that the High Court is not a Court of Appeal for cases under section 110 of the Code of Criminal Procedure. The responsibility of administering that section rests primarily with the District authorities. That section coupled with section 117 of the Code of Criminal Procedure, gives very wide powers, and necessarily so, to the trying Magistrate and it is only in very rare cases that this Court interferes with his decision, when it has been upheld either on appeal by the District Magistrate or on reference, under section 123 of the Code of Criminal Procedure, by the Sessions Judge. Seeing how extensive the powers of the trial Court are, it is all the more necessary that Magistrates ought to administer it with scrupulous care and ought not to allow materials to be brought on the record which are not legally admissible in evidence and which are liable, if on the record, to prejudice the accused before the Court. In this case unfortunately we have materials on the record which the learned Assistant Government Advocate frankly admits are not admissible in evidence, according to the rulings of this Court by which I am bound. The learned Sessions Judge states that the applicant is apparently a man of some substance, has a considerable amount of cultivation and is also a money lender. It appears that in October 1914 the applicant was acquitted in a dacoity case. On the 6th November of the same year proceedings were instituted against him under section 110 of the Code of Criminal Procedure. He was bound over by a Magistrate of the first class on the 19th December 1914, but the learned Sessions Judge, to whom the proceedings were referred for confirmation under section 123 of the Code of Criminal Procedure, came to the conclusion that the applicant should not have been bound over and discharged the order which had been passed against him. The learned Sessions Judge, from whose order this revision has been filed, says that there are two parties in the village where the accused resides, one of them being headed by Muhammad Zahur and the other by the accused, that these two parties are hostile to each other and that many of the prosecution witnesses seem to be connected with Muhammad Zahur. This is a further reason why the

evidence for the prosecution has to be carefully scrutinized. There is on the record a certified copy of a complaint, dated the 31st January 1919, by the present applicant charging Muhammad Zahur of an offence punishable under section 323, Indian Penal Code. It does not appear what the result of those proceedings was, but very few days after, namely, on the 5th February 1919, the applicant was arrested on a charge under section 397, Indian Penal Code. There appear to have been two dacoities at Maheshpur and Bhawanipur. The applicant was not named as having participated in either of them, but some time in the month of February he was identified with reference to both the dacoities by one witness regarding each of these two dacoities. This was apparently all the evidence that the Police secured against the applicant, because we find that they dropped the charges under section 397, Indian Penal Code, against him and, in lieu of those, instituted proceedings on the 1st March under section 110 of the Criminal Procedure Code. These resulted in an order, dated the 16th May 1919, binding him over for three years. This order was confirmed by the Sessions Judge on the 14th June 1919. Against these orders the present revision has been filed. The learned Sessions Judge says that the chief point for the prosecution is that the accused was identified, as already mentioned by me, as having taken part in two dacoities. The two persons who identified him, were prosecution witnesses in this case. Then the learned Sessions Judge proceeds: "Most of the other witnesses refer to him as having been suspected in these or other dacoities of recent occurrence, but the reason they give for their suspicions is that he was mentioned to them by the complainants. The complainants usually say that they did not mention their suspicions to anybody." In the case of *Raham Ali* v. *Emperor* (1) Rafique, J., has held that specific instances of crime in which the applicant was suspected were not good evidence and could not be said to fall within the meaning of "general repute" under section 117 of the Code of Criminal Procedure. The same view was also taken by Chamier, J., in *Bechai* v. *Emperor* (2). Chamier, J., says: "The so-called evidence which is supposed to connect him with various offences consists of (1) Police lists of cases in which he is said to have come under suspicion, (2) the statements of witnesses each of whom says that he suspected the applicant of complicity in this or that isolated offence, (3) a list of cases in which the applicant's house has been searched on suspicion that he had committed some offence. Police lists of the kind here referred to have been repeatedly held to be inadmissible and suspicion cannot take the place of proof that a man has committed an offence." In the case with which I am dealing in revision, the learned Sessions Judge observes as follows:—"It should be noted that the accused has been recorded on a history sheet as a dacoit for some years." History sheets are not evidence against the accused. This history sheet was produced by an official who is not himself responsible for all the entries on the history-sheet and it was a piece of paper of the kind which was held by Chamier, J., not to be evidence in a section 110 case. In my opinion, therefore, a considerable amount of inadmissible evidence has been allowed to be brought on the record by the trial Magistrate, and, having regard to the evidence given, I am of opinion that this inadmissible material has seriously prejudiced the applicant.

To satisfy myself as to whether the admissible evidence on the record is sufficient to justify an order under section 110 of the Code of Criminal Procedure I have gone through the evidence of the witnesses for the prosecution. Almost throughout the evidence I find such a quantity of inadmissible material in the statements of witnesses that I am not prepared to say that that evidence is sufficient when contrasted with the evidence produced on behalf of the defence. Regarding the defence evidence the learned Sessions Judge says: "It is true that of the witnesses for the defence many are of higher status than those for the prosecution, but a man of the position of the accused has usually little difficulty in procuring witnesses to speak for him and the defence

(1) 20 Ind. Cas. 231; 11 A. L. J. 461, 14 Cr. L. J. 407.

(2) 26 Ind. Cas. 153; 12 A. L. J. 937; 15 Cr. L. J. 705.

witnesses are not in a position to know much about his real character." I fail to see why the learned Judge says that the defence witnesses are not likely to know much of the applicant's character. They are in as good a position to know of the applicant's real character as many of the prosecution witnesses were. The reason here suggested by the trying Magistrate for discrediting those defence witnesses, who were of a higher status than the prosecution witnesses, was that a man of his position, that is a man who had the assistance of *badmashes* at his back, would find little difficulty in procuring witnesses to speak for him. In the words of Richards, C. J., in the case of *Miharban Singh* v. *Emperor* (3), it seems to me that the Magistrate disbelieved the evidence adduced by the accused because he had decided before hearing them that he was guilty. That is not a fair way of dealing with the evidence of the witnesses for the defence. Specific reasons should have been given for disbelieving them and not merely the reason that, assuming that the accused was guilty, it was easy for him to get witnesses of fairly good status to give evidence on his behalf. In my opinion the Courts below did not proceed to the consideration of the case from the proper point of view, and, for the reasons already stated, I think the order ought to be set aside. I accordingly allow the application in revision, set aside the orders of both Courts below and direct that the applicant's bail bond be cancelled.

Application allowed.

(3) 31 Ind. Cas. 821; 13 A. L. J. 1046; 16 Cr. L. J. 805.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 189 TO 191 OF 1919.

April 28, 1919.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

SRIPAL SINGH AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), s. 266—Oudh Criminal Digest, para. 49—Penal Code (Act XLV of 1860), ss. 395, 396—Dacoity with murder—Offence, whether triable by Jury—Trial under s. 395—Acquittal—Conviction under s. 396, legality of.

An offence under section 396 of the Penal Code is not one of the offences made triable by a Jury under the Government order which is embodied in paragraph 49 of the Oudh Criminal Digest. [p. 659, col. 2.]

Accused were charged with an offence under section 396 of the Penal Code and were tried by a Jury. The Jury acquitted them of the offence under section 396 of the Code but returned a verdict of guilty under section 395 of the Code:

Held, (1) that the offence with which the accused were charged being an offence which was not triable by Jury, the trial should not have been by Jury at all; [p. 660, col. 1.]

(2) that the accused, having been acquitted of the offence with which they were charged, could not be convicted of another offence on the same charge. [p. 660, col. 1.]

Appeal against the order of the Sessions Judge, Lucknow, dated the 19th March 1919.

Mr. *N. N. Sinha*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—Sripal Singh, Badal and Chhabile have been convicted and sentenced to death under section 396, Indian Penal Code, subject to confirmation by this Court. In the case of Badal the conviction is under section 396, read with section 107, Indian Penal Code. It should have been section 396, read with section 109, as the latter is the section which prescribes the penalty. They have appealed and their appeals and reference for confirmation are before us.

Six people in all were tried on the charge under section 396, Indian Penal Code. The remaining three—Ram Sarup, Ram Pal and Lachhman—have been acquitted by the learned Sessions Judge. At the same time the Judge has submitted a reference under section 307, Criminal Procedure Code, differing from the verdict of a Jury who were for convicting them under section 395, Indian Penal Code. As no charge under section 395, Indian Penal Code, was framed against any of the accused, it is not apparent why a Jury should have been impanelled at all. The only offence with which the accused were charged was one under section 396, Indian Penal Code, which is not one of the offences made triable by a Jury under the Government order which is embodied in paragraph 49 of the Oudh Criminal Digest. If there was any doubt as to which offence had been committed, the accused should have been charged in the alternative, but they were not so charged.

There is in fact no dispute that two persons, Sarju and his wife *Musammat* Kailasa, were murdered in the commission of the dacoity with which the case is concerned, and the accused were either guilty of an offence under section 396, Indian Penal Code, or of no offence at all. The question whether we agree or disagree with the verdict of the Jury does not, therefore, arise. They have been acquitted of the only offence with which they were charged, or of which they could properly have been convicted. Under these circumstances we accept the Sessions Judge's reference and, acquitting Ram Sarup, Ram Phal and Lachhman of the offence under section 395 of which the Jury convicted them, we direct that they be set at liberty. We can only suppose that a Jury was impanelled under the idea that, because the commission of a dacoity is an element of the offence under section 396, and as the offence of simple dacoity under section 395 is in the Lucknow District triable by a Jury, every charge under section 396 must be tried by the procedure described in section 269 (3), Criminal Procedure Code. This is an error. Section 396 describes a distinct offence, namely, the offence of taking part in a dacoity in the commission of which murder is committed, and it is so treated in the Oudh Criminal Digest, which includes section 395 but omits section 396 in enumerating the offences which are made triable by a Jury. In this respect we agree with the observations of the Madras High Court in *Queen-Empress* v. *Anga Valayan* (1).

The facts of the case are that on the night of 10th December 1918 the house of Sarju, headman of Suryamau, was entered by a number of men who climbed over the roof. Sarju and his wife *Musammat* Kailasa were both strangled. *Musammat* Kailasa was also stripped of her ornaments. The medical evidence leaves no doubt as to the cause of death. Sarju's three little daughters, of ages ranging from nine to four and a baby boy of two, were in the house. These were not seriously molested, though the eldest child *Musammat* Kunjan was robbed of the bracelets and earrings (*karanphul*) which she was wearing. In the morning she went to the *chaukidar*, told him what had happened and asked him to call her elder brother Swami Dayal, a youth of 18, who was at school at Amethi. The *chaukidar* came to the house, saw the two bodies and saw that locks had been broken, and, sending off a woman to call Swami Dayal, went in haste to the Thana and reported the occurrence. The report itself states that he had come in a hurry without stopping to ascertain the full facts. The report was lodged at 8 A. M. on the morning of the 11th. The second officer of the Thana arrived on the scene about 11. In the course of his inquiry on the same day the eldest girl *Musammat* Kunjan mentioned the name of the accused Sripal Singh. *Musammat* Kunjan and her sister state in their evidence that they recognized his voice at the time of the dacoity, and in view of the fact that it was *Musammat* Kunjan's statement to the Sub Inspector which led to Sripal Singh's arrest, there is no reason to doubt the truth of this statement. The Thanedar, Sheikh Tauqirul Islam (P. W. No. 20), arrived in the afternoon. Finding that Sripal Singh's name had been mentioned he searched for him. Sripal Singh was brought in about 1 P. M. on the following day. He asked that Badal might be sent for and on this being done he made, in presence of the latter, a statement the contents of which could not, of course, be proved. What could be proved and was proved is that he took the Police to a place behind his house where there are *nim* trees, and digging below the garden wall produced a bangle (Exhibit 1) which has been amply identified as having belonged to the deceased *Musammat* Kailasa and been worn by her at the time of the murder. Badal's house was then searched. A *lota* was found under a corn bin, and buried in the ground in an inner room were found a pair of *pachelas* and a pair of *nigrohis*, which are also proved beyond doubt to have been worn by the deceased woman. Rs. 49 were also found in the same room, Rs. 40 in one place and Rs. 9 in another. Chhabile was arrested on 14th December and was found to be wearing a sheet (*dohar*) which was part of the property taken from the house of Sarju deceased. Two *lotas* and a bag containing a *sarauta* were also recovered from his house. As to the *lotas* there may be some doubt, but the bag containing the *sarauta* was found on the top of the wall just below the

(1) 22 M. 15; 2 Weir 705; 8 Ind. Dec. (N. S) 11.

thatch, above the height to which a man could reach standing on the ground, and it was, as the Judge has stated, an article which could readily be identified and which has been identified by the prosecution witnesses as belonging to Sarju deceased. It is true that it was omitted from the list of stolen property given by the deceased's son, but an article of small value like this is very likely to be omitted. In preparing a list attention is naturally concentrated on the valuable ornaments, money, etc. We agree with the learned Judge and the assessors that it is amply proved that articles forming part of the proceeds of the dacoity were found in the possession of all three appellants.

On 14th December Sripal Singh made a confession which was recorded by the City Magistrate Dr. S. S. Nehru. This confession was afterwards retracted, but the Magistrate who recorded it took great pains, as his evidence shows, to satisfy himself that it was voluntarily made. The contradictions and inconsistencies into which the accused fell when retracting the confession go to confirm our impression that the confession was genuine and the retraction false. The matter is very well summed up in the following passage in the judgment of the Sessions Judge:—

"Sripal has retracted his confession and says that he made it because he was beaten and tortured by the Thaneder. He told the Committing Magistrate also that the Thanedar had given him *bhang* and liquor before the confession was made. Before the Committing Magistrate he stated that he did not hand over the *kara* (Exhibit 1) to anybody and had never seen it before that date. Before this Court he also retracted the confession and says he made it because he was tortured by the Thanedar. It is significant that the Thanedar was not asked a single question in cross-examination in regard to any torture or ill treatment of Sripal, nor was any of the witnesses asked a single question on this point. Sripal has produced only one witness in defence, his mother, who says that during the whole of the Tuesday night Sripal was present with her in their house. This witness also was not asked a single question as regards any torture or ill-treatment. There is the evidence of Mr. Nehru to the effect that no signs of ill-treatment were visible, nor any signs that Sripal had been kept without sleep or had been drugged or intoxicated. Sripal was given an opportunity of making a complaint, but as a matter of fact made no complaint of any sort to Mr. Nehru. There is also the fact that on the same day that Sripal made his statement before Mr. Nehru, he was produced before the Committing Magistrate for remand. The Committing Magistrate asked him whether he ever made any complaint of Police torture to him, the Committing Magistrate, and Sripal replied that he made no such complaint.

"Before the Committing Magistrate Sripal stated that he had never seen the *kara* (Exhibit 1) before and had certainly not handed it over to any one. Before this Court he says that the Sub-Inspector gave the *kara* (Exhibit 1) with instructions to place it in his house and produce it from his house when the Sub-Inspector asked him to do so. He says that in compliance with these instructions he hid the *kara* under the *nim* tree in the ground and then took the Sub-Inspector and the other persons to the spot and handed over the *kara* to the Sub-Inspector."

Sripal states that for two months previously Badal had been contemplating the murder of the deceased headman, who had threatened to get him *challaned* for *badmashi*. On Sunday, two days before the murder, Badal's brother-in law the accused Chhabile came to his house and told him that he had engaged the men. Sripal himself and two of the other accused were present. On Tuesday, the day of the murder, Badal himself went off to Lucknow to get *takavi*. At 11 P. M., Chhabile brought with him six other men who were strangers to Sripal and having fetched the remaining three accused, of whom Lachhman is Badal's son-in-law, came to Sripal's door. At midnight they started for Sarju's house, climbed over the roof, went into the room in which Sarju was sleeping and dragged him out. They then proceeded to press his neck and to beat him with their hands. Finally, finding that he was still able to cry out faintly, one of the Pasis tied his *dhóti* round his neck and so strangled him. While this was being done, *Musammat* Kailasa came out and asked what they were doing,

She was also throttled lest she should give information of the murder. She was then stripped of her ornaments. A box of money, a *lota* and various brass vessels were taken and the dacoits then decamped, departing as they had come over the roof. Sripal does not minimise the part which he took in the murder. He admits that he was one of the two who seized Sarju and dragged him out in the first instance and that he also assisted in robbing *Musammat* Kailasa of her ornaments. He got a silver bangle as his share. Badal's share, consisting of a pair of *nigrohis*, a pair of *pachelas* and two other ornaments, was taken by his son-in-law Lachhman.

Sripal's confession is corroborated on a number of points:—

(1) His own participation is proved both by his giving up of the bangle and by the fact that he was recognised and named by *Musammat* Kunjan, a circumstance which led to his arrest.

(2) There is independent corroboration of the motive which he assigns for the crime. It is proved by the Sub-Inspector that Sarju deceased had given information that Badal was on friendly terms with bad characters. Badal was at that time one of the *chaukidars* of the village and the Sub-Inspector had, on Sarju's information, recommended Badal's dismissal. The Deputy Superintendent of Police thereupon sent for Badal and warned him. Badal had taken leave at the time of the occurrence. It is further proved that two nephews of Badal had been *challaned* for *badmashi* in June 1918 and that Sarju was one of the witnesses against them.

(3) Sripal's account of the manner in which the murder was committed is corroborated by the medical evidence and by the fact that when the *chaukidar* came on the scene in the morning a cloth was still tied in a noose round Sarju's neck. This fact was mentioned in the first report.

(4) A neighbour of Badal named Pancham, whose house is separated from his house only by a lane, deposes to having seen the accused assembled at Badal's door conversing on Sunday morning preceding the murder, and having heard them mention the word "Tuesday" several times.

(5) His account of the manner in which the murder was committed is corroborated generally by the evidence of *Musammat* Kunjan. The latter was pushed back by the murderers into the *kothri* in which her sisters were and, therefore, did not see everything. Her tender age and the length of time which elapsed between the occurrence and the trial combined to render her statement less complete than that given by the accused. As the case was committed to the Sessions on 23rd January, it is to be regretted that the trial could not be commenced earlier than 6th March.

(6) There is also independent corroboration of the part assigned to each of the other two appellants As we have already noticed, it is proved beyond doubt that articles forming part of the stolen property were recovered from both Badal and Chhabile. That Badal did not take part in the actual dacoity is admitted. It is stated by Sripal and proved by other evidence that on that date he went to Lucknow to get *takavi*. He has, therefore, been convicted of abetment under section 396 read with section 107, Indian Penal Code. The recovery of the *nigrohis* and *pachelas*, articles readily susceptible of identification from his house is of the highest possible, significance. Accused does not allege that these articles were planted on him. He claimed them as his own but failed to produce any evidence whatever to support his assertion. It was known, and was reported at the Thana on the morning of December the 11th, that Sarju and his wife had been murdered. It is hardly conceivable under these circumstances that Badal should have consented to receive property which was part of the dacoity unless he had in reality been, as Sripal says he was, privy to it and one of the instigators of it. Badal had a very strong motive for wishing to injure Sarju, and the circumstances of the dacoity lend support to Sripal's statement that the theft was only subsidiary and that the primary object of the assailants was the murder of Sarju. The truth of Sripal's story has been thoroughly tested and taking into account the various items of corroboration which have been mentioned we are fully satisfied that the dacoity was planned and instigated by Badal with the deliberate intention of getting rid of Sarju whom he regarded as his enemy.

NIRMAL SINGH *v.* EMPEROR.

The learned Counsel who represented Sripal admitted his participation in the murder and addressed us only on the question of sentence. He pleaded on his behalf his youth (his age is 20 or 22) and the fact that the principal evidence against him is his own confession. If the accused had stuck to his confession in the Sessions Court, the latter plea might have been entitled to some consideration, but as he retracted it at the earliest opportunity it can hardly be pleaded on his behalf as a reason for mitigation of sentence. The murder was organised and deliberate, and the principal motive for it was that the deceased Sarju had done his duty as headman of the village. When we consider also that his innocent wife was murdered in cold blood merely to prevent the possibility of her giving evidence against the accused, we can find no reason whatever for interfering with the sentence of death in the case of any of the accused.

We, accordingly, dismiss the appeals of Sripal Singh, Badal and Chhabile. We alter the conviction of Badal to one under section 396 read with section 109, Indian Penal Code. Subject to this amendment we affirm the convictions. We confirm the death sentence in the case of all three appellants and direct that it be carried into effect in accordance with law.

Appeals dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 389 OF 1919.

July 25, 1919.

Present:—Mr. Justice Wallach.

NIRMAL SINGH AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 103—Penal Code (Act XLV of 1860), s. 332—Search, whether can be conducted without warrant—Witnesses, absence of, effect of—Search, legality of—Deterring public servant from doing duty.

An officer of Police who is empowered to conduct an investigation, is entitled to carry out a search without a warrant, but in carrying out such search he is bound, under section 103 of the Criminal Procedure Code, to call upon two or more respectable inhabitants of the locality to attend and witness the search, and if he omits to do so, a householder would be justified in closing his door and refusing ingress into the house, and would not be guilty of an offence under section 332 of the Penal Code. [p. 664, cols. 1 & 2.]

While it may be necessary to oppose a Police Officer from forcing his way into a house in order to honestly prevent an illegal search, there would be no justification for compelling him to do something illegal. [p. 664, col. 2.]

Criminal revision against the order of the Sessions Judge of Shahjahanpur, dated the 26th June 1919.

Mr. *J. M. Banerji*, for the Applicants.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—A Magistrate of the first class convicted eleven persons under sections 147 and 332, Indian Penal Code, for rioting and causing hurt to a public servant in discharging his duties, and sentenced them to varying terms of imprisonment and to fines. On appeal, the learned Sessions Judge of Shahjahanpur allowed the appeal of one Sukhdeo Singh but dismissed the appeal of the other ten appellants, upholding the sentences passed on them. These ten persons have filed revisions in this Court against their convictions and sentences and were released on bail by the learned Judge who admitted their applications. The facts of the case are somewhat singular. It appears that a burglary was committed on the night of the 30th September 1918 in the house of one Bhujai in the village of Kandar, in which, besides other property, a brass "*thal*" and a "*lota*" were lost. A report was made in the ordinary course and Sub-Inspector Godhan Lal, second officer of the Police Station, Jalalabad, within whose circle the offence was committed, took up the investigation. He suspected one Harsahai Bhangi, and on the 5th October he first searched his house and finding nothing, he proceeded, on information received that the stolen property was in the possession of one Nirmal Singh of Kateli, a village some two furlongs away from Kandar, to Kateli and at once wanted to search his house. Chunna and Partil, *chowkidars*, had, in the meantime, come up and were with him at the time. According to the facts as found by the Courts below, he informed Nirmal

Singh that he suspected that the stolen property was in his house and wanted to search it. Nirmal Singh and the other applicants resisted his doing so, and, whilst thus resisting, they are alleged to have caused simple injury both to him as well as to the *chowkidars*. They are further alleged to have snatched his *pagri* and revolver from him, and are alleged, further, to have compelled him under threats to draw up a search list saying that a search had been made and that nothing had been found. These facts are contested by the petitioners, but I am not prepared to go behind the findings of fact in revision. Several points of law have been raised by the petitioners. It is claimed that the search was wholly illegal on two grounds:—

(1) It is argued that the Sub Inspector was not empowered to proceed on the search without a warrant. I am not prepared to accept this contention. The Sub Inspector was undoubtedly empowered to investigate. Being empowered to investigate the charge he had, in my opinion, the right to search, which is incidental to his right to investigate.

(2) It is further argued in support of the petitioners' application that the officer conducting the search was bound under section 103 of the Code of Criminal Procedure to call upon two or more respectable inhabitants of the locality to attend and witness the search. That section further provides that the search shall be made in the presence of search witnesses. It is admitted on behalf of the Crown that the provisions of this section were totally ignored by the Sub-Inspector, but it was argued in support of the conviction that the provisions of that section were purely formal and that non-compliance with the same would not invalidate the search and that, therefore, the officer conducting the search, in spite of his ignoring the provisions of that section, was acting in the discharge of his duties, and that the interference with him would constitute an offence under section 332, Indian Penal Code. In the absence of any authority in support of the learned Government Advocate's contention I am not prepared to uphold it. Police Officers must be protected when acting in the exercise of their duties. The public have also rights, and it is very important that those rights of the householder should be safeguarded. Section 103 of the Code of Criminal Procedure was introduced into the Act in order to safeguard the rights of a householder and also to ensure that the search conducted by the Police Officials should be an honest search and a genuine one. I am prepared to go so far as to hold that when the provisions of that section are ignored, a householder is justified in closing his door and refusing ingress into his house. Holding this view I am of opinion that no offence under section 332, Indian Penal Code, has been made out. On the other hand, it is quite clear, on the facts as found, that the applicants were absolutely unjustified in the further action taken by them beyond merely preventing the Police Officer from entering the house. This further action consisted in compelling the Police Officer to draw up a document setting out that a search had been made and nothing was found. The petitioners, through their Counsel here, deny that such action was taken by them and the learned Counsel asks me to look into the evidence in order to satisfy myself on that point, but I am not going to look into the evidence in a revision. It may have been necessary, for the purpose of honestly preventing the Sub-Inspector from forcing his way into the house and conducting the illegal search, to snatch away his revolver but there can be absolutely no justification for the further action of compelling him to write out the false statement that the search had actually taken place. Whilst being, therefore, of opinion that the petitioners should be acquitted of the charges under sections 147 and 332, Indian Penal Code, I am of opinion that they are guilty under section 503 read with section 149 of the Indian Penal Code.

The applicants have been sentenced to heavy terms of imprisonment and also to heavy fines. I am informed that each of them has undergone ten days' rigorous imprisonment. They have served sufficient terms of imprisonment and I reduce the periods of their imprisonment to the periods already served. It is further submitted, and not contested, that the ten petitioners are members of one and the same family. The combined fines to which

they have been sentenced amount to an aggregate sum of Rs. 1,900. I sentence each of the petitioners to a fine of Rs. 50 in addition to the imprisonment under the section under which I have convicted them. In case of non-payment of fine, each accused, who does not pay such fine, will serve a term of three months' rigorous imprisonment.

Sentences reduced.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 38 OF 1919.

April 3, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

BYRAMJI PUDUMJI—ACCUSED No. 2—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Cantonment Code, 1912, *r.* 97—*Building in ruinous condition—Removal or repairs—Owner, whether has choice.*

The option given by rule 97 of the Cantonment Code of deciding, when any building is in a ruinous condition or in any way dangerous to the occupier, whether the owner shall be required to remove the same, or be required to cause repairs to be made, is an option given to the Cantonment authority and not to the owner of the building. [p. 665, col. 2; p. 666, col. 1.]

Criminal application for revision against conviction and sentence passed by the District Magistrate, Poona.

Mr. *Velinkar* (with him Mr. *Payne & Co.*), for the Applicant.

Mr. *P. Bunter*, for the Complainant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—The only point, as to which it is necessary for us to express an opinion, is the meaning of rule 97 of the Cantonment Code of 1912. Rule 97 runs as follows:—

"Where any building, wall or structure, or anything affixed thereto, or any bank or tree, is, in the opinion of the Cantonment authority, in a ruinous state or in any way dangerous either, in the case of an occupied building, to the occupier or to the public, the Cantonment authority may, by notice in writing, require the owner or occupier thereof forthwith either to remove the same or to cause such repairs to be made as it may think necessary for the safety of the occupier or of the public, etc."

The point arises in this way: The Cantonment authority sent a notice under this section to the applicant to remove a building, and the applicant says that the notice was not a legal notice, because under the section it had to be a notice to him, he argues, either to remove or to cause repairs to be made. So we have to choose between two alternative meanings of these words. Do the words describe the notice and must the notice always be in the alternative either to remove or to repair, the choice lying with the owner; or do the words describe a power given to the Cantonment authority: who may choose whether the notice shall be to remove or shall be to make repairs? I hold that the latter is the true interpretation. I do so, because, firstly, I think that the words themselves, apart altogether from any extraneous considerations, mean this. And secondly, if we take extraneous matter into account, they seem to me to lead to the same conclusion. I gather that the meaning of the framers of this Code was to give the choice not to the owner, but to the Cantonment authority. If the framers of the Code had in view the interests of the public, the requirements of safety and of sanitation, it seems to me that it inevitably follows that the intention was to give the power to the Cantonment authority and not to leave the choice to the owner of the property.

I think, therefore, that the Magistrate's order was correct and that the Rule should be discharged.

SHAH, J.—I agree. I desire to add that at one stage of the argument I was impressed with the contention urged by Mr. Velinkar that under the rule an option of removing the building or of effecting the repairs which may be specified by the Cantonment authority should be given in every notice to the owner. But, on a further consideration, I feel satisfied that the argument is more plausible than sound, and that the words of the section convey the meaning that the option is given to the Cantonment authority of deciding, when any building is in a ruinous state

or in any way dangerous to the occupier, whether the owner shall be required to remove the same or whether he shall be required to cause such repairs as may be necessary for the safety of the occupier or the public. It is also clear that, if due regard is had to the object and the scope of this Rule, that is the interpretation which ought to be accepted. I am unable to see any force in the suggestion made on behalf of the accused that if it were intended that the option was not to be given to the owner in every notice given under this rule, the expression "require the owner or occupier thereof forthwith either to remove the same or to cause such repairs to be made as it may think necessary for the safety of the occupier" would not be appropriate. I think that if the framers of the Code intended to give to the Cantonment authority the power of deciding whether under certain circumstances the building should be removed or whether it should be repaired in a particular manner, the expression used would be appropriate.

Rule discharged.

ALLAHABAD HIGH COURT.
CIVIL REVISION NO. 110 OF 1918.
July 31, 1919.
Present:—Mr. Justice Stuart.
BADRI—PETITIONER—APPLICANT
versus
EMPEROR—OPPOSITE PARTY—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 209, 210—Dishonestly making false claim—Fraudulently obtaining decree—Court not having jurisdiction, effect of—Offence.

In order to bring a case under section 209 of the Penal Code, it is immaterial whether the Court in which the false claim was instituted had jurisdiction to try the suit. The words in the section are "a Court of justice," and not "a Court of justice having jurisdiction." Similarly, if a person obtains a decree fraudulently for a sum not due, the case would fall under section 210 of the Code, whether the Court had, or had not, power to pass the decree. [p. 667, col. 1]

Civil revision against the order of the District Judge, Gorakhpur, dated the 14th May 1918.

Mr. *R. K. Sorabji*, for the Applicant.
Mr. *R. Malcomson* for Mr. *A. E. Ryves*, for the Respondent.

JUDGMENT.—The four applicants, Badri, Jageshar, Raja Ram Pathak and Rameshar, filed about the same time four separate suits in the Court of the Village Munsif of Khajuri and obtained decrees therein. In execution of one of these decrees Jagat was imprisoned for 42 days. The learned District Judge of Gorakhpore under the provisions of section 73, Local Act III of 1892, set aside all these decrees, on the finding amongst other findings that the Village Munsif had no jurisdiction to decide the suits. He further found that the suits were deliberately false and that they had been instituted in pursuance of a conspiracy to prosecute Jagat, because Jagat had exposed a scandal in Jageshar's family the disclosure of which had put Jageshar to considerable expense and damaged the reputation of himself and his relations. The learned District Judge, after having arrived at this conclusion and setting aside the decrees, proceeded to take action under section 476 of the Code of Criminal Procedure, and has ordered the four applicants to be prosecuted criminally on various charges. One of the charges under which he has ordered each applicant to be prosecuted is a charge section 209. The applicants apply in revision to have this order set aside. The applications are under the provisions of section 115 of the Code of Civil Procedure. Now there is nothing to show that the learned District Judge exercised a jurisdiction not vested in him by law, or failed to exercise a jurisdiction so vested or that he acted in the exercise of his jurisdiction illegally or with material irregularity; and here I might leave the matter and dismiss the applications. But inasmuch as other Judges of this Court have thought fit to admit these applications and as the proceedings have already dragged on for some 14 months, it will perhaps be better to examine the arguments put forward by the learned Counsel for the applicants. The learned Counsel argues that inasmuch as the Munsif had no jurisdiction, his clients can in no circumstances have committed an offence under either sections 209 or 210. The words of section 209 are:—"Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of justice any

claim which he knows to be false, shall be punished with imprisonment."

and section 210 is to the effect that—"whoever fraudulently obtains a decree or order against any person for a sum not due, or fraudulently causes a decree or order to be executed against any person for anything is liable for imprisonment."

Now on the learned Judge's finding, which is the only finding with which I am concerned, these four persons fraudulently, dishonestly and with intent to injure Badri, misrepresenting their residence, went to a Court which they knew had no jurisdiction and obtained by the use of the most dishonest methods decrees for sums not due to them, and in one instance obtained the imprisonment of Jagat for six weeks. It would have been an extraordinary defect in the Indian Penal Code if such acts could pass unpunished, because the Court had no jurisdiction, but I see no reason to suppose that the law contains this defect. The words in section 209 are "a Court of justice" not "a Court of justice having jurisdiction in the case." If a person brings a claim in a Court of justice which has no jurisdiction the case falls under section 209 in my opinion, and similarly, if he obtains a decree fraudulently for a sum not due, the case will fall under section 210, whether the Court had, or had not, power to pass the decree. In these circumstances there would be no force in the argument that there is a legal flaw in the charge even if the argument could be pressed under section 115.

I dismiss these applications with costs. I fix the fees of the Government Advocate at Rs. 32 on each application.

Appeals dismissed.

BOMBAY HIGH COURT.
CRIMINAL REFERENCE No. 18 OF 1919.
May 7, 1919.
Present:- Mr. Justice Macleod and
Mr. Justice Pratt.
EMPEROR—PROSECUTOR
versus
DHONDYA DUDYA—ACCUSED.

Railways Act (IX of 1890), ss. 126 (a), 130—Minor, offence committed by—Summary trial by Magistrate legality of—Criminal Procedure Code (Act V of 1898), s. 260, Sch. II—Penal Code (Act XLV of 1860), ss. 82, 83.

When a person is prosecuted under section 130, read with section 126 (*a*), of the Railways Act, the offence is not one triable exclusively by a Court of Session—a Magistrate has jurisdiction to try it, and to try it summarily. [p. 668, col. 1.]

Section 130 of the Railways Act enacts an offence distinct from the offences in sections 126 to 129 of the Act. A minor who is entitled to the benefit of section 82 or section 83 of the Penal Code, does not commit an offence when he is guilty of any of the acts or omissions referred to in sections 126 to 129 of the Railways Act. It is section 130 of the latter Act which, by excluding the operation of these exceptions, creates the offence. [p. 667, col. 2.]

Criminal reference made by the District Magistrate, Belgaum.

JUDGMENT.—This is a report by the District Magistrate of Belgaum, under section 438 of the Criminal Procedure Code, of the case of the accused Dhondya *bin* Dudya, a boy aged nine years who has been convicted by the Cantonment Magistrate of Belgaum after a summary trial of an offence under section 130 of the Indian Railways Act of 1890.

The District Magistrate considers that as the act which the boy committed, *viz.*, putting a nail on a railway line, amounted to an offence under section 126 (*a*) of the Indian Railways Act. the case was triable only by a Court of Session.

We think it clear that section 130 enacts an offence distinct from the offences in sections 126 to 129. A minor who is entitled to the benefit of section 82 or section 83 of the Indian Penal Code does not commit an offence when he is guilty of any of the acts or omissions referred to in sections 126 to 129. It is section 130, which by excluding the operation of these exceptions creates the offence.

No doubt if the accused had been charged with offence under section 126 (*a*), the Magistrate should have committed the case to the Court of Session and left the accused to establish his defence under section 83 of the Indian Penal Code.

But the accused was not prosecuted under section 126 (*a*). The summary register shows that he was prosecuted under section 130 read with section 126 (*a*) of the Indian Railways Act. The prosecution, therefore, conceded that though

the accused had committed the act described in section 126 (*a*), he had not attained sufficient maturity of understanding to judge the nature and consequences of the conduct and elected to proceed under section 130.

The offence with which the accused was charged was, therefore, under section 130 and this offence the Magistrate had jurisdiction to try: Schedule II, Criminal Procedure Code, and to try summarily: section 260, Criminal Procedure Code.

There is, therefore, no occasion for our interference and we direct the record and proceedings to be returned to the District Magistrate.

Order accordingly.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 406 OF 1919.
August 8, 1919.
Present:—Mr. Justice Wallach.
NANDU AND OTHERS—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 188—Offence committed in Native State—Trial in British India, when permissible—Certificate of Political Agent, whether necessary.

A subject of a Native State arrested in British India cannot be tried in a British Indian Court for an offence committed in that State without the certificate of the Political Agent of the State or the sanction of the Local Government required by section 188 of the Criminal Procedure Code.

An agreement between a Native State and the authorities of a British Indian District, conceding to the British Indian Courts the right to try subjects of the State arrested in British India, cannot take the place of the certificate or sanction contemplated by section 188 of the Criminal Procedure Code.

Criminal revision against the order of the Magistrate, 1st Class, Kara, dated the 22nd of May, 1919.

Mr. *B. N. Vyas*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicants have been sentenced to fines of Rs. 20 and in default to three weeks' rigorous imprisonment for offences under section 13 of Act III of 1867, alleged to have been committed in Kampta, which is a Native State. Objection was taken at the hearing of the case that gambling was not shown to be an offence in the Native State in question, and secondly, that the requirements of the proviso to section 188 of the Code of Criminal Procedure had not been satisfied. That proviso sets out that "when a native Indian subject of His Majesty commits an offence in the territories of any Native Prince or Chief in India, he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found: Provided that no charge as to any such offence shall be enquired into in British India, unless the Political Agent, if there is one in the territory in which the offence is alleged to have been committed, certifies that in his opinion the charge ought to be enquired into in British India and where there is no Political Agent, the sanction of the Local Government shall be required.' The learned Magistrate has dealt in a light and airy fashion with these legal objections. Even if the applicants could be convicted of an offence of gambling in the Native State in question, they cannot be proceeded against in the absence of the certificate or the sanction set out in the proviso to section 188 of the Code of Criminal Procedure. The Magistrate who tried the case says: "A few months ago under the instructions of the Political Agent a committee was constituted of some members of the Native State concerned and some members of the executive authorities in British India and it was mutually agreed for convenience that British India Police might arrest persons found gambling in the Native State and try them in British India if they are British India subjects and send them to the Native State if they are subjects thereof, and *vice versa* the Native State Police could arrest persons found gambling in British India" An agreement like this cannot take the place of a certificate or sanction which is contemplated by the section aforesaid. Where there is a bar to the prosecution of a person unless certain formalities are carried out, those formalities have to be strictly carried out. I hold, therefore, that

there was no jurisdiction to try the applicants at Banda, and I, therefore, set aside the conviction and sentence and direct that the fines, if paid, be refunded.

Conviction set aside.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 1 OF 1919.

March 26, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

RAMKRISHNA HARIBHAOO VADKE—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Workman's Breach of Contract Act (XIII of 1859), s. 1—Scope of Act—Advance to be paid off from wages, effect of.

The Workman's Breach of Contract Act relates to contracts in which workmen have received advances of money on account of the work which they have contracted to perform, and has no application to a contract of service for a term of years accompanied with an advance of money which may be paid off from the wages the workman is to earn, as such a contract is not one made on account of the work which he has contracted to perform.

Criminal application for revision from an order passed by the Resident Magistrate, First Class, Bandra.

Mr. *M. M. Kotasthane*, for the Applicant.

Mr. *Koyajee* (with him Mr. *V. C. Kelkar*), for the Complainant.

JUDGMENT.

HEATON, J.—The main purpose of the contract is that the artificer shall work for ten years for his employer. One of its stated objects, and a most important one, is to prevent the artificer leaving his employer's service during the period of ten years. I cannot believe that such contracts as this were ever intended to come under Act XIII of 1859. To me the words taken with the declared object of the Act definitely suggest that they were not.

Therefore, I think the Rule should be made absolute.

SHAH, J.—The question arising in this application is whether the contract between the parties falls within the purview of Act XIII of 1859. The applicant entered into a contract with his employer on the 17th January 1917, whereby he agreed to serve for a period of ten years on a salary of Rs. 40 per mensem as an artisan and not to go elsewhere leaving his service. The employer purported to advance Rs. 286; but it is found that Rs. 186 represented the previous advances and that Rs. 100 only were advanced in cash at the date of the contract. The advance is described as having been made in cash for the work to be done under the contract. The applicant agreed to re-pay this sum of Rs. 286 by deducting Rs. 5 out of his salary every month. He agreed to pay off the advance in ten years. The contract contemplates further advances, and also provides that if any part of the sum advanced or to be advanced remains unpaid at the expiry of the ten years he will serve on the same terms till the whole amount is paid off.

Taking the terms of the contract as a whole, it seems to me that the principal item is the undertaking on the part of the applicant to serve on a salary of Rs. 40 per mensem for ten years, and that the advance is really a subordinate thing intended to secure as far as possible a due fulfilment of the contract of service. The sum of Rs. 186 advanced from time to time prior to the contract cannot be treated as an advance of money on account of the work to be performed under the contract. The remaining sum of Rs. 100 advanced in cash has no doubt some relation to the work under the contract. But in effect it is nothing more than a loan, which the workman is bound to pay in any event, and which the contract provides may be paid off at the rate of Rs. 5 per month. The Act of 1859 relates to contracts in which workmen have received advances of money on account of the work which they have contracted to perform. I do not think that the advance in the present case fulfils that condition. I think that the present contract is in the main a contract of service for ten years, accompanied with an advance of money which may be paid off from the wages which the workman is to earn under the contract, but which cannot be said to have been made on account

of the work which he has contracted to perform. In my opinion the Act does not apply to such a contract. I, therefore, agree that the Rule should be made absolute and the order of the lower Court set aside.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 451 OF 1919.

July 29, 1919.

Present:—Mr. Justice Wallach.

EMPEROR—PROSECUTOR

versus

MOHOMED NAQI HUSAIN—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 195 (1) (a)—Penal Code (Act XLV of 1860), s. 182—False charge against public servant made in letter addressed to Collector—Sanction for prosecution, who can grant—Jurisdiction.

A. addressed a letter to the Collector of the district making certain charges against an official of the district. It was found that in respect of this letter he had committed an offence under section 182 of the Penal Code, and the Sub-Divisional Magistrate sanctioned his prosecution:

Held, that the Sub-Divisional Magistrate had no jurisdiction to sanction the prosecution, as, under section 195 (1) (*a*) of the Criminal Procedure Code, such sanction could only be given by the public servant concerned or by some public servant to whom he was subordinate, and, with reference to section 182 of the Penal Code, the proper officer to sanction the prosecution was the Magistrate of the district.

Criminal reference by the Sessions Judge, Aligarh.

JUDGMENT.—This is a reference from the Sessions Judge of Aligarh recommending that an order directing the prosecution of one Mohommad Naqi Husain for an offence under section 182, Indian Penal Code, be set aside as having been directed by the Sub-Divisional Officer, Mr. R. H. Niblett, who had no jurisdiction to pass the order. Together with the reference the Magistrate's explanation has also been forwarded to this Court. Mohommad Naqi Husain had complained to the Collector of Aligarh by means of a letter, making certain charges against Mohommad Ayub, pound-keeper of Chama. If an offence under section 182, Indian Penal Code, has been committed with reference to the letter complaining against the pound-keeper, then under section 195, clause (1) (*a*), of the Code of Criminal Procedure no Court can take cognizance of the offence without the previous sanction or the complaint of the public servant concerned or of some public servant to whom he is subordinate. The public servant concerned with reference to section 182, Indian Penal Code, is clearly the District Magistrate. The Sub-Divisional Officer does not take the place of the District Magistrate and cannot usurp the District Magistrate's powers for the purpose of giving jurisdiction under section 195, clause (1) (*a*), of the Code of Criminal Procedure to a Court for the purpose of trying the alleged offence.

I, therefore, accept the reference of the learned Sessions Judge and set aside the order of Mr. Niblett, Magistrate, 1st Class, dated the 5th June 1919, directing the prosecution of Mohommad Naqi Husain under section 182, Indian Penal Code, with respect to the letter mentioned in that order.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION NO. 51 OF 1919.

April 7, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

In re DINBAI JIJIBHOY KHAMBATA—ACCUSED—APPLICANT.

Bombay District Municipalities Act (III Bom. of 1901), s. 161 (2), order under—Revision—High Court, power of, interference of—Criminal Procedure Code (Act V of 1898), ss. 435, 439.

The Magistrate referred to as 'such Magistrate' in the latter part of sub-section (2) of section 161 of the Bombay District Municipalities Act is an inferior Criminal Court, and his orders are liable to revision by the High Court. [p. 671, col. 1.]

Criminal application for revision against an order passed by the Resident Magistrate, 1st Class, Bandra.

In re DINBAI JIJIBHOY KHAMBATA.

Mr. *Coyajee* instructed by Messrs. *Khambatta & Co.*, for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—In this case the Notified Area Committee for Andheri gave notice to the owner of a certain house to construct certain drainage work specified in the notice under the rules framed by the Governor in Council under the Bombay District Municipalities Act. It is said that the owner failed to carry out the work, and that it was completed by the Notified Area Committee. An application to the Resident Magistrate of Bandra was made under section 161 (2) of the Bombay District Municipalities Act, for the recovery of the expenses incurred by the Committee as provided by rule 62, clause (6), of the rules applicable to the Committee. The owner of the house pleaded in effect that the Chairman of the Committee had substantially modified the terms of the notice, and that the work as suggested by him having been carried out, she was not liable for the expenses incurred by the Committee. The Magistrate directed the expenses to be recovered by distress. It is this order for distress that is now sought to be revised.

The first question is whether this order is liable to revision by this Court. I think it is. The first part of sub-section (2) of section 161 relates to prosecutions to be instituted before any Magistrate, and it is unquestionable that the power which the Magistrate exercises in respect of any prosecution is a judicial power and any order made by him would be the order of an inferior Criminal Court liable to revision by this Court. The power, which he has to exercise under the latter part of the sub-section, is ordinarily of a ministerial nature. But this part of the sub-section refers to such Magistrate as has been referred to in the first of the sub section; and I do not see any good reason to hold that 'such Magistrate' is not an inferior Criminal Court, and that his orders are not liable to revision. It may be that having regard to the nature of the inquiry that a Magistrate has to make, when an application is made to him for the recovery of fines or penalties or sums for compensation or for expenses, there would not be any scope for revising his orders ordinarily. For instance where the fine or penalty or compensation is otherwise duly determined, he would not be concerned with the question of determining the amount. But there may be occasions when he may have to determine the amount of compensation or expenses, where it is disputed, and the scope of the inquiry will necessarily depend upon the nature of the defence put forward by the owner on an application under the latter part of sub section (2). But it is clear that the Magistrate will have to make some inquiry in proper cases; and I see no reason to treat such an inquiry as purely ministerial, when the inquiry contemplated by the Magistrate in the former part of the same sub-section is purely judicial. This view is in consonance with the decisions of this Court under section 84 of the old District Municipal Act (Bombay Act VI of 1873), which corresponded in part to the present sub-section (2) of section 161: see *Municipality of Ahmedabad* v. *Jumna Punja* (1) and *Queen-Empress* v. *Nathu* (2). No doubt the wording of that section was different. But I do not think that the Legislature meant to effect any change in this respect; and I gather that meaning from the circumstance that both these powers are referred to in one sub-section, and that one of them is purely judicial. Unless the contrary meaning is clearly indicated, I think that it is reasonable to hold that no differential treatment is intended in respect of orders made by Magistrates under sub-section (2). The decision in *In re Dalsukhram Hurgovandas* (3) relating to section 86 of the Bombay District Municipalities Act is an instance in point and is in no way inconsistent with the construction which I put upon sub-section (2) of section 161.

The next question is, whether there is any ground to revise the order. If it were clear that the learned Magistrate made his order after making proper inquiry as to the merits of the contention put forward by the owner of the house, I would not interfere. But it is alleged in the petition that the order was made without making any inquiry

(1) 17 B. 731; 9 Ind. Dec. (N. S.) 479.
(2) (1891) Rat. Unrep. Cr. C. 559.
(3) 9 Bom. L. R. 1347; 6 Cr. L. J. 425.

as to the merits of the contention raised by the owner, and as it is not denied before us, I think under the circumstances it would be proper to direct the Magistrate to make a proper inquiry and to determine whether the notice of the Notified Area Committee was in fact modified by the Chairman as alleged by the petitioner, and whether he was competent to so modify it according to the rules. The learned Magistrate purports to find that the notice was neither modified nor cancelled. But it is not clear that it was the result of a proper inquiry on the merits.

I would make the Rule absolute, set aside the order for distress, and direct the Magistrate to dispose of the application for the recovery of expenses according to law.

HEATON, J.—I agree to the proposed order.

We have to find out the meaning of clause (2) of section 161 of the Bombay District Municipalities Act and it is a difficult task. If the words "and also all claims... in this Act" were omitted, there would not be any great difficulty. The section would then provide for the trial of certain matters by a Magistrate and for the method of enforcing the fines and penalties inflicted by the Magistrate. The former would be a judicial, the latter a ministerial, act, the former could be revised by this Court, and, as I think, not the latter.

The introduction of the words "and also all claims, etc.," makes the real difficulty. The section in general, however, provides for (1) the arriving at a judicial decision; and (2) the carrying out ministerially of that decision. Taking the general meaning, you cannot have the second without having the first. That meaning must also, I think, apply to the case of "claims to compensation or other expenses," unless some cogent reason to the contrary is forthcoming, and I cannot find such reason. That being so, it follows that there must be a decision on the claim before the amount can be recovered and that decision must be a judicial decision.

This may or may not be what was intended when the section was enacted. I decide that it is what was intended. If it is not, the Legislature should make the matter clear.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 423 OF 1919.

August 5, 1919.

Present:—Mr. Justice Wallach.

DESRAJ SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 437—Enquiry under s. 110—Further inquiry, whether can be directed—District Magistrate, power of.

Under section 437, Criminal Procedure Code, a District Magistrate has jurisdiction to direct further inquiry in a case where a person has been discharged in an inquiry under section 110 of the Criminal Procedure Code.

Criminal revision against the order of the District Magistrate, Mainpuri, dated the 4th July 1919.

Mr. *Mangal Prasad Bhargava*, for the Apellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant, Desraj, had been discharged by a Magistrate of the First Class in an enquiry under section 110 of the Code of Criminal Procedure. The District Magistrate of Mainpuri ordered a further enquiry under section 437. Against that order Desraj has applied in revision to this Court. In *Kharga* v. *Emperor* (1) a Divisional Bench of this Court has held that a District Magistrate has jurisdiction to direct further enquiry in a case where a person has been discharged in an enquiry under section 110 of the Code of Criminal Procedure. I am bound by that ruling and, therefore, have to hold that the District Magistrate had jurisdiction to pass the order which is attacked in this revision. The only question that remains is whether he was justified, in the exercise of his jurisdiction, in ordering a further enquiry. I am not prepared to tie the Magistrate's hands, and to hold that he was not justified in passing the order and, therefore, reject this application.

Application rejected.

(1) 22 Ind. Cas. 183; 12 A. L. J. 167; 15 Cr. L. J. 39; 36 A. 147.

AMINADDI *v.* TARINI CHARAN MONDAL.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 260 OF 1917.

March 7, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

AMINADDI AND OTHERS—DEFENDANTS Nos. 1, 4, 5, 6—APPELLANTS

versus

TARINI CHARAN MONDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Alluvion and diluvion—Landlord and tenant—Submergence of land leased—Reformation in situ, *effect of—Rent, non-payment of—Third person claiming land as accretion, right of—Bengal Regulation XI of* 1825.

The defendants obtained a lease of certain land in 1876 from the Government, and in the same year the land was submerged in the river and re-appeared in 1903. During the period of submersion the defendants did not pay any rent, but when that land re-appeared, they took possession of it as reformation *in situ* of land which they held under the lease and which had been submerged in the river. The plaintiffs claimed the land as accretion to their *raiyati jote* land:

Held, (1) that as the land was reformation *in situ* it could not be claimed by the plaintiffs as accretion to their *raiyati jote* land; [p. 675, col. 1.]

(2) that, in the circumstances of the case, it was difficult to hold that the rights of the defendants were subsisting at the time when the land re-appeared; [p. 674, col. 2.]

(3) that the Government, as owner of the *khas mahal*, was entitled to the land, and the defendants, professing to hold it as tenants under the Government and in assertion of the same right in which they held under the lease before the submergence of the land, were entitled to set up the rights of the Government. [p. 674, col. 2.]

Appeal against an order of the District Judge, Backergunge, dated the 25th April 1917, reversing that of the Munsif, Barisal, dated the 11th April 1916.

Babus *Brojendra Nath Chatterjee*, for the Appellants.

Babu *Dwarka Nath Chuckerbutty* and *Sarat Chandra Dutt*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to recover possession of newly formed Chur land as accretion to the plaintiffs' *raiyati jote* land, and for mesne profits.

The defence was that the land was reformation *in situ* of land which the defendants held under the Government in a Government Khas Mahal, and which had been submerged in the river.

It appears that the land was submerged in the year 1872 and re appeared in 1903. After the reformation, the defendants took possession of the land and they have been in possession since then.

A Commissioner appointed by the Court of first instance found that the disputed land was included in Dags Nos. 143 and 144 of the map of 1876. The land was identifiable and in fact it had formed on the site of the land of the Potta (Exhibit B) under which the land had been let out to defendants in the year 1876. Having regard to these facts, the Court of first instance dismissed the suit.

On appeal, the learned District Judge held that the rights of the defendants to the land had been extinguished by reason of their not having paid any rent during the long period of submergence of the land, and that the land, therefore, was an accretion to the plaintiffs' estate. The defendants have appealed to this Court.

The learned Judge relied upon the case of *Hemnath Dutt* v. *Ashgur Sindar* (1). In that case it was held that where land, held by tenants with rights of occupancy, was completely submerged for a number of years, and during the period of such submersion, no rent was paid by the tenants, the tenants had, by non-payment of the rent during the period of submersion, forfeited their rights of occupancy. That case was followed in another case, *Saligram Singh* v. *Paluk Pandey* (2), where this Court held that under section 6 of Act VIII of 1869 a *raiyat* retains his right of occupancy only so long as he pays rent, and that "although mere non payment of rent might not be conclusive evidence of abandonment, non-payment of rent taken with submergence of land is sufficient to indicate an extinction of the right of occupancy." In that case, an occupancy holding diluviated at a time when Act VIII of 1869 was in force, and the lands remained under water for 13 years before the Bengal Tenancy Act of 1885 was passed. It was held that whatever right was acquired by the *raiyat* was extinguished by the non-payment of rent during the period of submergence before the Bengal Tenancy Act of 1885 came into force and the provisions of that Act could create no new rights in favour of the plaintiffs, nor revive those which had already been extinguished.

On behalf of the appellants reliance has

(1) 4 C. 894; 2 Shome L. R. 142; 2 Ind. Dec. (N. S.) 566.

(2) 6 C. L. J. 149.

been placed on the decision of the Privy Council in *Arun Chandra Singh* v. *Kamini Kumar* (3), in support of the proposition that the rights of the tenants were still subsisting even though they paid no rent during the period of submergence. Referring to the case of *Hemnath Dutt* v. *Ashgur Sindar* (1) the Judicial Committee observed: "Their Lordships, however, do not find themselves in accord with the rule of law expressed in that case. They think that the principle applicable to this class of cases is correctly enunciated in *Mazhar Rai* v. *Ramgat Singh* (4)." In the latter case where the lands of certain tenants became submerged by the action of a river, and the tenants though, they ceased to pay rent during the period of the submersion, made no overt indication of their intention to relinquish the said lands, but on the contrary, on the river again shifting its course, laid claim to lands which had emerged and which they alleged to be identical with their former holding, it was held that there had been no relinquishment. The Allahabad Court observed that it could not agree that the view of law expressed in *Hemnath Dutt's case* (1), "though it may be sound in Lower Bengal, is applicable to these Provinces." The judgment proceeded upon the ground that Act XII of 1881 and the Acts of a like nature which preceded it assumed that a tenancy of agricultural lands once entered upon continues until determined by effluxion of time, or by mutual consent, or in one of the ways provided for by statutory enactment, but mere non-payment of rent does not of itself determine the tenancy.

In the case of *Hemnath Dutt's case* (1) the tenant was a *raiyat* and the case was governed by the provisions of Act VIII of 1869, under which a tenant could have a right of occupancy only so long as he paid rent; whereas in the case before the Judicial Committee the diluviated lands formed part of a permanent, heritable and transferable tenure. Their Lordships observed: "The diluviated lands formed part of a permanent, heritable, and transferable tenure: until it can be established that the holder of the tenure has abandoned his right to the submerged land, it remains intact," and it is accordingly contended on behalf of the respondent that the observations of their Lordships were directed to permanent tenures such as were under consideration in that case.

In the present case the lands diluviated in the very same year that the tenants obtained a lease of the land. They did not, therefore, even acquire a right of occupancy. The land remained under water for a period of more than 30 years. In these circumstances it is difficult to hold that the rights of the defendants were subsisting at the time when the land re appeared. It is unnecessary, however, to consider in the present case the effect of the decision of the Privy Council upon the rights of a tenant governed by the provisions of Bengal Act VIII of 1859, because even assuming that the defendants' rights were extinguished, the plaintiff is not entitled to the land as accretion, as the defendants are entitled to set up the rights of the Government.

In the case of *Lopez* v. *Muldun Mohun Thakoor* (5) Lord Justice James in delivering the judgment of the Judicial Committee observed: "This principle is one not merely of English Law, not a principle peculiar to any system of Municipal Law, but it is a principle founded in universal law and justice, that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner." Referring to the provisions of the 4th clause of the Regulation XI of 1825, he said: "It is to be observed, however, that that clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The plaintiff here says: 'I had the property. It was my

(3) 22 Ind. Cas. 317; 41 C. 683; 19 C. L. J. 272; 26 M. L. J. 251; 18 C. W. N. 369; 15 M. L. T. 182; (1914) M. W. N. 175, 16 Bom. L. R. 323; 12 A. L. J. 243; 41 I. A. 32 (P. C.).

(4) 18 A. 290; A. W. N. (1896) 56; 8 Ind. Dec. (N. S.) 899.

(5) 13 M. I. A. 467; 14 W. R. P. C. 11; 5 B. L. R. 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. There was nothing in that state of things that took it from me and gave it to the Government. When it emerged there was nothing that took it from me and gave it to any other person,' and in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another." In the result their Lordships held that "lands washed away and afterwards reformed on an old site, which could be clearly recognised, are not lands gained within the meaning of section 4, Regulation XI of 1825, *viz.*, they do not become the property of the adjoining owner, but remain the property of the original owner."

As already stated, it has been found that the land is reformation *in situ*. That being so, it cannot be claimed by the plaintiffs as accretion to his estate. The ground upon which the judgment proceeds, is that if the rights of the defendants were extinguished before the land re-appeared, the land must be held to be accretion to the plaintiffs' estate. The learned Pleader for the respondent contended before us that that must be so because the land became part of the river or public domain and that the plaintiffs, therefore, acquired title to it by contiguous accretion.

If, however, as has been found in the case, the land is reformation *in situ*, we do not see how it can be claimed by the plaintiffs as accretion to their estate. Although the defendants may have no rights under the lease which they obtained from Government, the latter as the owner of the Khas Mahal is entitled to the land. As proprietor of the Khas Mahal, Government stands in the same position as a private Zemindar; and if the Government as the owner of the Khas Mahal had resisted the plaintiffs' claim, we do not think that the latter could have enforced their claim, having regard to the fact that the land is reformation *in situ*. The only person interested in the land is the Government, the owner of the Khas Mahal, and the Government has not raised any objection to the defendants' holding the land which they have been holding ever since its formation. They have held it, professing to do so as tenants under the Government, and in assertion of the same right in which they held under the Potta before the submergence of the land.

In these circumstances, we think that the view taken by the learned District Judge that the land must be held to be accretion to the plaintiffs' estate merely because the defendants' right under the lease might have been extinguished, cannot be supported.

The result is that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored with costs. We assess the hearing fee in this Court at one gold *mohar*.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2440 OF 1917.

April 23, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

KUTTIPURATH KUNHUNNI PANIKKAR—DEFENDANT No. 2—APPELLANT

versus

RAMAN *alias* THAMARAPALLI THIRUMUMP—PLAINTIFF'S LEGAL REPRESENTATIVE—RESPONDENT.

Malabar Law—Trustee of estate held by devaswom—*Perpetual* kanom, *grant of, validity of—Construction of document*—Kanom *deed stipulating for payment of renewal fee with rent and enjoyment by* kanomdars *'for ever and for ever,' whether creates permanent tenure —Adverse possession, claim of.*

The grant of a perpetual *kanom* by the trustee of a *devaswom* is not binding on the *devaswom*. [p. 677, col. 1.]

Palaniappa Chetty v. *Sreemath Deivasikamony Pandara Sannadhi*, 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 & 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.), followed.

A *kanom* deed, after reciting that the *kanomdars* were to hold the properties 'for ever and for ever', stipulated for payment of a fixed renewal fee not at the end of 12 years but to be spread over the 12 years and paid along with the rent. This docu-

ment was in renewal of a prior simple *kanom* under which the mortgagee took possession:

Held, (1) that the document should be treated as if it was a perpetual *kanom*; [p. 677, col. 1.]

(2) that the *kanomdars* could not set up an adverse title as they held possession under the earlier simple *kanom*. [p. 680, col. 1.]

The estate held by a trustee should not be regarded as analogous to that of a Hindu widow. [p. 677, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suit No. 149 of 1917 (Appeal Suit No. 177 of 1917 of District Court), preferred against the decree of the Court of the District Munsif, Parapanangadi, in Original Suit No. 555 of 1915.

FACTS appear from the judgment.

Mr. *C. Madhavan Nair*, for the Appellant.—The document, Exhibit I, creates an irredeemable and perpetual Kanom. Plaintiff's right to redeem should be negatived.

Even if the Kanom is not binding on the temple, the defendants, having prescribed for a perpetual and irredeemable Kanom, can hold on as they like. *Baluswami Aiyer* v. *Venkitaswamy Naicken* (1). They have acquired a title by adverse possession, their right being traceable to the document Exhibit I which conferred a permanent tenure.

Mr. *T. N. Krishnaswamy Aiyar*, for the Respondent.—Exhibit I is an ordinary Kanom. There is a stipulation that the Kanom should be renewed at the end of 12 years.

Even if Exhibit I was a perpetual Kanom, it is not binding on the Dewaswom. The Urlan could not grant a permanent Kanom. It is invalid in law.

The defendants cannot prescribe for a prescriptive right, as they held possession under the earlier ordinary Kanom and they could not trace their possession to the later invalid document.

JUDGMENT.—The question in this case is whether the Oorakam, a Devaswom, is entitled to redeem the property in suit. Prior to 1864 there was a simple Kanom by the then Ooralan in favour of the predecessor-in-title of the defendants. That document has been lost and, therefore, its terms can only be gathered from Exhibit I. We are clear from the recital in it that the first transaction was a simple Kanom. Then in 1864, Exhibit I was executed by the then Ooralan. The question as to whether it confers a permanent and irredeemable right or whether it is an ordinary Kanom is one of some difficulty. The Munsif held it was a permanent tenure. The Appellate Court has differed from him. In our opinion the Munsif was right.

In the operative portion, the language employed is: "You and your Anandravans may, as hitherto, hold the aforesaid properties for ever and ever." As was pointed out in *Neelakandhan* v. *Ananthakrishna Ayyar* (2), these words would ordinarily import a permanent grant unless there are circumstances which indicate that the intention was different. In that case the learned Judges held that the clause which provided for the renewal of the Kanom every 12 years by a new document was a sufficient indication that the transaction was an ordinary Kanom. Mr. Krishnaswamy Aiyar contended that in the present case also those circumstances exist. We are unable to agree with him. Exhibit I provides that instead of having the renewal fee paid in 1876 the amount of it should be spread over 12 years and should be made payable along with the rent. There is also the provision that subsequent to 1876 the rent should be at the rate at which it was being paid before that date. Even though we may concede that the additional amount paid along with the rent during the first twelve years may be taken as the equivalent of the renewal fee, we are unable to hold that the payments after 1876 must also be regarded as renewal fees, because under the customary law of Malabar a renewal fee is not ordinarily fixed before hand. Further the registration charges and other perquisities which are generally paid along with the renewal fee, have not been mentioned in this document. Moreover a renewal fee is fixed by the mortgagor at the time of the re-grant with reference to the then state of affairs. In our opinion, what the parties intended was that the rent payable should be increased for all time to come as the temple was benefited by such an arrangement.

(1) 40 Ind. Cas. 531; 40 M. 745; 32 M. L. J. 24.

(2) 30 M. 61; 16 M. L. J. 462; 1 M. L. T. 426.

We are, therefore, of opinion that the document should be treated as if it was a perpetual Kanom.

In this view the further question is whether it is binding upon the Devaswom. As was pointed out by the Judicial Committee in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (3) it is not competent to a trustee to grant away permanently trust property. Therefore, we must hold that the permanent Kanom is not binding upon the plaintiff.

It was then argued by Mr. Madhavan Nair that even though the Kanom may not be binding, his clients have prescribed for a perpetual and irredeemable Kanom, and, therefore, they are entitled to hold on as long as they like. He is undoubtedly supported by *Baluswami Aiyer* v. *Venkitaswamy Naicken* (1) in this contention. To the decision in *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (4), relied on by the learned Vakil for the respondent, one of the Judges who decided *Baluswami Aiyer* v. *Venkitaswamy Naicken* (1) was a party, and the learned Judges in the latter case say that *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (4) is not good law. We are also of opinion that the estate held by a trustee should not be regarded as analogous to that of a widow. In *Raja of Palghat* v. *Kannampra Nair Veetil* (5), to which one of us was a party, it was pointed out that the trustees constitute a chain of representation of the trust. That is not quite consistent with holding that each trustee holds an estate similar to that of a Hindu widow. Our attention was drawn to two decisions of this Court, namely, *Ramunni* v. *Kerala Varma Valia Raja* (6) and *Chirakkall Kovilagath* v. *Saidammadath Ayakomba* (7), where under very similar circumstances it was held that possession will not be adverse. The learned Judges in the first of these cases point out that subsequent possession under an invalid permanent lease must be referred back to the possession taken under the valid lease. That was also the view taken in *Chirakkal Kovilagath* v. *Saidammadath Ayakomba* (7). As regards *Baluswami Aiyer* v. *Venkitaswamy Naicker* (1), it is enough to point out that possession in that case began for the first time under the permanent lease itself. Mr. Madhavan Nair argued that as his clients and the subsequent trustees treated the subsequent enjoyment as traceable to a permanent right, they must be deemed to have prescribed for that right. How many intermediate Ooralams there were and upon what understanding the Kanomdar and the Ooralams dealt with each other, are not clear. We have, therefore, resolved upon asking the lower Appellate Court to return a finding upon the question of adverse possession with reference to the observations contained in *Ramunni* v. *Kerala Varma Valia Raja* (6) and *Chirakkal Kovilagath* v. *Saidammadath Ayakomba* (7). No further evidence. Six weeks for finding and 7 days for objection.

In compliance with the order contained in the above judgment the Temporary Subordinate Judge of Palghat at Calicut submitted the following

FINDING.—The case has been remanded to this Court for determination of the following issue raised in second appeal.

Whether the defendants acquired a permanent and irredeemable Kanom interest in the suit properties by adverse possession?

2. So far as the facts bearing on the issue go, the evidence is extremely meagre. All that appears is that the defendants' Tarwad entered into possession under a Kanom arrangement prior to 1864. Then a fresh document (Exhibit I) was executed by the plaintiff's then predecessor-in-title confirming the original demise. Between the date of Exhibit I and the plaintiff's becoming trustee in Chingom 1088 (August September 1913), there were about 8 or 9 intervening trustees according to the defendants' first witness. The deposition of the plaintiff's first witness, Krishnan Embrandiri, is to the following effect:—"From 20 years" (*sic*) "plaintiff had 3 or 4 predecessors." This would

(3) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 & 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.).

(4) 19 Ind. Cas 694; 38 M. 356; 13 M. L. T. 498; (1913) M. W. N. 581; 25 M. L. J. 393.

(5) 42 Ind. Cas. 22; 41 M. 4; 33 M. L. J. 26; 6 L. W. 195; (1917) M. W. N. 552.

(6) 15 M. 166; 5 Ind. Dec. (N. s.) 465.

(7) 7 Ind. Cas. 253; 8 M. L. T. 309; (1910) M. W. N. 460.

give an average of one trustee every five years, which indicates an unusually rapid acceleration of life estates in the headship of the Thrikaikat Mutt to which is appurtenant the Oorakam Devaswom, the owner of the lands. Although there is no direct evidence on the point, I take it that subsequent to 1864 the trustee who granted Exhibit I and his successors dealt with the defendant on the basis of Exhibit I.

3. Exhibit II shows that within a month or two after the plaintiff's accession to the office his Kariastan has received arrears of rent according to the tenor of Exhibit I. Exhibit II refers to this document as 'the Saswathom deed.' This corroborates the view that Exhibit I evidences a permanent tenure, that being the interpretation which the parties themselves put upon it. Beyond this the evidence does not go, and it does not disclose any specific terms or covenants indicating any special understanding between the succeeding trustees and the Kanomdar. These being the facts, what is the legal position?

4. Mr. K. P. Raman Menon, who represents the plaintiff in this Court, based his arguments on the two decisions referred to in the order of remand and quoted also the rulings in *Seshamma Chettati* v. *Chikaya Hegade* (8), *Rairu Nayar* v. *Moidin* (9) and *Ariyaputhira* v. *Muthukumarasawmy* (10). The respondent-defendant's Vakil, Mr. K. Raman Nair, rested his arguments on the claim of prescriptive right set up in the High Court and he laid stress on the conduct of the parties shown by payment and acceptance of rent on the terms of Exhibit I. The respective arguments advanced at the Bar do not, however, meet all the aspects of the case.

5. As regards the defendants' position, if it can be held that Exhibit I was executed merely because the deed under which the original demise was granted had crumbled to pieces by reason of age or use, and that the later document is a *replica* of the older document, it is unquestionable that the Kanomdar can successfully set up the acquisition by prescriptive right of a permanent tenure so as to counter the plaintiff's claim by means of the bar of limitation. In such a case, possession having been taken under the first document which itself would be invalid according to the present day view of the powers of a Matadhipathi, the enjoyment of the lands by the Tarward would have been under a hostile claim to hold as permanent Kanomdar and would, after 12 years, ripen into a legal title on such a basis. It will be sufficient to refer to the latest authorities laying down the law in the above sense, *Rameshwar Malia* v. *Jiu Thakur* (11), *Narsaya Udpa* v. *Venkataamana Bhatta* (12), S. A. No. 1465 of 1917; (1918) M. W. N. Week's cases, CLXVII). The earlier cases will be found collected in Mr. Justice Mookerjee's judgment in *Iswar Shyam Chand Jiu* v. *Ram Kanai Ghose* (13). But such a defence is not open to the Kanomdar in view of the finding of their Lordships that the original Kanom was one of the usual simple kind. The defendant, therefore, has to fall back on the change of position effected by Exhibit I. His contention is that whatever might have been the relations between him and the Devaswom represented by the Uralans prior to 1864, a permanent tenure has been created in that year by means of Exhibit I and both sides having accepted and acted upon it for more than half a century, his rights must be referred to the altered state of things and that for this reason his title by prescription must be recognised. The question at this stage becomes difficult as it lends itself to two different lines of reasoning.

6. For the Kanomdar it may be said that a question of prescriptive right is mainly to be judged by the *animus possidendi*—See *Thuppan Nambudripad* v. *Ittichiri Amma* (14), *Muthaya Shetti* v. *Kanthappa Shetti* (15)—and that the course of conduct of

(8) 25 M. 507; 12 M. L. J. 119.
(9) 13 M. 39; 4 Ind. Dec. (N. S.) 737.
(10) 15 Ind Cas. 343; 37 M. 423; 12 M L. T. 425; 3 M. L. J. 339; (1912) M. W. N. 854.
(11) 29 Ind. Cas. 337; 43 C. 34; 19 C. W. N. 1082.
(12) 16 Ind. Cas. 53; (1912) M. W. N. 870; 12 M. L. T. 218; 23 M. L. J. 260.
(13) 10 Ind. Cas. 683; 38 C. 526 at pp. 529, 532 (1911) 2 M. W. N. 281; 21 M. L. J. 1145; 15 C. W. N. 417; 9 M. L. T. 448; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 C. L. J. 238; 38 I. A. 76 (P. C.).
(14) 14 Ind. Cas. 168; 37 M. 373; 11 M. L. T. 355; (1912) M. W. N. 445.
(15) 45 Ind. Cas. 975; 34 M. L. J. 431; 7 L. W. 482; 23 M. L. T. 291; (1918) M. W. N. 334.

the parties since 1864 can only be explained on the footing that the defendant held as a permanent demisee under Exhibit I and that this was known to and acquiesced in by the several Uralans. That possession in one right may be converted by mutual agreement into possession of another and a higher right has been laid down in *Muthukaruppan* v. *Muthu Sumban* (16). On the other hand, there is the consideration in favour of the plaintiff that a hostile right should not be inferred where possession can be referred to a lawful title. The origin of the defendant's possession being traceable to the earlier simple Kanom demise, and the later permanent tenure being liable to be successfully attacked by the plaintiff as invalid, it can be argued that the character of the Kanomdar's possession must be referred to its inception under the simple Kanom right. I have looked into the authorities bearing on the subject and it appears to be clear that the solution of the question raised for determination is furnished by the principles relating to novation of contracts and the estoppels arising therefrom.

7. If Exhibit I were valid or even voidable, the defendant would undoubtedly be entitled to say that his possession for such a long period invests him with the right put forward by him. But Exhibit I has been found to be invalid in the sense that the plaintiff can treat it as a void transaction. If the defendant's possession arose for the first time under Exhibit I, even then it will be competent to him to advance the plea of acquisition of a permanent right by prescription. But his possession began prior to Exhibit I and has continued uninterrupted all along. Exhibit I must, under the circumstances, be deemed to be merely an infructuous attempt to substitute for the original simple Kanom a *saswatam* tenure. The attempt at novation having failed, the law will relegate the parties to their original characters. As to the general rule reference may be made to *Anantanarayana Iyer* v. *Savittri Ammal* (17), *Ramjiban Shah* v. *Dhiku Singh* (18), *Mathura Mohan Saha* v. *Ramkumar Saha* (19).

8. Coming to the particular instances of the contractual relations between a mortgagor and a mortgagee and a landlord and his tenant, instances of the application of the rule will be found in *Ariyaputhira* v. *Muthukumarasawmy* (10), *Ramunni* v. *Kerala Varma Valia Raja* (6), *Chirakkall Kovilagath* v. *Saidammadath Ayakomba* (7). The present case isnot wholly a mortgage or wholly a lease but is a combination of both. See *Silapani* v. *Ashtamurti Nambudri* (20), *Gopalan Nair* v. *Kunhan Menon* (21), *Meenakshisundara Mudaliar* v. *Rathnasami Pillai* (22).

9. Viewed as a mortgage, the following observations of Sadasiva Ayyar, J., will be found in point. Says his Lordship: "The next contention of the appellant's Vakil based on the Limitation Act is not sustainable as, if the original mortgagee continued to hold possession as mortgagee owing to the alleged sale of 1893 being invalid and ineffective to convey to him the ownership in the equity of redemption in the A Schedule properties, he cannot by merely asserting possession as owner under the invalid sale convert his possession as mortgagee into possession as owner even granting that the mortgage" (? mortgagor) "knew and acquiesced in his assertion" [*Ariyaputhira* v. *Muthukumarasawmy* (10).] In its aspect of a lease the claim founded on Exhibit I must fail in view of what has been held in the case in *Ramunni* v. *Kerala Varma Valia Raja* (6), which is followed in *Chirakkall Kovilagath* v. *Saidammadath Ayakomba* (7).

10. Exhibit I was in renewal of a prior Kanom under which the defendant was already holding. The prior demise must be taken to continue unless it can be shown that it was put an end to according to law. The only ground on which such a view can be taken must be

(16) 25 Ind. Cas. 772; 38 M. 1158; 27 M. L. J. 497; 16 M. L. T. 344; (1914) M. W. N. 765; 1 L. W. 754.

(17) 13 Ind. Cas. 458; (1912) M. W. N. 59 at p. 63; 36 M. 151; 22 M. L. J. 231; 11 M. L. T. 63.

(18) 16 Ind. Cas. 246; 16 C. L. J. 264.

(19) 35 Ind. Cas. 305; 43 C. 790; 23 C. L. J. 26; 20 C. W. N. 370.

(20) 3 M. 382; 1 Ind. Dec. (N. S.) 821.

(21) 30 M. 300; 2 M. L. T. 161; 17 M. L. J. 189.

(22) 49 Ind. Cas. 291; 41 M. 959 at pp. 962, 975; 8 L. W. 438; 35 M. L. J. 489; 24 M. L. T. 315; (1918) M. W. N. 811.

rested on Exhibit I. The transaction, therefore, comes under the class of implied surrenders by operation of law. But the law both in England and in India is well-settled that such a surrender would be valid only in case the later transaction is legally operative. But if the new arrangement fails, the implied surrender would become void and old relations between the parties will revive and continue. The Indian cases have been referred to already. The English Law will be found stated in Halsbury's Laws of England, Volume XVIII, section 1061. The matter, therefore, being concluded by the rules of estoppel, the principle of mutuality will shut the defendant's mouth as effectually from claiming a new right under the void transaction as it would prevent the plaintiff from approbating it for one purpose while reprobating it for another.

11. Judged from any point of view, I think it is not possible for the Kanomdar to set up a hostile new right referable to the invalid instrument of 1864.

12. The question of the legal effect of the payment and acceptance of rent on which some emphasis was laid on behalf of the Kanomdar does not merit much notice. The rent paid appears to have been on the basis of the earlier demise. Further, the mere payment of rent under the invalid transaction repudiated by the plaintiff is of no consequence, as will be seen from *Baluswami Aiyer* v. *Venkitaswamy Naicken* (1). Exhibit II shows that after plaintiff became trustee there was a payment of some arrears of rent. But he alleges that he came to know of the demise in question only subsequent to his accession to office and considering the few weeks' interval between the plaintiff's becoming the trustee and the payment evidenced by Exhibit II, I have no doubt that he could have had no knowledge of it so as to bring in the question of acquiescence or ratification. The plaintiff appears to have acted in repudiation of Exhibit I as soon as he came to know of it.

13. It has to be noticed that while the plaintiff denounces Exhibit I the suit itself is so framed as to claim redemption in foot of the permanent Kanom. Apparently, the plaintiff's position is that the terms of both the Kanoms were the same as regards the incidents of the Kanom amount and Purapad and that it would only be a theoretical distinction to hold that he should sue to redeem in terms the earlier Kanom. However this may be, I am not called upon to deal with the question.

14. My finding on the issue is in the negative.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding of the Subordinate Judge, who has written a clear and well-considered judgment. The result is that the defendants' possession taken under the simple Kanom continued even after the execution of Exhibit I and consequently no prescriptive right in respect of the terms of Exhibit I was acquired by the defendants. Mr. Madhavan Nair contends that there must be a further finding whether on the date of Exhibit I the previous Kanom was subsisting: We are satisfied from the recitals in Exhibit I, that it was subsisting in 1864. In this view, the suit for redeeming that Kanom is not barred: The decree of the lower Appellate Court will be confirmed on this ground. But seeing that the decree in this Court is based on the ground that the plaintiff is entitled to renew the old Kanom (which was not the case put forward by the plaintiff in either of the Courts below), we direct each party to bear his own costs throughout. Time for redemption will be six months from this date.

M. C. P. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 503 OF 1917.

August 8, 1918.

Present :—Mr. Justice Roe and Mr. Justice Coutts.

BARAIK RADHA NATH SINGH AND OTHERS—APPELLANTS

versus

Thakur DAVENDRA NATH SAHI DEO —RESPONDENT.

Hindu Law—Joint family—Debt incurred by father to help relative—Sons, liability of.

A debt, not being illegal or immoral, incurred by a Hindu father to help a relative, which he expects will be repaid and out of which he expects to get some benefit, is binding on his sons and they are liable for its payment. [p. 681, col. 2.]

Appeal from a decision of the Subordinate Judge, Ranchi.

Mr. *S. N. Palit*, for the Appellants.

Mr. *Fakhruddin*, for the Respondent.

JUDGMENT.

COUTTS, J.—The facts of this case are not disputed and are shortly as follows. The plaintiffs are the sons of one Baraik Kashinath Singh who had an ancestral Jagir of 8 annas of village Murga. In 1891 he purchased another 5 annas so that in all he had 13 annas of the village. On the 16th June 1904 he mortgaged his entire share to one Lal Jogindra Nath Sah Deo in order to raise money to pay off the debts of one Baraik Paduman Singh, whose estate was at that time being managed by the Manager of the Encumbered Estates. Jogindra Nath subsequently assigned his mortgage to Debendra Nath Sah Deo, the defendant in this case, who brought a mortgage suit, and after obtaining a decree put up the property to sale and purchased it himself. He obtained a delivery of possession on the 29th August 1913. Kashinath is dead and the case of the plaintiffs is that the bond executed by Kashinath was without legal necessity and was immoral and that it was executed by him without any right and they asked that the bond, the sale and the delivery of possession should not bind the plaintiffs' or their property and that the plaintiffs' ancestral Jagir right might be declared in the 13 annas which had been sold by Kashinath, that their possession might be confirmed and that of the defendants might be cancelled by declaring it null and void and illegal.

The learned Subordinate Judge who heard the appeal was of opinion that Kashinath expected some benefit from the loan to Baraik Paduman Singh and that the debt not being illegal or immoral it is binding on the plaintiffs who are liable for their deceased father's debts. In this view he has dismissed the plaintiffs' suit.

The only question for consideration in this appeal is, whether the plaintiffs are liable for Kashinath's debt. According to the recital in the mortgage bond executed by Kashinath, the reason for lending the money is stated as follows :—"Now in consideration of the fact that Baraik Paduman Singh aforesaid is connected with us, and is a big Zemindar, and that as it is in every way incumbent on us to save his property we have unanimously decided that in order to help him at this juncture we should arrange for money and pay the same to him, so that his ancestral property may be saved and we too may be benefited in future. The said Baraik will repay our money on getting possession of his properties." It is clear then that the debt contracted by Kashinath was neither an immoral nor an illegal debt and that he expected to get some benefit from the payment of the money to Baraik Paduman Singh. The question of liability in cases of this kind has been very fully discussed in the ruling reported as *Chakouri Mahton* v. *Ganga Proshad* (1). At page 869* the texts on the point have been summarised by Mookerjee, J., in the following passage:

"The result appears to be that the debts which a son is not under any obligation to pay may be grouped as follows: (*i*) debts due for spirituous liquor, (*ii*) debts due for lust, (*iii*) debts due for gambling, (*iv*) unpaid fines, (*v*) unpaid tolls, (*vi*) useless gifts or promises without consideration, or made under the influence of lust or wrath, (*vii*) suretyship debts, (*viii*) commercial debts, and (*ix*) debts that are not Vyavaharika, *i. e.*, debts that are not lawful, usual, or customary, or, if we accept the version of Colebrook, debts for a cause repugnant to good morals."

The only one of these categories under which this particular debt could possibly

(1) 12 Ind. Cas. 609; 39 C. 862; 15 C. L. J. 228.

*Page of 39 C.—*Ed.*

come would be useless gifts or debts which are not lawful, usual or customary, but it does not in fact come under either of them, because the debt was incurred to help a relative, it was expected that it would be repaid and Kashinath expected that he would get some benefit out of it. The plaintiffs, therefore, cannot escape liability for the debt.

In this view of the case the question of whether the suit can at all lie because section 47 of the Code of Civil Procedure operates as a bar does not arise.

I would dismiss the appeal with costs.

ROE, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO. 1105 OF 1916.
February 12, 1919.
Present:—Sir Basil Scott, KT.,
Chief Justice, and Mr. Justice Hayward.
BHIKHABHAI MULJIBHAI PATEL—
PLAINTIFF—APPELLANT
versus
PANACHAND ODHAVJI PATEL—
DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Intent to defeat or delay creditors—Transaction, how far void.

Where the inferences deducible from the established facts in relation to a conveyance or transfer show that the transferor and transferee had the intention of defeating or delaying the creditors of the transferor, the transaction must, at the option of the person defeated or delayed, be treated as void *in toto*, and not merely void in so far as there is no consideration [p. 683, col. 1.]

Second appeal from the decision of the Joint Judge, Ahmedabad, in Appeal No. 215 of 1914, confirming the decree passed by the Subordinate Judge at Ahmedabad, in Civil Suit No. 761 of 1912.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

SCOTT, C. J.—Joitaram Chhagan and Magan Joitaram traded in grain and cloth in partnership from the year 1908 till April 1911, when Magan died and the business of the firm came to an end. Eight days after the death of his partner, namely, on the 27th April 1911, Joitaram executed two registered documents by which he purported to mortgage practically the whole of his immoveable property to the plaintiff for Rs. 5,000 or thereabouts. The property, which was his by right of ownership, was mortgaged for Rs. 4,000, and the property which he held as mortgagee was assigned to the plaintiff as security for Rs. 1,400. In June in the same year the defendant, a creditor of Joitaram, brought a suit against him and obtained a decree in execution of which the properties mortgaged to the plaintiff were attached. The plaintiff then applied that the properties should be sold subject to his lien, but his application was rejected and the plaintiff has brought this suit for a declaration that the defendant is not entitled to attach the properties and bring them to sale. The defendant's case is that the mortgage to the plaintiff was merely intended to defeat and delay the creditors of Joitaram, who was an insolvent at the time, and was not entered into in good faith for valuable consideration. On behalf of the plaintiff it is alleged that the consideration for the transaction was an already existing debt in respect of four loans previously made by the plaintiff to Joitaram of Rs. 2,000, 1,200, 1,300 and 1,000, amounting in all to Rs. 5,500.

The findings of the lower Courts establish that this case of four existing loans as a consideration for the mortgage transaction is entirely false, and that the only sum for which the plaintiff was a creditor of Joitaram at the time was possibly Rs. 1,300, but more probably Rs. 1,000. The value of the properties mortgaged, apart from those of which Joitaram was the mortgagee, was about Rs. 4,000 and in this appeal we are only concerned with that mortgage for Rs. 4,000. The finding of the lower Appellate Court is that "it is, to say the least of it, very doubtful, whether the transaction was intended to be a genuine mortgage at all. It purported to be a mortgage with possession, but the plaintiff never got possession, and though Joitaram executed some rent-notes in his favour, he never paid any rent. The explanations given of this are very unconvincing. If this was a real mortgage, and not a sham, one cannot understand

why the plaintiff took no steps to exercise his rights under it and insist on the payment of rent." The learned Judge also holds that considering the circumstances in which the transaction took place, good faith on the plaintiff's part is out of the question. The inevitable conclusion appears to be that the plaintiff and Joitaram were in collusion in framing a mortgage deed upon a false consideration of Rs 4,000, whereas the only sum owing did not exceed Rs. 1,300, and considering the financial condition of Joitaram one must conclude that the parties were in collusion for the purpose of screening Joitaram's property from his creditors.

The only question which gives rise to any difficulty is whether the plaintiff is entitled to a declaration that he has a lien to the extent of the debt existing at the time of the mortgage. The case must be decided according to the provisions of section 53 of the Transfer of Property Act, for although there has been no suit to avoid the mortgage, the action of the defendant is tantamount to an avoidance if he has the right to avoid it as a creditor defeated or delayed. Section 53, so far as material, provides that every transfer of immoveable property, made with intent to defeat or delay the creditors of the transferor, is voidable at the option of any person so defeated, or delayed, but nothing in the section shall impair the rights of any transferee in good faith for valuable consideration. There can be no doubt that the mortgage is a transfer of immoveable property, and that the plaintiff is a transferee, and upon the findings of fact there can be no doubt that the plaintiff is not a transferee in good faith. Therefore, the concluding words of the section do not apply to his case. The inferences deducible from the established facts show that both the transferor and the transferee had the intention of defeating or delaying the creditors of the transferor, and under those circumstances it appears to us that the document must, at the option of the person defeated or delayed, be treated as void *in toto*, and not merely as void in so far as there is no consideration.

In May on 'Fraudulent and Voluntary Dispositions of Property,' 3rd Edition, at page 63, it is stated, as the result of the English authorities, that a fraudulent intention, to which the purchaser was a party, will override all inquiry into the consideration, and among the cases cited in support of that proposition is *Ex parte Chaplin*; *In re Sinclair* (1), where a transfer was stated to be for a consideration which was entirely false, although there was some consideration proceeding from the transferee, and Lord Justice Fry held that the whole deed was void under the Statute of Elizabeth.

Similarly in *Hakim Lal* v. *Mooshahar Sahu* (2) Mr. Justice Mookerjee states, after an exhaustive discussion of the authorities, that a conveyance or transfer, whether founded on a valuable or adequate consideration or not, if entered into by the parties thereto with the intent to hinder, delay or defraud creditors, is void as to them.

It has been contended on behalf of the appellant that the judgment in *Hakim Lal* v. *Mooshahar Sahu* (2) is inconsistent with that in *Rajani Kumar Dass* v. *Gaur Kishore Shaha* (3). In the latter case, however, at page 1057, we find the following passage:

"It has not been shown by any evidence, which may be said to be cogent, that the transaction of mortgage between the plaintiffs and the Deb defendants was entirely fraudulent, or for a grossly inadequate consideration and was intended only to defeat or delay the realization of the dues of the Dass defendants. If the considerations, for the mortgage (we use the plural number to include the two different sums—Rs. 4,853 and Rs. 3,647—which make up Rs. 8,500) could not be separated from each other, there would be good grounds for holding that the transfer evidenced by the deed was fraudulent. In that case the failure of consideration to the extent of Rs. 3,647, taken with the other proved facts, would lead to a reasonable conclusion that the mortgagees intended to help the mortgagors to defeat the realization of the debt covered by the *hatchitta* in favour of the Dass defendants. Such conduct on the part of the mortgagees and mortgagors would

(1) (1884) 26 Ch. D. 319; 53 L. J. Ch. 732; 51 L. T. 345.
(2) 34 C. 999 at p. 1017; 11 C. W. N. 889; 6 C. L. J. 410.
(3) 35 C. 1051 at pp. 1057, 1058; 7 C. L. J. 586; 12 C. W. N. 761.

lead to the inference that they were acting in collusion."

Then further on the Court indicates with regard to the Rs. 3,647, as to the reality of which as part of the consideration there was some doubt, "it might...be that the plaintiffs had a *bona fide* intention of advancing the additional sum for enabling the mortgagors to carry on their business, that they put off payment until the money was needed or until registration of the deed, but that as the Dass defendants either commenced their suit, or were about to do so for a larger sum than Rs. 3,647, the plaintiff withheld payment of the additional sum They might not have had any such intention as would invalidate the instrument under section 53 of the Transfer of Property Act. Their moral turpitude in making a false case afterwards in the present proceedings would not be sufficient to deprive them of their legal rights, though a false case might reflect discredit on the original transaction." It appears from this that the Judges in that case did not in any way dissent from the law as laid down in the earlier volume. Being of opinion then that the consideration stated in the mortgage-deed must in the circumstances of the case be treated as one and indivisible, we are of opinion that the plaintiffs' case must fail. We, therefore, affirm the decree and dismiss the appeal with costs.

Decree affirmed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 265 OF 1916.
July 28, 1919.
Present:—Mr. Justice Stuart and
Mr. Justice Ryves.
Rani BARKAT-UN-NISSA BEGAM—
PLAINTIFF—APPELLANT
versus
MAHBOOB ALI MIAN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 126, 140, 141—Principal and surety—Oral contract, validity of—Surety paying off whole debt, position and remedies of—Right to avail of remedies of creditor—Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage, payable on demand—Limitation, commencement of—Transferee, position of.

Section 126 of the Contract Act makes no difference between an oral and a written guarantee, the former being as equally binding as the latter. [p. 686, col 2; p. 687, col. 1.]

Where a surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off and is entitled to the benefit of every security which the creditor had against the debtor at the time when the surety was entered into. [p. 687, col. 1.]

Where a mortgage is payable on demand, time begins to run from the date of its execution, and in order to succeed in a suit to enforce the mortgage the suit must be brought within twelve years of its execution, otherwise it will be barred by time. This rule applies equally to a transferee of mortgage rights, who in this respect can be put in no better position than the mortgagee. [p. 687, col. 1.]

First appeal against the decision of the Subordinate Judge, Shahjahanpur, dated the 15th of August 1916.

The Hon'ble Mr. *Moti Lal Nehru* and Dr. *S. M. Sulaiman*, for the Appellant.

Messrs. *Abdur Rauf*, *B. E. O'Conor*, *Ishaq Khan* and *Baleshwari Pershad*, for the Respondents.

JUDGMENT.—Khurshed Ali Mian and his wife *Musammat* Latifunnissa executed the two mortgages, the subject of this appeal:—

(1) dated the 14th June 1899, in favour of Darbari Lal, for Rs. 3,000, and

(2) dated 27th July 1900, for the same amount in favour of Darbari Lal and Lalta Pershad.

They had also executed two other mortgages, dated 20th November 1897 and 10th August 1899, in favour of Lalta Pershad alone. Those two mortgages formed the subject of the connected suit, and are disposed of by our judgment in First Appeal No. 264.

The only reason for mentioning this fact is because the two suits were tried together, and the evidence was recorded in one only and in order to appreciate (correctly) the evidence in this case, it is necessary to remember the circumstances of the other case as well.

Khurshed Ail died in 1905 and in 1906 the creditors, that is Lalta Parshad and Darbari Lal, demanded payment. *Musammat* Latifunnissa asked for time, which the creditors agreed to give her, provided they got security for their debts. Latifunnissa appealed to her sister, Rani Barkatunnissa, (plaintiff-appellant), who was a wealthy woman, and she agreed to secure all the four

mortgage-debts. On their side the creditors agreed to reduce the rate of interest. All four mortgages were paid off by Barkatunnissa, according to the plaint, and these suits were brought by her to recover the amounts so paid from the sons and daughters of Khurshed Ali and Latifunnissa, who also is now dead. This suit was filed on the 7th June 1915.

The defendants are three adult sons, three adult daughters and some minors under the guardianship of *Musammat* Hasina Begam. One of the adult sons, Mahbub Ali, admitted the claim and is the chief witness in the case. The two other adult sons and one of the adult daughters did not appear to contest the suit. Two adult daughters only, *Musammats* Hasina Begam and Anwari Begam, opposed the claim.

It is, we think, necessary to bear this circumstance in mind in judging the value to be assigned to the evidence in the case.

The contesting defendants in this case admitted the execution of the mortgages but pleaded that the mortgages had been paid off by *Musammat* Latifunnissa herself out of her own funds, and that *Musammat* Barkatunnissa, in fact, paid nothing. But they go on to say that if the Court holds that Barkatunnissa made any or all of the payments she cannot recover them from the defendants, as the payments were merely voluntary, and, therefore, gave her no lien over the defendants' property.

The Court framed two main issues:—

(1) Whether the plaintiff stood surety for payment of the money due under the two bonds in suit; and made payments as surety?

(2) Whether she can obtain a decree for sale?

The Court held that the plaintiff paid off the mortgage of 27th July 1900 on the 12th October 1906 by a payment of Rs. 6,300 but that she did not do so as a surety, and, therefore, cannot get a decree for this amount.

With regard to the second mortgage, the plaintiff claimed to recover 7 items:—

	Rs.	a.	p.	
1.	628	15	0	on 25th March 1908.
2.	606	7	0	on 17th March 1909.
3.	1,204	13	0	on 24th September 1910.
4.	2,441	0	0	on 17th June 1911.
5.	2,426	6	9	on 25th June 1912.
6.	1,376	0	0	on 15th January 1913.
7.	1,500	0	0	on 17th January 1913.

The Court below has held that all these payments were made (though it has not discussed item No. 7 in its judgment), and apparently were made by money advanced by the plaintiff, but it held that, although there was no reason to suppose that Barkatunnissa advanced the money voluntarily, still as "there was no privity of contract between the plaintiff and Darbari Lal and as she gave no guarantee to the latter, she did not become invested with the rights of Darbari Lal against the mortgaged property, and, therefore, she could not get a decree for sale." It seems to have come to the conclusion that item No. 7 had not been proved, and held that inasmuch as item No. 5 could not be traced in the account books of the plaintiff, it could not be held with certainty that the plaintiff had paid it. In the result it gave plaintiff a simple money-decree for item No. 6, for Rs. 1,376 with future interest, and held that the rest of the payments having been made more than 3 years before suit were irrecoverable, being barred by limitation.

The plaintiff has appealed and claimed to recover the whole amount.

Before discussing the law, it will be convenient to set out what we find to be the facts.

Khurshed Ali and his wife, though possessed of some property, made these four mortgages, between the years 1897 and 1900. They paid nothing towards either interest or capital. In 1906 the mortgagees began to press for their money, and then it was that *Musammat* Latifunnissa (her husband having died as said above) turned to her sister the plaintiff for help. The evidence of what then happened consists of the testimony of Mahbub Ali (defendant No. 1, son of Latifunnissa) and Darbari Lal, and three documents:—(1) a security bond executed by the plaintiff, dated the 6th October 1906, (2) an agreement executed by Lalta Parshad, since deceased, dated 12th October 1906, and (3) a document executed by Darbari Lal, dated 12th October 1906. The only other person who is said to have taken part in the negotiations was Har Dayal, the *karinda* of the plaintiff, but he is dead.

Mahbub Ali swears that after Khurshed Ali's death, Lalta Parshad and Darbari Lal (it will be remembered that two of these four mortgages were in favour of Lalta Par-

shad alone, one in favour of Lalta Parshad alone, one in favour of Darbari Lal alone, and the other in their favour jointly) pressed *Musammat* Latifunnissa for payment. Mahbub Ali stated: "My mother said, 'give me time.' Thereupon, the bankers said, 'if you give security for the money we will give you time and reduce interest as well.' My mother said, 'I will speak to my sister and if she accept it I will give the security.' My mother sent me to the plaintiff. I went and mentioned full particulars. Thereupon the plaintiff consented and said, 'go and bring from the bankers the conditions of the security bond.' Thereupon, I came to Shahjahanpur and told the same to the bankers. They gave a draft of the conditions and I took it to the plaintiff, who accepted it and executed the security bond. When I brought the security bond and gave it to Lalta Parshad, he and Darbari Lal, having seen it, executed separate agreements with the stipulations that they would continue to charge interest in future, at the rate of 12 per cent. per mensem, on the amount that was due up to that day." Mahbub Ali has not been disbelieved by the Subordinate Judge, in fact his evidence has been accepted generally, he has not been in any way broken down in cross-examination and as his statement is against his own interest, we think it quite safe to act upon it. It will be remembered that his other two adult brothers and one adult sister have not contested the suit, and, therefore, tacitly accept the plaintiff's version.

Darbari Lal's version is not quite the same, but his evidence is not very satisfactory, because his memory seems to be defective. Thus, when shown the document executed by him on 12th October 1906 in which he agreed to reduce the rate of interest on the bond of the 14th June 1899, (the other one having been that day paid off) he admits that it bears his signature beyond any doubt, but he says he has no recollection of ever having executed it. His words are: "I do not remember exactly if I executed such an agreement. I think there was a verbal agreement," but he admits that he accepted interest at the reduced rate from that date. He says he did not know Barkatunnissa, and never had any conversation with her, which is probably quite true as she is a *pardanashin* lady. He says he does not know her *karinda*, although he admits that he had dealings with her and that her servants used to come to his shop. As to the plaintiff standing security for the payment of his one remaining mortgage, he says she did not. He did not require security as apparently the property mortgaged was sufficient security in itself. He admits that Mahbub Ali from time to time made payments and that the mortgage was paid off by such payments.

Mahbub Ali says that Hardayal did enter into negotiations with Darbari Lal, but whether Darbari Lal has forgotten or whether Mahbub Ali is mistaken, is not very important. The fact remains that on the 12th October 1906 both Darbari Lal and Lalta Parshad agreed to reduce the rate of interest. Lalta Parshad alone required a security bond. Mahbub Ali says, in corroboration of Darbari Lal, that as a large amount of money (Rs 6,300) was paid to Darbari Lal, and only one mortgage for Rs. 3,000 in his name remained due, he (Darbari Lal) did not think the execution of a security bond to be necessary. It may well be that while Lalta Parshad to whom the large sum of Rs. 23,000 was still due on two mortgages required a security bond from Barkatunnissa, Darbari Lal considered himself already sufficiently secured, as he says, by the property hypothecated in his bond.

It seems quite clear that both Lalta Parshad and Darbari Lal were acting together in these negotiations, and we are satisfied that Barkatunnissa guaranteed the payments of all these mortgages. Whether Darbari Lal was or was not aware of this (though we are inclined to think he was) seems to us immaterial and even if there was no privity of contract between Barkatunnissa and Darbari Lal, that is no bar to Barkatunnissa recovering from the defendants what she paid on account of the defendants' parents' debt, if she is otherwise entitled to recover. It is admitted in argument that, at any rate, the bulk of the money was paid by Barkatunnissa.

We have now to discuss Barkatunnissa's legal position. We find, as the lower Court did, that there was an oral guarantee given by Barkatunnissa to Latifunnissa, and that it was not voluntary. Section 126 of the Indian Contract Act makes no difference between an oral and a written

guarantee. See also section 187 of the Act.

We have now to consider the effect of sections 140 and 141 of the Act.

Under section 140 it seems to us that when the surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off, and under section 141 the surety is entitled to the benefit of every security which the creditor has against the debtor at the time when the contract of surety is entered into. We have no doubt that Rani Barkatunnissa was fully informed about the mortgages, and that she agreed to pay up her sister's debts, and that the creditors for that reason agreed on a lower rate of interest being charged in the future. So far there is no difficulty.

The appellants' Counsel claims that the plaintiff can take the benefit of both mortgages, and is entitled to a decree for sale of the properties hypothecated under both.

A difficulty at once arises with regard to the mortgage of the 27th July 1900. That was payable on demand, and time began to run from the date of its execution. Barkatunnissa (plaintiff) paid it up in full on October 12th, 1906. Her suit was brought in 1915, that is to say, within twelve years of her paying it off, but long after twelve years of its execution. On consideration, we hold that she should have brought her suit on the basis of this security within twelve years of its execution and not having done so, her claim under this head is barred by time. We cannot see how she as a transferee of the mortgagee rights can be put in a better position than the mortgagee. She had approximately six years within which to sue; as she did not sue in this interval, we must hold that her present claim is barred, and in so far we accept the decision of the lower Court.

The same difficulty is not present in regard to the second mortgage. Payments were made yearly in reduction of both principal and interest upto 1913. The suit was brought in 1915 within 3 years of the penultimate payment, and the suit is, therefore, clearly within time.

We have, therefore, only to satisfy ourselves that the seven items claimed by the plaintiff as having been paid by her were in fact so paid. The learned Counsel for the appellant plaintiff very frankly admitted that item No. 7 has not been brought home to the plaintiff as clearly as the others, and that, therefore, there may be a possible doubt whether in fact the plaintiff paid it. We, therefore, agree with the lower Court in not accepting this item.

The other items seem to us to be proved. The Subordinate Judge has not disbelieved Mahbub Ali, who said he paid them from the monies of Barkatunnissa. The sums were undoubtedly paid and there is no evidence that *Musammat* Latifunnissa paid them out of her own pocket. The learned Subordinate Judge, exercising perhaps undue caution, refused to credit Barkatunnissa with any item which was not clearly demonstrable from her books. We are, however, satisfied that all these items are shown in the plaintiffs' books. We took exception to one small item of about Rs. 125 in the other case, as not having been necessarily paid in reduction of the mortgage-debt involved in that case, for the reasons given in our judgment in the connected appeal. On all the other disputed items we are satisfied that what happened was that a particular sum was paid to both creditors but entered in the plaintiff's books as a single debit.

We, therefore, think that the appeal must be allowed in part, and the decree of the Court be amended. It is, therefore, ordered and decreed as follows:—

That the decree of the Court below is modified to this extent that in addition the plaintiff shall get a decree for items Nos. 1 to 5 inclusive with future interest against all the defendants and is entitled to bring the property hypothecated to sale in satisfaction of her decree. The appellant will get her costs and pay them in proportion to her success or failure in both Courts; costs in this Court include fees on the higher scale.

Appeal allowed in part;
Decree modified.

KALLIANI AMMA *v.* SANKARAN NAIR.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 833 OF 1918.
February 10, 1919.
Present:— Mr. Justice Bakewell and
Mr. Justice Phillips.
KARUMATHIL KALLIANI AMMA AND OTHERS—LEGAL REPRESENTATIVES OF THE DECEASED PLAINTIFFS—APPELLANTS
versus
KARUMATHIL SANKARAN NAIR AND OTHERS—DEFENDANTS NOS. 1 TO 5 AND RESPONDENT NO. 6 IN THE LOWER APPELLATE COURT—RESPONDENTS.

Malabar Law—Tarwad *property*—Karnavan *submitting to infringement of rights*—*Member, whether can take proceedings.*

If the *karnavan* for the time being of a *tarwad* submits to the infringement of the *tarwad's* rights of property, the next senior member may take proceedings.

Where a plaintiff *karnavan* died after a decree, and it was found that his successor was colluding with the defendants:

Held, that the next senior member of the *tarwad* was competent to file an appeal.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suit No. 222 of 1917 (Appeal Suit No. 164 of 1917, on the file of the District Court), preferred against the decree of the Court of the District Munsif, Palghat, in Original Suit No. 364 of 1914.

JUDGMENT.—The Karnavan, who brought the suit in this Court died after decree, and the lower Appellate Court finds that the Karnavan who succeeded him was not interested in filing an appeal as he sided with the defendants in the suit. It has been held in *Raja of Arakal* v. *Kunhi Kannan* (1) that if the Karnavan for the time being is submitting to an infringement of the Tarwad's rights of property, the next senior member may take proceedings. The appellants in the lower Appellate Court are interested parties within the decision and the present Karnavan was joined as party respondent.

We are of opinion that the appeal was properly brought and we set aside the appellate decree and pass a decree restraining the respondents Nos. 1 to 5 from removing the timber logs and other materials found by the Subordinate Judge to be the property of the Tarwad (paragraph 11 of his judgment) from the possession or control of the 6th respondent or otherwise interfering with the rights of the Tarwad therein.

Respondents Nos. 1 to 5 will pay costs throughout.

M. C. P.

Appeal allowed.

(1) 31 Ind. Cas. 482; 29 M. L. J. 632.

NUR MUHAMMAD *v.* FIRM MAULVI JAMIL AHMAD.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 117 OF 1919.
July 30, 1919.
Present:—Justice Sir P. C. Banerji, KT., and
Mr. Justice Piggott.
NUR MUHAMMAD—PLAINTIFF—APPLICANT
versus
FIRM MAULVI JAMIL AHMAD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. VII, r. 10, O. XXXIII, r. 8, O. XLIII, r. 1 (a)—Application for leave to sue as pauper—Order returning application for presentation to proper Court, legality of—Appeal, whether lies—Irregularity—Revision.

An application for leave to sue as a pauper is not a plaint, and it only reaches the stage of a plaint when it is granted. Where, therefore, a Court, regarding such application as a plaint, directs it to be returned for presentation to the proper Court, it acts without jurisdiction, and, although such an order is not appealable, the High Court will, in the exercise of its powers of revision, interfere and set the order aside.

Civil revision against the order of the Subordinate Judge, Allahabad, dated the 4th July 1918.

Mr. *Vishnu Nath*, for the Applicant.

Messrs. *S. C. Chaudhri* and *A. C. Mittra*, for the Opposite Party.

JUDGMENT.—The appellant presented an application in the Court of the Subordinate Judge of Allahabad for leave to sue as a pauper for the recovery of a certain sum of money. The learned Subordinate Judge was of opinion that no cause of action accrued to the plaintiff within the jurisdiction of his Court. He accordingly made an order in the following terms :—

"I return the plaint for presentation to the proper Court." From this order the present appeal has been preferred. A preliminary objection has been taken on behalf of the respondent to the effect that no appeal lies. If the order is in reality an order returning a plaint an appeal does lie under Order XLIII, rule 1, of the Code of Civil Procedure, but what we have to consider is whether there was any plaint before the Court at the time when it made this order. Order XXXIII provides the procedure for suits by paupers. Rule 2 of the Order provides that "every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits and a schedule of any moveable and immoveable property belonging to the applicant with the estimated value thereof." Rule 4 provides that "where the application is in proper form and duly presented the Court may, if it thinks fit, examine the applicant or his agent." Under rule 5 the Court shall reject an application for permission to sue as a pauper in the cases specified in that section. Rule 6 provides that if the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day of which notice shall be given to the opposite party and the Government. Rule 8 provides that "where the application is granted it shall be numbered and registered and shall be deemed the plaint in the suit." It is thus manifest that what was presented to the Court was not a plaint but an application and it would reach the stage of a plaint when the application was granted, and it would then be deemed to be the plaint in the suit. The Court below did not adopt any of the procedure mentioned in the rules to which we have referred above, but it proceeded to consider whether it had jurisdiction to entertain the suit and holding that it had no jurisdiction, it ordered the application which it regarded as the plaint to be returned. As at that stage there was no plaint before the Court, the order must be deemed to be an order returning the application. For this there is no authority in Order XXXIII. If the order be deemed to be a right order returning a plaint an appeal lies from that order, but in the present case the order cannot be held to be an order returning a plaint but it is an order returning an application. Such an order was passed without jurisdiction and should not have been passed. Although, therefore, no appeal is allowed from the order which is clearly an improper order, we deem it desirable in the exercise of our powers of revision to treat this appeal as an application for revision and so treating it we think we should be justified in setting aside the order of the Court below and in sending back the case to that Court with directions to adopt the procedure mentioned in Order XXXIII of the Code. We accordingly order that the application returned by the Court below and filed with the memorandum of appeal in this case, be sent to the Court below with directions to deal with it in the manner indicated above. We make no order as to the costs of this appeal.

Application sent back.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 344 OF 1918.

April 25, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

R. VELAYUDHAM PILLAI AND ANOTHER —PETITIONERS—APPELLANTS

versus

THE OFFICIAL RECEIVER OF TINNEVELLY—RESPONDENT.

Provincial Insolvency Act III of 1907, s 42—Annulment of insolvency, application for—Payment of debts, proof of—Payment through Official Receiver, whether necessary.

Where a person who has been adjudicated an insolvent applies for the adjudication to be annulled on the ground that his debts have been paid in full, the fact that such payments were not made through the Official Receiver is no justification for refusing to grant the annulment The petitioner should be put to proof of the allegations made by him. [p. 690, col. 1.]

Appeal against the order of the District Court, Tinnevelly, in I. P. No. 14 of 1914.

FACTS.—Application to get an adjudication as insolvent annulled. The application was dismissed on the ground that there was no proof that the debts were paid through the Official Receiver, who had reported that the debts had not been discharged.

Mr. *M. D. Devadoss*, for the Petitioners.—The law does not require that payment should be made through the Official Receiver and the lower Court was bound to have inquired whether in fact the payments were made and the debts discharged.

Mr. *T. R. Venkatrama Sastri*, for the Respondent.

[OLDFIELD, J.—Do you support the general proposition that all payments must be through the Official Receiver ?]

The reason for the rule is that if so made, the payments could be believed. And, in fact, the evidence in the present case is that no payments were made.

[ABDUR RAHIM, J.—But the order of the Judge is based on the general proposition alone.]

I am not prepared to support it by itself.

JUDGMENT.—Section 42 of the Provincial Insolvency Act lays down "where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor or of any other person interested, by order in writing annul the adjudication." The learned District Judge, in disposing of the appellants' petition under this section, says that as the payments had not been made through the Official Receiver, he could not grant the annulment sought for and has dismissed the petition. We do not understand how the learned Judge came to hold that, unless the payments alleged to have been made by the insolvent were made through the Official Receiver, annulment could not be granted. Section 42 does not require that the payments should be made through the Official Receiver, and Mr. T. R. Venkatarama Sastri appearing for the Official Receiver is unable to cite any authority in support of the proposition laid down by the learned Judge. The learned Judge ought to have enquired into the truth of the allegations made by the petitioner and if he was able to prove that his debts had been paid in full, the adjudication should have been annulled. We, therefore, set aside the order of the District Judge and direct him to dispose of the petition in accordance with law. Costs will abide the result.

M. C. P.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 253 OF 1916.

July 17, 1919.

Present:—Mr. Justice Stuart and Mr. Justice Ryves.

Raja RATTAN SEN SINGH—PLAINTIFF—APPELLANT

versus

TRIPATHI UGARNATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Estoppel*—*Mortgage by way of conditional sale followed by simple mortgage—Suit on simple mortgage—Purchase of equity of redemption in execution of decree—Suit to enforce conditional sale—Claim for full amount due—Denial of purchase of equity of redemption, effect of Suit, subsequent, for declaration of full ownership, maintainability of.*

T. executed three deeds of conditional sale in favour of the Raja of Bansi, and subsequently executed a simple mortgage in the Raja's favour. The Raja instituted a suit on the last mortgage and obtained a simple money-decree, in execution of which he brought to sale the whole of the equity of redemption of some of the properties mentioned in the deeds of conditional sale, and a portion of the equity of redemption of others, and purchased these interests himself, and continued in possession without causing any entries to be made in the revenue records as to the properties of which he was the mortgagee and those of which he was the owner. The Raja then sued for foreclosure in respect of the three deeds of conditional sale, and demanded the full amount due thereon; he made no mention that he had purchased any portion of the equity of redemption, nor did he allow for any reduction in the amount to be paid for redemption in virtue of his purchase of a portion of the equity of redemption and, in the course of the suit, denied that he had made such a purchase. He obtained a decree and the mortgagor paid up the amounts due. The Raja then instituted the present suit for a declaration that he was the full owner of the properties of which he had purchased the equity of redemption. The trial Court dismissed the suit on the ground that it was barred both by *res judicata* and by the principle of estoppel. On appeal to the High Court,

Held, that the suit had been rightly dismissed, and that as the Raja had deliberately agreed to return the property free of all incumbrances on being paid a certain sum and as that sum had been paid the suit was barred by equitable estoppel, and this would be so even if the defendant was in a position to know that the plaintiff had a title under which he could have retained full proprietary rights over a portion of the property concerned. [p. 691, col. 2; p. 692, col. 1.]

First appeal against the decision of the Subordinate Judge, Basti, dated the 29th of July 1916.

Mr. *B. E. O'Conor*, the Hon'ble Dr. *T. B. Sapru* and Mr. *Iswar Saran*, for the Appellant.

The Hon'ble Mr. *Moti Lal Nehru* and Mr. *Baldeo Ram Dave*, for the Respondents.

RATTAN SEN SINGH *v.* TRIPATHI UGARNATH.

JUDGMENT.—Tripathi Ugarnath, who is the head of a family of Tewari Brahmins in the Bansi Sub-Division of the Basti District, executed three deeds of conditional sale on the 8th June 1883, the 8th September 1884 and the 19th June 1885 in favour of Raja Ram Singh, who was then Raja of Bansi. By these deeds he mortgaged various properties. On the 17th March 1887 Tripathi Ugarnath executed a deed of simple mortgage in favour of Raja Ram Singh. The Raja instituted a suit on the basis of the deed of the 17th March 1887. In the course of the proceedings he withdrew all claim for relief other than a simple money decree. He obtained a simple money decree on the 28th April 1894, and in execution of that simple money decree he brought to sale (in some instances) the whole of the equity of redemption in certain property mortgaged under the first three deeds, and (in other instances) a portion of the equity of redemption in certain other property mortgaged under the first three deeds, and purchased these interests himself. The sale took place on the 20th May 1901, and was confirmed on the 16th July 1901. The Raja, being in possession of the property mortgaged under the first three deeds, continued in possession but made no attempt whatever to have an entry made in the revenue papers to show of what portion of the property he was mortgagee and of what portion he was owner. The Raja died. He was succeeded by Raja Rattan Sen Singh, who died during the course of these proceedings. Raja Rattan Sen Singh instituted suits for foreclosure on the first three deeds. In those suits he demanded that the mortgagors should pay the full amount due on these deeds but did not state anywhere that he had purchased any portion of the right of equity of redemption himself, and he allowed for no reduction of the amount to be paid for redemption in view of the fact that he had acquired a portion of the equity of redemption himself, and when the other side suggested (in one suit at any rate) that he had purchased a portion of the equity of redemption himself, he appears to have denied the allegation. He obtained decrees in the following form:—

"That the full amount due under the deeds should be paid to him by certain date and if those amounts are not paid to him, the property should be held foreclosed to him but that if the amounts were paid, it should be incumbent on him to return the property to the defendants clear of all mortgages and charges which the plaintiff or anybody through him might have created on it as also to give possession over the property to the defendants." The mortgagors paid up the amounts due under the decrees in 1911 and 1912. The Raja then instituted a suit for a declaration that he was full owner of portions of the property to the extent to which he had purchased the portions of the rights of the equity of redemption. The learned Subordinate Judge dismissed his suit on the ground that it was barred both by *res judicata* and by the principle of estoppel. The present first appeal is preferred. We consider that the learned Subordinate Judge rightly dismissed the suit. He states in his judgment:

"Leaving aside the many arguments which the learned lawyers addressed to me on behalf of the plaintiff and the learned expositions of the law of *res judicata* which they made, what I want to ask is how can the plaintiff back out of the express order in the decree whether rightly or wrongly made. I do not think he can so long as decrees are decrees." There is much sound sense in this reasoning. Further it is to be noted that by carefully suppressing his present pleas the plaintiff-appellant obtained something like double the amount of the money to which he would have been entitled had he advanced them. We consider this a clear case of *res judicata*, and the plea of equitable estoppel appears also to have been made out in spite of the fact that it must be presumed that the defendants-respondents were aware of the purchase of the rights of equity of redemption. But it is to be noted that when they themselves put the point forward apparently in order to reduce the amounts that they had to pay, the plaintiff-appellant apparently denied that he had made any purchase, and the Court held against the defendants respondents because they were unable to prove the allegation. When the plaintiff-appellant

deliberately agreed to return the property to the defendants clear of all mortgages and charges provided they paid a certain amount, and they did pay that amount, it appears to us that this suit would be barred by equitable estoppel, even if the defendants-respondents were in a position to know that the plaintiff-appellant had a title under which he could have retained full proprietary rights over a portion of the property concerned.

We, therefore, dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

PATNA HIGH COURT.

(APPEALS FROM ORIGINAL ORDERS NOS. 42 AND 44 OF 1919.

July 23, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

BANSI SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

SHEONANDAN THAKUR AND OTHERS—DECREE HOLDERS AND TRIBHUBAN THAKUR AND OTHERS—JUDGMENT DEBTORS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), s. 34, application of Suit by third party for relief not provided by Act.

Section 34 of the Bengal Land Revenue Sales Act applies merely to the case of an owner who has committed default in payment of the revenue rent of his property and who, subsequently, by a suit succeeds in setting aside the sale held under that Act, and who has applied for and withdrawn the surplus purchase-money lodged in the Collectorate under such sale for his own benefit. [p. 693, col. .]

The section has no application to a suit instituted by a third party against an auction-purchaser at a revenue sale, *e.g.*, a suit by the reversioners, in respect of a claim for relief not provided by the Act itself. [p. 693, col. 2.]

Appeals from a decision of the District Judge, Durbhanga.

Messrs. *L. N. Singh*, *Sambhu Saran* and *Jaanbans Sahay*, for the Appellant.

Messrs. *Naresh Chandra Sinha* and *Nilai Chandra Ghosh*, for the Respondents.

JUDGMENT.

ATKINSON, J.—Lalji Thakur died childless possessed of an estate situate in Mouza Sembhuar. Upon his death he was succeeded by his mother, *Musammat* Phani Thakurain, who thereupon became entitled to a Hindu widow's estate therein.

During her possession of the estate as a Hindu widow, she allowed the revenue rent due and payable to Government to fall into arrear. The estate to which *Musammat* Phani Thakurain succeeded was a revenue rent paying estate. The actual amount due for arrears of revenue was the sum of Rs. 6 odd; and the actual amount thereof in respect of which default was committed and for which the property was sold was Re. 1-4-0.

The property was sold by the Collector on the 5th June 1911 in pursuance of the powers vested in him under the Revenue Sales Act, Act XI of 1859, and was purchased by the judgment-debtor before us, *viz.*, Bansi Singh, who paid for the property sold the sum of Rs. 1,300 odd.

The plaintiffs as reversionary heirs of Lalji Thakur instituted the original suit connected with these miscellaneous appeals, claiming a declaration that the sale effected by the Collector as aforesaid under the Revenue Sales Act was invalid and inoperative to bind the reversioners, on the ground that *Musammat* Thakurain, the mother of the last male owner, had conspired with others including the purchaser to fraudulently force the property to be sold in defeasance of the rights of the plaintiffs.

The case came on for hearing and was tried by the learned District Judge of Darbhanga; and the learned District Judge decreed the suit in favour of the plaintiffs, granting them the declaration which they sought by the prayer of their plaint.

From the decision of the learned District Judge an appeal was preferred to the High Court, and this Court by its order of the 17th August 1916 reversed the decree granted by the learned District Judge and held that the property then in suit was not fraudulently brought to sale by *Musammat* Phani Thakurain and others acting jointly with her.

Subsequently, however, the High Court was asked to review its previous order or decision, dated the 17th August 1916; and upon review two of our learned brothers of this Court were pleased to direct, by their order dated the 4th April 1918, that the

appeal presented to the High Court should be dismissed, which in effect operated to restore the decree pronounced by the learned District Judge, granting the plaintiffs the relief claimed by them.

Pending the appeal, *Musammat* Phani Thakurain died.

By the order pronounced by this Court, dated the 17th August 1916, the plaintiffs were obliged to lodge in Court the costs awarded against them by that order. This the plaintiffs did: and the amount for costs so lodged by the plaintiffs was withdrawn by Bansi Singh, who was the auction purchaser as aforesaid at the revenue sale.

It is necessary to observe that the sale effected by the Collector was never impeached on any ground specified by the Revenue Sales Act, so that the sale so effected by the Collector was binding and operative.

After the High Court's order of the 4th April 1918 an application was made to the learned District Judge by the plaintiffs seeking to have restored to them the amount of costs which they deposited in Court by the direction of this Court's order, dated the 17th August 1916, which money was withdrawn by Bansi Singh.

This application is covered by Miscellaneous Appeal No. 44 of 1919.

A second application was also made by the plaintiffs seeking to execute as against Bansi Singh, the auction-purchaser, the decree for the amount of costs to which the plaintiffs became entitled as a result of the litigation terminating in their favour.

The learned District Judge by his order, dated the 4th January 1919, rejected the contention put forward on behalf of the judgment-debtor and acceded to the application presented on behalf of the plaintiffs and directed restitution of the monies which Bansi Singh had withdrawn from Court as and for costs; and the learned Judge also gave the plaintiffs permission to execute their decree for costs in respect of the costs incurred not only in the High Court but also in the Subordinate Courts as against Bansi Singh.

From the order of the learned Judge two miscellaneous appeals have been preferred before us.

The contention is that by virtue of section 34 of the Revenue Sales Act XI of 1859, the plaintiffs are not entitled to the relief which they now seek.

It is necessary to state that when Bansi Singh, the auction purchaser, deposited in the Collectorate the amount due by him as the purchase-money in respect of his purchase of the estate sold, *Musammat* Phani Thakurain withdrew the money so lodged in the Collectorate and applied the same for her own use; and, so far as can be gathered, no portion of such monies ever reached the hands or possession of the plaintiffs.

It is contended that, by reason of this payment into the Collectorate by Bansi Singh and the withdrawal of the monies so lodged by him by *Musammat* Phani Thakurain, the plaintiffs are not entitled to seek or ask for restitution of the amount for costs paid into Court by them and withdrawn by Bansi Singh, unless and until the plaintiffs reimburse the purchaser the amount of the surplus purchase monies which the mother of the last male owner withdrew from the Collectorate. With that contention we cannot agree.

Section 34 of the Revenue Sales Act has, in our opinion, no application to the facts of this case at all. It applies merely to the case of an owner who has committed default in payment of the revenue rent of his property, and who subsequently by a suit succeeds in setting aside the sale held under the Revenue Sales Act, and which owner has applied for and withdrawn the surplus purchase money lodged in the Collectorate under such sale for his own benefit.

Section 34 provides that, in such event, if the owner on default of the payment of Government revenue seeks to be restored to his own property on the sale being set aside, on any of the grounds specified in the Act itself, he must refund to the purchaser whatever monies belonging to the purchaser he has acquired for his own benefit, and the section prescribes a limit of six months within which time such refund must be made.

Obviously section 34 of Act XI of 1859 has no application to a suit instituted by third parties against an auction-purchaser at a revenue sale such, for example, as the reversioners in this case, in respect of a claim for relief not provided by the Act itself.

Accordingly section 144, Civil Procedure Code, is the section which governs the

rights of the parties in the present application, and clearly this is a case in which restitution ought to be made to the plaintiffs of the amount for costs which they deposited under the order of this Court and which Bansi Singh duly withdrew.

Therefore, with regard to the decision of the learned District Judge in Miscellaneous Appeal No. 44, we agree that his finding in law and fact was right.

With regard to Miscellaneous Appeal No. 42 we fail to see on what principle the plaintiffs should not be entitled to recover from the judgment-debtor, Bansi Singh, the costs to which they are properly entitled by reason of their success in the litigation which they instituted, and in which Bansi Singh was substantially defeated.

It is contended that the order of this Court made on the 4th April 1918 is silent as to any award in respect of costs incurred in the lower Court: but inasmuch as the order of this Court, dated the 4th April 1918, was an order of affirmance, and the appeal was dismissed with costs, it clearly, in our opinion, was intended that the costs in all Courts should follow as a matter of right on the successful event and be awarded to the plaintiffs.

Therefore, we see no reason in law or principle why the plaintiffs should not be entitled to read the full fruits of their victory.

Accordingly we dismiss both these appeals with costs, measured at five gold *mohurs* to cover both cases.

MULLICK, J.—I agree.

Appeals dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 235 OF 1918.

January 15, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

Lala KIRAT CHUND SINGH—PLAINTIFF—PETITIONER

versus

THE MAHARAJA OF JEYPORE—DEFENDANT—RESPONDENT.

Vizagapatam Agency Rules, rr. 17, 19, 20—*Appellate judgment of Assistant Agent—High Court, power of, to direct review under r.* 20—*Remedy of aggrieved party.*

Under the Vizagapatam Agency Rules the only course open to a party dissatisfied with an appellate judgment passed by an Assistant Agent is to appeal to the Agent under rule 17, and not to move the High Court to direct a review under rule 20, as, for the purposes of that rule, the judgment of the Assistant Agent cannot be treated as passed by the Agent.

Petition, under rule 20 of the Agency Rules, praying that in the circumstances stated in the memorandum of Civil Miscellaneous Petition the High Court will be pleased to issue an order directing the Special Assistant Agent, Vizianagaram Division, to review his judgment in Agency Appeal No. 1 of 1917, preferred against the decree of the Court of the Special Assistant Agent, Koraput Division, in Original Suit No. 37 of 1916.

The Hon'ble Mr. *T. Richmond*, for the Petitioner.

The Hon'ble Rao Bahadur *B. N. Sarma*, for the Respondent.

JUDGMENT.—Mr. B. N. Sarma objects that the petition cannot be heard because it is presented as authorised by Agency Rule 20. But that rule deals only with petitions for an order directing the Agent to review his own judgments: and we do not see how we can treat the judgment of an Assistant Agent as passed by the Agent for this purpose. The appeal in which that judgment was passed was transferred to the Assistant Agent under Agency Rule 19, and the only course open under the rules for any party dissatisfied with an appellate judgment passed in these circumstances appears to be under rule 17 to appeal to the Agent, not to move this Court, as petitioner prefers to do. We are, therefore, constrained to dismiss the petition with costs. We observe that in case an appeal is presented to the Agent, he will be well advised to consider the propriety of excluding the time taken in the present proceedings in dealing with the limitation applicable.

M. C. P.

Petition dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 250 OF 1917.

April 8, 1919.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

RAMCHANDRA SWAMINAIK JORAPUR—JUDGMENT-DEBTOR—APPELLANT

versus

MANUBAI RAMDAS GUJAR—RESPONDENT.

Hindu Law—Adoption—Son given in adoption, whether acquires any rights in property of natural father—Execution of decree—Decree obtained by father—Adopted son, whether can execute decree after death of father.

A son given in adoption cannot, for any purpose, be regarded as having existed so as to acquire a vested interest in the property of his natural father. Where, therefore, the natural father obtains a decree and dies before its execution, such son must be treated as non-existent for the purpose of executing the decree.

Second appeal from the decision of the District Judge, Bijapur, in Appeal No. 60 of 1915, confirming the order passed by the Subordinate Judge at Bagalkot, in Darkhast No. 25 of 1914.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *G. S. Mulgaokar*, for the Respondent.

JUDGMENT.—This is an application in execution which gives rise to a rather original position. It was presented by the decree holder in a suit in which it had been decreed that the applicant might open a new door in the southern wall of his house. The person against whom the decree was passed opposes the application on the ground that the applicant, having been given in adoption since the date of the decree, has no right to take out execution. The decree presumably was in respect of his natural father's house and for the benefit of that house. It was passed in 1908. The decree-holder was subsequently adopted, and after his adoption sought to execute the decree. It is contended that he by his adoption had lost his rights in his natural family, and the only person entitled to execute the decree was the person entitled to the house, and that person must be the heir of Narsidas, the natural father of the applicant. Now the applicant was adopted by his natural father's first cousin Bhagwandas. Therefore, his relation to his natural father was no higher than that of Bhagwandas. Narsidas, however, had left a daughter who

has a son, and the daughter's son is to be preferred to a first cousin in the Western India. The only ground on which the applicant after his adoption could be entitled to execute the decree in respect of property inherited from his natural father would be on the theory that he lived in his natural family until his adoption and then died, having required a vested interest descendible to his heir. The daughter's son of Narsidas would then be the sister's son of the applicant, and the son of Bhagwandas, *i. e.*, the applicant himself, would be a preferential heir. Any such fiction, however, appears to be untenable having regard to the definite pronouncement of the Privy Council in *Nagindas Bhugwandas v. Bachoo Hurkissondas* (1). At the close of the judgment is cited a passage from a judgment of Mr. Justice Mitter in which it is stated that the theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect of the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it. Then the Privy Council observes that with that statement as to the Hindu Law of adoption their Lordships agree. The result is that the fiction goes the length of treating the adopted son as having been from his birth in the family of his adoptive father, and, therefore, he cannot for any purpose be regarded as having existed so as to acquire a vested interest in the property of his natural father. The consequence is that he must be treated as non-existent for the purpose of the execution of the decree, and the nearest heir of Narsidas will be the daughter's son. For these reasons the objection to the application appears to be a good one. We must set aside the decree of the District Court and dismiss the Darkhast. As it is a very novel and technical point, we think that each party should bear his own costs.

Decree set aside.

(1) 32 Ind. Cas. 403; 43 I. A. 56; 18 Bom. L. R. 172; 23 C. L. J. 395; 20 C. W. N. 702; 30 M. L. J. 193; 14 A. L. J. 185 3 L. W. 259. 19 M. L. T. 193; (1916) 1 M. W. N. 258; 40 B. 270 (P. C.).

JOGESH CHANDRA DEB *v.* JAGAT CHANDRA DEB.

CALCUTTA HIGH COURT.

CIVIL RULE No. 145 OF 1919.

June 17, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT.

JOGESH CHANDRA DEB—PETITIONER

versus

JAGAT CHANDRA DEB—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1, Sch II, para. 12—Arbitration—Award, decree based on—Review, whether competent—Jurisdiction of Court.

An application for review of a decree based upon an arbitration award, on the ground of an evident mistake in the award, is maintainable, and a Court has jurisdiction, under Order XLVII, rule 1 of the Civil Procedure Code, to go into the merits of the application.

Rule against the order of the Sadar Munsif, 3rd Court, Mymensingh, in Miscellaneous Case No. 72 of 1918.

Babu *Heramba Chandra Guha*, for the Petitioner.—The facts of the case are shortly these. A decree was passed in accordance with the terms of an award made by arbitrators appointed by the Court in a case under section 9 of the Specific Relief Act brought by the opposite party. When the decree was going to be executed, the petitioners found that the decree was wrongly drawn up as it was based on the award which contained a mistake apparent on the face of it, seriously affecting the position of the petitioners. The petitioners thereupon applied for the correction of the decree and the award as well. The application was rejected. On review the learned Munsif again dismissed the application, holding that no application for review lay in the matter and that the Court had no jurisdiction to interfere in the matter settled by the arbitrators. The present Rule is directed against that order. My contention is that Order XLVII, rule 1, is wide enough to cover applications for review of decrees passed on an award. Otherwise, paragraph 16, clause (2), Schedule II of the Code of Civil Procedure, would have excluded that remedy expressly. In support of my contention I would refer to *Buta* v. *Guni Das* (1). The learned Munsif had, I submit, jurisdiction to go into the matter.

Babu *Lunendra Kumar Le*, for the Opposite Party.—The provisions of the present Civil Procedure Code do not contemplate applications for review of decrees based on awards. The decree being in conformity with the terms of the award cannot be rectified now. The learned Munsif was right in holding that he had no jurisdiction to interfere.

Babu *Heramba Chandra Guha* replied in brief.

JUDGMENT.—The application for review was rejected on the ground that decrees made upon awards do not come within the provisions of Order XLVII, rule 1. The matter was referred to arbitration by the Court and a decree followed upon the award. It was contended on behalf of the applicant that he had discovered the mistake he complains of in execution of the decree, namely, that it had embodied an evident mistake in the award, and he then applied to have the award corrected under the provisions of the Code, namely, under rule 12, Schedule II. The learned Munsif held that such an application was not maintainable. It was held in the case of *Buta* v. *Guni Das* (1) by Rattigan, J., that a review of a decree based upon an award is admissible. That was no doubt a case under sections 522 and 623 of Act X of 1877. The present provisions of the Code do not affect that decision in my opinion, and I think it is a matter which the learned Munsif ought to go into. It will be open to the parties to show then whether there is any ground at all for granting a review. The learned Munsif will, therefore, issue notices to both parties and determine the matter as to whether a review ought to be granted. He has jurisdiction to go into the matter under the provisions of rule 1, Order XLVII. The Rule is made absolute in these terms.

The petitioner has to pay the costs of this Rule, which, I assess at two gold *mohurs*.

Rule made absolute.

(1) 111 P. R. 1881.

SIVASUBRAMANIA MUDALIAR v. LAKSHMANAIER.

MADRAS HIGH COURT.

CIVIL APPEAL No. 342 OF 1917.

December 12, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

SIVASUBRAMANIA MUDALIAR AND OTHERS—DEFENDANTS NOS. 1 TO 6—APPELLANTS

versus

R. S. A. LAKSHMANAIER AND OTHERS—PLAINTIFFS NOS. 2 TO 5 AND DEFENDANTS NOS. 7 TO 26—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 97—Appeal from preliminary decree, whether can be maintained after passing of final decree.

An appeal against a preliminary decree can be maintained in spite of the fact that a final decree has been passed in pursuance of the preliminary decree, especially where the final decree is in accordance with the preliminary decree and does not in any way modify it or supersede it. [p. 697, col. 2; p. 698, col. 1.]

Lakshmi v. *Marudevi*, 12 Ind. Cas. 664; 37 M. 29; 21 M. L. J. 1063; 10 M. L. T. 437, *Ramien* v. *Veerappudian*, 14 Ind. Cas. 394; 37 M. 455; 22 M. L. J. 217; 11 M. L. T. 69; (1912) M. W. N. 117 and 530; *Kuppusamy Aiyar* v. *Regmah Boi Ammani*, 18 Ind. Cas. 730; (1913) M. W. N. 173; 24 M. L. J. 190; 13 M. L. T. 209, *Cunniah Mudaly* v. *Rangaswami Mudaly*, 48 Ind. Cas. 7; 35 M. L. J. 36 and *Kanhaiya Lal* v. *Tribeni Sahai*, 24 Ind. Cas. 827; 36 A. 532; 12 A. L. J. 876, followed.

Khirodamoyi Dasi v. *Adhar Chandra Ghose*, 21 Ind. Cas. 516; 18 C. L. J. 321, *Sadhu Charan Datta* v. *Hara Nath Datta*, 27 Ind. Cas. 135; 20 C. W. N. 231, *Mackenzie* v. *Narsing Sahai*, 1 Ind. Cas. 413; 36 C. 762; 10 C. L. J. 113 and *Dattatraya Ramachandra* v. *Ajmuddin Fakruddin*, 33 Ind. Cas. 146; 18 Bom. L. R. 76, distinguished.

Subramania Chettyar v. *Palachakrapani Chettyar*, 16 Ind. Cas. 380; (1913) M. W. N. 140, not followed.

Appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, in Original Suit No. 66 of 1914.

FACTS appear from the judgment.

Mr. *K. S. Srinivasa Aiyangar*, for the Respondents, raised the preliminary objection that no appeal lay from the preliminary decree as the final decree had been passed before presentation of the appeal. He relied on *Kuppusamy Aiyar* v. *Regmah Boi Ammani* (1). Also *Lakshmi* v. *Marudevi* (2), *Ramien* v. *Veerappudian* (3), *Cunniah Mudaly* v. *Rangaswami Mudaly* (4) and *Kanhaiya Lal* v. *Tribeni Sahai* (5).

Messrs. *K. R. Guruswami Aiyar* and *A. Subrama Aiyar*, for the Appellants.—Here the final order is in accordance with the preliminary decree. It neither varies nor supersedes it. An appeal lies from the latter. See *Subramania Chettyar* v. *Palachakrapani Chettyar* (6), *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (7), *Sadhu Charan Datta* v. *Hara Nath Datta* (8) and *Dattatraya Ramachandra* v. *Ajmuddin Fakruddin* (9).

JUDGMENT.—A preliminary objection is taken by Mr. K. Srinivasa Aiyangar to the effect that the appeal being filed against the preliminary decree alone, while before the presentation of the appeal a final decree had also been passed, it is unsustainable. The question is covered by a number of decisions of this Court. It was first considered in *Lakshmi* v. *Marudevi* (2) and it was ruled that, under such circumstances, an appeal against a preliminary order would be sustainable in spite of the fact that a final order had been passed in pursuance of the preliminary order. This ruling was followed in *Ramien* v. *Veerappudian* (3), *Kurpusamy Aiyar* v. *Regmah Boi Ammani* (1) and *Cunniah Mudaly* v. *Rangaswami Mudaly* (4). No doubt there is a decision *Subramania Chettyar* v. *Palachakrapani Chettyar* (6) which, so far as it goes, seems to take a somewhat different view. That is a decision of Sundara Aiyar and Sadasiva Aiyar, JJ. There the learned Judges do not discuss the previous decisions, though to the ruling in *Lakshmi* v. *Marudevi* (2) Mr. Justice Sundara Aiyar was himself a party. The same view of the law was taken in the Allahabad High Court in *Kanhaiya Lal* v. *Tribeni Sahai* (5), where a Full Bench decided, overruling some of the previous Division Bench rulings, that the fact that a final decree had been passed does not in any way affect the validity of an appeal against the preliminary decree. We think that the reasoning in *Kuppusamy Aiyar* v. *Regmah Boi Ammani* (1) and that in *Kanhaiya*

(1) 18 Ind. Cas. 730; (1913) M. W. N. 173; 24 M. L. J. 190; 13 M. L. T. 209.
(2) 12 Ind. Cas. 664; 37 M. 29; 21 M. L. J. 1063; 10 M. L. T. 437.
(3) 14 Ind. Cas. 394; 37 M. 455; 22 M. L. J. 217; 11 M. L. T. 69; (1912) M. W. N. 117 and 530.
(4) 48 Ind. Cas. 7; 35 M. L. J. 361.
(5) 24 Ind. Cas. 827; 36 A. 532; 12 A. L. J. 876.
(6) 16 Ind. Cas. 380; (1913) M. W. N. 140.
(7) 21 Ind. Cas. 516; 18 C. L. J. 321.
(8) 27 Ind. Cas. 135; 20 C. W. N. 231.
(9) 33 Ind. Cas. 146; 18 Bom. L. R. 76.

Lal v. *Tribeni Sahai* (5) is based upon a correct view of the provisions of section 97 of the Civil Procedure Code, which requires that an appeal must be filed from the preliminary decree, that otherwise its correctness cannot be disputed afterwards in the appeal preferred from the final decree. It can hardly be said that the final decree is that which follows the preliminary decree. It is not like the decree of an Appellate Court superseding the decree of the lower Court which it reverses. A different view has prevailed in *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (7), *Sadhu Charan Datta* v. *Hara Nath Datta* (8) and *Mackenzie* v. *Narsing Sahai* (10) and also apparently in *Dattatraya Ramachandra* v. *Ajmuddin Fakruddin* (9). There may be cases such as in *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (7), where the final decree altogether dismisses the suit for non-prosecution; then different considerations may possibly arise. But so far as the present question is concerned, that is where the final decree is in accordance with the preliminary decree and does not in any way supersede it or modify it, supposing that is allowable, we think the weight of reasoning is in favour of the view which has almost unanimously prevailed in this Court. The preliminary objection will, therefore, be overruled.

We do not think that there is any substance in any of the arguments urged in this appeal against the decree of the learned Subordinate Judge. The most important question is whether there were separate payments of rent amounting to about Rs. 10,000 in addition to those entered in Schedule F to the plaint. The Subordinate Judge finds, we think quite rightly, that there is really no evidence worth considering in support of the defence allegation that there were payments amounting to Rs. 10,000 over and above those for which the plaintiffs have given credit in their plaint. No receipt or vouchers were produced by the defendants nor any accounts, and the only documentary evidence with respect to payments is that furnished by the plaintiffs' accounts and the entries made on Exhibit A on the 22nd April 1914. The evidence on the side of the defence consists merely of very general statements of two of the defendants. They are not even able to specify the dates or the amounts of the different payments, if there were any such. There can be no doubt whatever that the finding of the Subordinate Judge on this point is correct, namely that there were no payments other than those with which the defendants have been credited.

That being found against the defendants, there is hardly any substance in the question raised regarding appropriation whether certain payments which were entered on Exhibit A were made towards the rent due on the lands covered by Exhibit B, that is, the usufructuary mortgage. The evidence on this point on the plaintiffs' side seems to be more reliable than that on the side of the defendants. The case of the plaintiffs is that all these payments, including those in question, were entered on Exhibit A, because the defendants had agreed to execute a mortgage for the bulk of the amount due on that date, that is Rs. 50,000, and the plaintiffs agreed to release some of the lands included in Exhibit A from encumbrances. It was on condition that such a document would be executed that all the payments were entered on Exhibit A. This story seems to be corroborated by Exhibit M, a letter written by 1st plaintiff to 2nd plaintiff, and accords more with the probabilities of the case than the version of the defendants. The payments, though covering several years, were all made on one date. The defendants tried to make out that the entries in question were made for the purpose of appropriating the payments towards the discharge of Exhibit A itself and none of the payments were with respect to Exhibit B for rent, which according to them had been paid separately. They being unable to prove any such separate payments, their version fails. Nor can the evidence in support of this story be said to be satisfactory. The Subordinate Judge, we think, has also rightly found this issue in favour of the plaintiffs.

As regards interest, it has been rightly held by the trial Judge that the alleged agreement not being registered could not be used to prove that the rate of interest mentioned in the mortgage-deed was not the rate which the defendants are liable

(10) 1 Ind. Cas. 413; 33 C. 762; 10 C. L. J. 113.

to pay. The learned Vakil for the appellants tried to argue that there had been a remission of the higher rate of interest, but no such case was put forward in the lower Court and cannot, therefore, be entertained in the appeal for the first time.

The last objection urged before us is with respect to Exhibit C, the last of the mortgages for Rs. 8,000 intended for the benefit of the 4th plaintiff. But we think that the Subordinate Judge has correctly found that it was executed in his name for the benefit of plaintiffs Nos. 1 to 3 as well as himself.

It was then argued that the rent for the Andu-year 1086 was barred. This would be so but for the acknowledgment alleged to be contained in Exhibit E. We have no doubt that Exhibit E, though couched in general terms amounts in law to an acknowledgment. And it is also clear that the 22nd defendant in writing acted on behalf of the entire family, that is, defendants Nos. 1 to 6.

In the result the appeal is dismissed with costs of the respondents Nos. 1 to 4.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2474 OF 1917.

April 10, 1919.

Present :—Justice Sir Charles Chitty, Kt., and Mr. Justice Cuming.

UMESH CHANDRA DASS—PLAINTIFF—APPELLANT

versus

SIKDAR ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 20 (1)—Raiyat holding under trespasser—Bona fides of parties—Occupancy rights, acquisition of.

Where lands appertaining to a *mahal* are held for more than 12 years by a *raiyat* under a trespasser, the *raiyat* would acquire a protected interest as against a purchaser of the *mahal* under the Bengal Land Revenue Sales Act, if the *raiyat* had a *bona fide* belief that the person under whom he held the land was the real owner, and if that person also *bona fide* believed that he was the real owner. [p. 700, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court of Chittagong, dated the 11th August 1917, modifying that of the Munsif, 2nd Court at Satkonia, dated the 31st July 1916.

FACTS relevant to the case appear from the judgment.

Babu *Dhirendra Lal Kastgir* (with him Babu *Tarakeswar Nath Mitter*), for the Appellant—The plaintiff who is the appellant before your Lordships sued for recovery of possession. Plaintiff's auction purchase was in 1909 and he started this suit in 1915. Defendants have no protected interest to keep plaintiff out of possession. Theirs is not a protected interest under Act XI of 1859. The decree of the lower Court says that the plaintiff has title to Dag No 2368, but by receipt of rent through defendants. It is clearly wrong. The plaintiff asks for *khas* possession also of Dag No. 2368. Under the facts of this case the defendants cannot be said to have a protected interest. The defendants are holding here under somebody else. They cannot get occupancy right, unless they can show that the trespasser under whom they hold was there in *bona fide* right, and that the lessee too who was inducted on the land had the *bona fide* belief that his lessor had such right. On the supposition that defendants had occupancy right the lower Court does not give my client *khas* possession. Section 37 of Act II of 1859 gives a list of protected interests which the auction-purchaser at a revenue sale cannot make *khas*. This comes under the proviso to section 27. Defendants claim to hold the land as the part of a different Mahal and under a different proprietor. They must be *raiyats* of that Mahal which the auction-purchaser has purchased. They cannot acquire right of occupancy. Refers to *Upendra Narain Bhattacharya* v. *Protab Chandra Pardhan* (1). There is no finding as regards the *bona fide* belief by the lower Appellate Court.

Babu *Chandra Sekhar Sen*, for the Respondents, was not called upon.

JUDGMENT.

CHITTY, J.—This is an appeal by the plaintiff and arises out of a suit brought by him for a declaration of his auction-

(1) 8 C. W. N. 320 at p. 321; 31 C. 703.

purchase right in the land in dispute and for *khas* possession. The plaintiff claimed the land as being Maghi Dag No. 3235. The defendants said that they knew nothing about the Maghi Dags, but that they had been in possession of the land as forming part of Cadastral Survey Dag No. 2363 under Nil Krishna Roy and others for a period of over thirty years; in other words, they maintained that they had acquired occupancy rights in the land. The Munsif dismissed the plaintiff's suit, holding that it was not proved that the land fell within the Mahal purchased by the plaintiff. That finding was reversed by the learned Subordinate Judge, but in passing a decree in favour of the plaintiff as to his title the Judge declined to give the plaintiff *khas* possession of any portion of the land which should be found to correspond with any portion of Cadastral Survey Dag No. 2368. His reason for passing such a decree was that he held that the defendants had a protected interest in the land of Cadastral Survey Dag No. 2368, which they had held for a long period of time. Against that part of the decree the plaintiff appeals asking us to say that he ought to have *khas* possession. In my opinion, the judgment of the learned Subordinate Judge is perfectly correct. Though he did not actually say that the defendants were occupancy *raiyats*, still he looked at it from that point of view and said that they had been in possession of it as *raiyats* for more than twenty years, that they had reclaimed the land and that, therefore, they had a protected interest. It is argued that before the Judge could come to such a decision, he ought to have found that Nil Krishna Roy and others, under whom the defendants held, had a *bona fide* belief that the land in suit appertained to that Mahal, that they let the land to the defendants or their predecessors under that belief and, further, that the defendants also had a *bona fide* belief that their landlord did own the Mahal to which they thought this land belonged. No question of the *bona fides* either of the defendants or their landlord appears to have been raised in the Courts below and the finding of the learned Subordinate Judge, in my opinion, amounts to the finding which the appellant's Pleader asks for, namely, that they did hold it *bona fide*. If they did not, it is obvious that they could not acquire a protected interest. The appeal must be dismissed with costs.

CUMING, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 28 OF 1918.

February 3, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

VELAYUDA CHETTY—DEFENDANT No. 5—APPELLANT

versus

KUMARASWAMI CHETTIAR AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 4—RESPONDENTS.

Specific performance, suit for—Sale of land - Person in possession of land with knowledge of agreement, whether necessary party—Possession, prayer for, whether can be joined.

To a suit for specific performance of a contract for the sale of land, a person who has obtained possession of the land with the knowledge that there is a prior agreement for sale in favour of the plaintiff, is a necessary party [p. 701, col. 1.]

Where parties properly sued for specific performance of a contract for the sale of land are in possession of the land the plaintiff may add a prayer for possession to the prayer for specific performance and so obviate the necessity for filing a fresh suit for possession. [p. 701, cols. 1 & 2.]

Appeal against the decree of the District Court, Salem, in Original Suit No. 29 of 1916.

FACTS appear from the judgment.

Mr. *B. Sitarama Rau*, for the Respondents, on the memorandum of objection.—The 5th defendant had notice of the agreement for sale in favour of the plaintiff, the document having been read out to him in the Sub Registrar's office before execution of his sale-deed. He was a necessary party to the suit. He was also in possession of the land. The lower Court should have given plaintiff a decree for possession also, to avoid the necessity of his suing for possession again. *Vide Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1) and *Krishnasami* v. *Sundarappaiyar* (2).

(1) 32 Ind. Cas. 227; (1916) 1 M. W. N. 77.
(2) 18 M. 415; 5 M. L. J. 164; 6 Ind. Dec. (N. S.) 638.

SUNDARBAS KUERI v. DILWAR SAHU.

Mr. *Govindarajulu Naidu* (with him Mr. *K. C. Subramaniam*), for the Appellant.—The suit is for specific performance. Plaintiff is not entitled to a decree for possession. See *Rangayya Reddy* v. *Subramanya Aiyar* (3).

JUDGMENT.—We think this is a perfectly clear case. The evidence entirely supports the finding of the learned trial Judge that the defendants Nos. 1 to 4 had agreed to sell the land in dispute to the plaintiff on the 16th August 19 6 for Rs. 7,000 and that they actually sold the land to the 5th defendant, the appellant before us, on the 23rd August 1916, for Rs. 10,000 but that, before the execution of the sale-deed, the plaintiff, having come to know of the contemplated sale, went to the Sub-Registrar's office when the sale deed was actually being written on the 23rd August 1916, and read out his agreement Exhibit B The evidence in the case and the probabilities all bear out the finding of the learned District Judge.

The appeal must be dismissed with costs.

The memorandum of objections must be allowed. The 5th defendant was undoubtedly a necessary party to the suit, having attempted to purchase the property with notice and knowledge of the agreement to sell in favour of the plaintiff The learned Judge has passed a decree directing the 5th defendant also to join in the execution of the sale-deed. That portion of the decree has not been objected to in appeal and it is not necessary for us to express any opinion as to whether that is the proper form of decree in such cases. He has not, however, given a decree for possession to the plaintiff and we think that he is entitled to such a decree. The Full Bench ruling in *Rangayya Reddy* v. *Subramanya Aiyar* (3) does not apply, inasmuch as the 5th defendant was a necessary party to the suit when he obtained possession of the property with the knowledge that there was a prior agreement for sale in favour of the plaintiff. But the learned Chief Justice observes there: "It may, I think, be taken as the settled and salutary practice of this and other Courts in India, where parties properly sued for specific performance of a contract for sale of land are in possession of the land, to allow a prayer for possession to be added to the prayer for specific performance, thereby obviating the necessity for filing a fresh suit for possession to which there could be no defence." In *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1) the same proposition is laid down and we may add, also in *Krishnasami* v. *Sundarappayyar* 2).

The result is the lower Court's decree will be modified by directing possession of the property in dispute to be given to the plaintiff. The plaintiff will have his costs from the appellant.

M. C. P.

Appeal dismissed,
Memo. of objections allowed.

(3) 40 Ind. Cas. 429; 40 M. 365; 32 M. L J. 575; 5 L. W. 797; 21 M. L. T. 385.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 765 OF 1918.

July 30, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Bhaiyan SUNDARBAS KUERI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Khawas DILWAR SAHU—DEFENDANT—RESPONDENT.

Landlord and tenant—Khas *possession, suit for*—Raiyati *holding, claim of*—*Burden of proof.*

Where, in a suit for *khas* possession of certain lands which the defendant contests are his *raiyati* holdings, the plaintiff establishes his title which *prima facie* entitles him to possession, it is on the defendant to identify the land which he claims as his *raiyati* land. [p. 702, col. 2.]

Appeal from a decision of the Judicial Commissioner, Ranchi.

Messrs. *Atul Krishna Roy* and *Siveswar Dayal*, for the Appellants.

Mr. *Rai Guru Saran Prasad*, for the Respondent.

JUDGMENT.

Das, J.—This appeal arises out of the judgment of the Judicial Commissioner of Ranchi. The suit was by the appellant for *khas* possession of certain lands specified in the plaint. The defendant contested the suit on the ground that those lands were his *raiyati* holdings.

It appears that the defendant took a lease of a village called village Bethi within which the lands in dispute are situate. The defendant's case is that previous to the lease he acquired an occupancy right in the lands in dispute. The Record of Rights was against the defendant.

The lower Appellate Court has come to the conclusion that the defendant has some *raiyati* lands within the lands in dispute but the lower Appellate Court, being of opinion that the plaintiff has not been able to show which land is the *raiyati* land of the defendant has dismissed the plaintiff's suit altogether.

It is contended on behalf of the plaintiff first of all that the finding of the lower Appellate Court is unsustainable in law. He says that the Record of Rights is in his favour and the evidence was insufficient to rebut the presumption arising from the Record of Rights. In our opinion the finding of the lower Appellate Court on this point is a finding of fact. It must, therefore, be held that the defendant has in fact some *raiyati* land within the lands in dispute.

The next question is one of importance, namely, whether the onus is on the defendant to show which of his lands are *raiyati* and which are not. The learned Vakil on behalf of the plaintiff contends that as the proprietor of the lands, he is entitled to *khas* possession of every portion of the lands in dispute except such in respect of which the defendant may be able to establish some sort of title. The lower Appellate Court has taken the view that it was for the plaintiff to prove his title to the land. It appears to us that there is very high authority in favour of the appellant's argument. In the case of *Rajah Sahib Perhlad Sein* v. *Doorgapersaud Tewarree* (1). the Judicial Committee said as follows:—

"The appellant is the Zemindar; as such he has a *prima facie* title to the gross collections from all the Mouzahs within his Zemindari. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure".

In the case of *Ram Monee Mohurrir* v. *Aleemoodeen* (2) Couch, C. J., said as follows: —

"The plaintiff then had made out a *prima facie* title to the possession of the land. The defendant, in fact, did not dispute that the land was the plaintiff's, and was ready to pay him rent, but he alleged that he had a right to continue to occupy the land. The case was of such a nature that it was necessary for the defendant to show that he had such a right. The plaintiff had shown that he was *prima facie* entitled to the possession, and unless the defendant had a tenure which would entitle him to keep the possession, the plaintiff ought to have had judgment to recover possession."

It seems to us, therefore, that the title of the plaintiff being admitted, it was for the defendant to identify the land which he claims as his *raiyati* land. The onus was clearly on the defendant. That being our view we would allow the appeal, set aside the judgments and decrees of the Courts below, and decree the plaintiff's suit.

The plaintiff is entitled to have his costs throughout.

COUTTS, J.—I agree.

Appeal allowed.

(1) 12 M. I. A. 286 at p. 331; 2 Suth. P. C. J. 225; 2 Sar. P. C. J. 429; 20 E. R. 347.
(2) 20 W. R. 374.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 84 OF 1917.

April 2, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT.,

SRIMANTA KUMAR CHAKRABARTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SABAR ALI HOWLADAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 6, 50, 105—Application under s. 105 for settlement of fair and equitable rent - Presumption of fixity of rent, whether arises in respect of heritable tenure created after Permanent Settlement—Landlord and tenant—Heritable tenure, whether necessarily mokarari.

The plaintiff landlord applied under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent of a tenure created by a *howla pattah* in 1233 B. S., which expressly made the tenure hereditary but which contained no clause about fixity of rent:

SRIMANTA KUMAR CHAKRABARTY *v.* SABAR ALI.

Held, (1) that although the plaintiff had been realizing the same rent for a great many years, that did not by itself show that the rent was fixed, and that, therefore, he was entitled to have a fair and equitable rent assessed: [p. 704, col. 1]

(2) that the mere fact that a heritable tenure was created could not by itself mean that a *mokarari* tenure was created. [p. 704, col. 1.]

Appeal against the decree of the Special Judge, Faridpur, dated the 3rd May 1916, reversing that of the Assistant Settlement Officer at Chikandi, dated the 27th April 1915.

FACTS appear from the judgment.

Babu *Broja Lal Chakrabarty* (with him Babu *Gopal Chandra Chakrabarty*), for the Appellant.—This is an appeal on behalf of the landlord. An application was made for the settlement of fair and equitable rent under section 105 of the Bengal Tenancy Act. The first Court gave the plaintiff a decree. But the lower Appellate Court reversed the decree, holding that the rent was not liable to enhancement having regard to section 6 of the Bengal Tenancy Act. Where a tenancy comes into existence after the Permanent Settlement, the rent is liable to enhancement. But where the tenancy comes into existence before or at the time of the Permanent Settlement, the rent cannot be enhanced. The tenancy here was created in 1233 B. S. long after the Permanent Settlement. Besides the contract between the parties here does not show that the rent is fixed in perpetuity. The *patta* is a confirmatory one. There are tenures where the occupation is permanent but the rent is not fixed but liable to variation. Here the rent is liable to enhancement. The lower Appellate Court refers to two cases, one in *Ram Dayal Giri* v. *Midnapur Zemindary Co. Ltd.* (1) and the other in *Purna Chandra Ghose* v. *Collector of Khulna* (2) I submit the cases have no bearing upon the point. I rely upon the case reported as *Ram Kumar Singh* v. *Watson & Co.* (3).

Moulvi *A. K. Fazlul Huq* (with him Babu *Atindra Nath Mukherjee*), for the Respondents.—I submit that the tenure is heritable and there is nothing to show that the rent is liable to enhancement. The payment of uniform rent for eight years shows that the rent is not liable to enhancement. There may be an express contract and an implied contract. Here the contract is implied as to the fixity of rent. Besides the rent here is a consolidated one. The rent is settled not per *kani* but upon the whole tenure. The tenure is heritable. Besides there are changes in the physical aspect of the tenure. The lower Appellate Court, after considering all the circumstances, has come to a correct finding as to the fixity of rent. Therefore in second appeal this finding ought not to be disturbed.

Babu *Broja Lal Chakrabarty* briefly replied.

JUDGMENT.—This appeal arises out of a suit under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent in respect of a tenure in the possession of the defendants. The tenure was created in the year 1233. The superior *talukdar* granted a *howla pattah* to the predecessor in interest of the defendants, which is Exhibit A. It was in respect of $4\frac{1}{2}$ *kanis* of land at the rental of Rs. 2 per *kani* of Rs. 9 *sicca*. The *howla* right was made expressly hereditary.

There is no specific clause in the *pattah* about the fixity of rent. The defendants have paid at the rate of Rs. 9 *sicca* all this time. From that the learned Subordinate Judge has come to the conclusion that the rent is to be considered as *mokarari*. He has relied upon the case in *Purna Chandra Ghose* v. *Collector of Khulna* (2) and the case of *Ram Dayal Giri* v. *Midnapur Zemindary Co., Ltd.* (1). As regards the first case it is based upon a finding that the *pattah* was a confirmatory one, in the sense that the tenancy was in existence before the *pattah* was granted, that is to say, it was not shown that the tenancy was created for the first time when the *pattah* was executed. As regards the case of *Ram Dayal Giri* v. *Midnapur Zemindary Co., Ltd.* (1), the basis of the decision was this, that for some 60 years, although there were transfers and several successions, the same rate was uniformly maintained. The admitted object of the lease in that case was to extend cultivation over jungle lands. New lands were added to the original cultivation but in every instance the same rate Rs. 5-4-0 was paid. They held that in those circumstances the inference of fixty of rental was

(1) 7 Ind. Cas. 785; 15 C. W. N. 263.
(2) 17 C. W. N. cviii (208).
(3) 9 C. W. N. 334.

legitimate. But there are no transactions in this case. The mere fact that the landlord has chosen to take the same rent for a great number of years in respect of a tenure created for the first time in the year 1233 does not by itself show that the rent was a fixed rent. A presumption of that kind only arises under section 50 of the Act. When there are express limitations in the Act with regard to the right of the landlord such as are to be found in sections 6 and 50 of the Bengal Tenancy Act, it would be extending the limitations if it be held that the mere fact that the landlord has not realized rent at a higher rate for some years is by itself sufficient to raise a presumption of fixity. One frequently comes across documents of this character where there is an express provision about the fixity of rent. The mere fact that a heritable tenure is created does not by itself mean that a *mokarari* rate is also created.

I, therefore, hold that the landlord is entitled to have a fair and equitable rent assessed with regard to the plot of land in suit. That being so, the matter is remanded to the Appellate Court for a decision as to what would be fair and equitable rent.

Having regard to the fact that the defendants had been paying at an unvarying rate, I think that fact ought to be taken into account in awarding costs in this case. I, therefore, direct that each party do bear his own costs in this Court. The order for costs in the lower Courts will stand.

Case remanded.

MADRAS HIGH COURT.
CIVIL APPEAL No. 98 OF 1917.
November 1, 1918.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.
M. S. YESUVADIYAN – DEFENDANT —APPELLANT
versus
P. S. A. SUBBA NAICKER—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 34, 160, scope of—Books of account, entries in, value of—'Sure' in s. 160, meaning of.

Section 34 of the Evidence Act only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. No particular form or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in books of account, if true. [p. 710, cols 1 & 2.]

The expression 'sure' in section 160 of the Evidence Act, in the sentence "if he is sure that the facts were correctly recorded in the statement", does not mean that the degree of conviction postulated by it can be treated as equivalent to any on which the witness may choose to say that he is sure, whether or not it is too fantastic or illogical to commend itself to reasonable men. The meaning of the expression is that the witness must satisfy the Court, with reference to ordinary probabilities, of his right to be sure that the record relied on by him is correct. [p. 711, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Civil Suit No. 6 of 1916.

Mr. *T. Rangachariar*, for the Appellant.

Mr. *K. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.—The appeal arises in a suit to recover sums of money amounting to Rs. 8,000 from the defendant on the basis of certain dealings. The plaintiff is a dealer in cotton and had been doing business with Messrs. Gaddam & Co. and afterwards with the New Berar Company, supplying them with cotton. The defendant was at first a writer employed in Gaddam & Co.'s office and afterwards did business as a broker. Admittedly the defendant had dealings with the plaintiff; he used to pay moneys to the plaintiff by way of deposit and drew moneys from time to time. The dealings out of which this suit has arisen covered a period of 5 or 6 years, and the claim of the plaintiff is that, on taking accounts, he was entitled to the sum which he has claimed. The defendant's case, on the other hand, is that he was entitled to Rs. 7,000 and odd and not that he owed anything to the plaintiff. The mode of dealings between the parties was of an extremely lax character. The defendant paying in sums of money from time to time

never asked for any receipt or voucher for them. According to the case of the plaintiff the defendant drew sums of money during the last 5 or 6 years on different dates; on some occasions he sent round chits to the plaintiff on which payments were made, but on the majority of occasions, payments were made on the defendant's personal request, there being no chits from the defendant authorising those payments. The learned Subordinate Judge has given a decree to the plaintiff as asked for in the plaint. The evidence in the case consists mainly of entries in the plaintiff's books of account. The defendant has not produced any accounts whatever and the suggestion of the plaintiff is that he has accounts but has wilfully withheld them. The defendant denies that he has accounts but, he says, with reference to about 29 or 30 out of about 200 items, that he did draw those sums and that he recollected having done so, although he has no accounts or other records with which he could refresh his memory. The accounts filed by the plaintiff have been impeached by the defendant as fabrications. The accounts consist of ledgers and day-books. They are properly bound books and from outward appearance the books seem to be regularly kept. The parties fell out sometime in December 1915. Before that, admittedly, they were good friends and there cannot be the slightest doubt that they trusted each other. The case of the defence, if true, would mean that these account-books, covering a period of 6 years and containing accounts of the dealings not only of the defendant but of various other persons, have all been fabricated. It would also mean, on the admitted facts of the case, that if they were fabricated it was done after the parties fell out, that is, after December 1915. Without saying that it is impossible, I should regard it as extremely improbable that books such as we have before us, have been paged, especially, without any sort of internal evidence whatever in the books themselves to bear out the defendant's suggestion that they have been concocted for the purpose of this case. No attempt was, in fact, made in the Court of trial, nor was any serious attempt made before me by Mr. T. Rangachariar who opened the case of the defendant (appellant) to show, from the character of the books or the entries, that the entries were either interpolated or that pages had been removed and new pages containing fresh entries has been substituted. There are, on the other hand, circumstances which would show that there is no substantial reason for doubting the genuineness and the *bona fides* of these books of account. They had been filed previously in connection with other suits in other Courts. And the nature of the entries relating to the dealings between the plaintiff and the defendant would in itself make it extremely difficult for the plaintiff to get up false entries to support his case. There are only two entries with respect to which any attempt has been made by the defendant to contradict the plaintiff's books. I shall deal with them later and point out that no good arguments can be based on these two items. It has to be pointed out that the case was not satisfactorily conducted for either party in the lower Court, and the procedure adopted for proving the entries was not strictly in accordance with what the law required. The plaintiff's evidence is that he made all these payments with which the defendant is charged; whether he made payments with his own hand or through clerks or writers who made payments on his orders would not make any difference. He apparently attended to his business himself. He used to be present at the shop, except when he was away to some other place of business and plaintiff knew the way in which entries used to be made in the books of account by the different writers and accountants. In his examination-in-chief, in addition to the general statement that all the payments were made as entered and that he made the payments himself, he speaks to a large number of specific items of which he has personal recollection independently of the entries in the books; most of those items are of large amounts and he deals with them in detail in his examination-in-chief. While he was cross-examined with reference to these specific items, it does not appear that any attempt was made by the Pleader for the defendant to make out that as regards other items he could have had no personal knowledge or means of speaking to them in the way he did in his examination-in-chief. No doubt it would have been more in accordance with the proper practice for the Pleader for the plaintiff having

asked him specifically about the items of which he had independent recollection, to have questioned him about the other items, which he said were actually paid to the defendant but with reference to which he had no independent recollection allowing him to refresh his memory with the entries in the books according to the provisions of sections 159 and 160 of the Evidence Act. But no objection was apparently taken to the form of the question or the answer with reference to these latter items. We may take it, therefore, that the plaintiff purported to speak not only to the specific items mentioned by him but also to the other payments entered in the book as having been made within his knowledge. We have also the evidence of two of the writers of the books and in their case we find that they were asked to speak to the way in which the books were kept and not to the items specifically. I should have been disposed to take a more serious view of this mode of proving the entries but for the fact that the defendant's Pleader made no objection. Further the plaintiff has with the plaint filed a list of the items with respect to which the defendant is charged, that list being simply a copy of the entries in the books of account, so that the defendant has ample notice of the items to which the plaintiff and his witnesses must have been referring as relating to the defendant's transactions in the Exhibits A and B series.

Then we have a number of items which has been clearly proved by evidence other than the entries by means of vouchers or chits, in addition to the oral testimony of the plaintiff. On the other hand, it is difficult to accept the defendant's statement that he kept no accounts whatever. He is a broker and had dealings not only with the plaintiff but with other persons, and it is unlikely that he did not keep any accounts or any records of the transactions into which he entered as broker or of his other dealings. His case strikes me as somewhat extraordinary. He professes to remember 29 or 30 items extending over a number of years and ignores all the other transactions alleged by the plaintiff. All that he appears to have done was to pick out certain items which he felt could not possibly be resisted and about which no decent show of objection could be advanced by him and admitted them, not because he had any recollection whatever of these items. His case is that he never drew money, except on chits. On this point the evidence is absolutely clear to my mind that he used to ask the plaintiff to make payments on his account or get money from him himself without any sort of voucher whatever. There are several instances of that sort proved by evidence independently of the entries. The nature of his drawings would also suggest that he could not have been sending chits for every payment. We find, for instance, entries relating to small amounts like Rs. 2, Rs. 3 and Rs. 5, and there are entries to show that payments were made through himself or through other persons, some of whom were apparently peons employed in the office of Gaddam & Co. If there were chits in connection with those payments then the entries relating to them would not have appeared in the form in which they are made. The entries mention the names of persons through whom payments were made at the instance of and on behalf of the defendant. If the defence of the defendant was true he could easily have called those persons and shown that the entries were false. He has made no such attempt except in the two cases above mentioned but which I shall show do not bear out the suggestion of the defendant. It was strongly pressed upon us by Mr. T. Rangachariar that the plaintiff ought to have asked for some voucher whenever he made payments, or that he ought to have taken the signature of the defendant whenever payments were made to him. And it was pointed out to us that the plaintiff did keep books for taking signatures of persons. As regards these books the evidence is not at all clear as to the nature of the transactions with respect to which the signature of parties used to be taken. That the plaintiff and the defendant, until they fell out, reposed confidence in each other is abundantly clear. As already mentioned, the defendant does not declare that he obtained any receipts or vouchers for the amounts paid in by him from time to time. He must have trusted not only the plaintiff but must have relied upon the

mode in which the plaintiff kept his books of account and did business. And if the defendant trusted the plaintiff in that way, it does not surprise me in the least that the plaintiff should have made payments without insisting on vouchers on each occasion. I may here mention some of the larger items which must be taken to be proved by evidence independently of the entries, for instance the item of Rs. 1,391-8-2. The case of the plaintiff is that he borrowed from the office of Messrs. Gaddam & Co. Rs. 1,500, and out of that amount gave this sum to the defendant. It was suggested by Mr. T. Rangachariar that it is a false story that he borrowed any money from Messrs. Gaddam & Co. If there was any foundation for this suggestion nothing was easier for the defendant than to produce the books of his employees and to prove the falsity of the plaintiff's case.

As regards the transaction relating to mortgage Exhibit E with respect to which a sum of Rs. 496 was paid by the plaintiff, the case of the defendant is that it was paid not to him but to his brother. This payment is supported by the receipt Exhibit D-1, the payments being made at the shop of one Ambalavana Pillai, and P. W. No. 5 proves the handwriting of this man in Exhibit D. If the payment was not made at the instance of the defendant, and it was a dealing directly between the plaintiff and the plaintiff's brother, one would have expected the defendant to examine his brother and prove the falsity of the plaintiff's case. No such attempt has, however, been made. I might refer to the transaction evidenced by Exhibit A as showing that it is unlikely that the plaintiff owed large sums of money to the defendant in 1915 or thereabouts as related by him. The defendant obtained from the plaintiff assignment of an *othi* for Rs. 4,000 and he paid down Rs. 1,000 and agreed to pay the balance of Rs. 3,000 before the Sub-Registrar. As he failed to pay the balance, the transaction fell through and the plaintiff had to refund Rs. 1,000 to the defendant. If the defendant's case were true, it was not likely that he would pay Rs. 1,000 if as a matter of fact Rs. 6,000 or Rs. 7,000 were owing to the plaintiff.

I shall deal now with some of the criticisms made on behalf of the defendant as to the corrections of certain entries. Under the transaction which is represented by Exhibit C 5 that is a chit on which, according to the case of the plaintiff, certain payments were made, Rs. 100 was to be paid to some person not mentioned therein. The suggestion on behalf of the defendant that Exhibit C 5, which he alleges has been wrongly translated, means that the payment was to be made on behalf of the defendant to the plaintiff himself, is not borne out. If that were the correct interpretation, then one would have expected that the man who was to pay the money to the plaintiff would be mentioned. Taking the document as it stands, the criticism on behalf of the defendant is that the entry on the 10th June 1913 is not of Rs. 100 but of Rs. 80. There is also a further entry of Rs. 25; that would make up Rs. 105 and not Rs. 100. There is to that extent discrepancy between Exhibit C-5 and the entry in plaintiff's book. But I am not satisfied that the discrepancy could not have been explained if the plaintiff or any of the accountants who had knowledge of the matter was asked about it. But the defendant's strongest criticism is with reference to the entries dated 3rd April and 17th April 1914. The first one reads "Debit, taken and paid by S. A. for P. K. S. Rs. 25," and the latter is to the effect "Debit for P. R. M. S. Rs. 373-12-4."

The defendant has examined D. Ws. Nos. 3 and 4 who are employed in the P. K. S. A. A. firm and P. R. M. S. firm respectively, who prove that on the dates mentioned there are no entries in the plaintiff's book. But these two witnesses were examined after the plaintiff had closed the case, and neither the plaintiff's nor any of his witnesses' attention had been specifically drawn to nor were they asked any questions as to the nature of these transactions that might not in itself be a sufficient answer, if the entries themselves were quite clear and unambiguous which we do not think they are. Both these entries are worded differently from other entries in cases where payments were made in to a particular person or firm at the instance of the defendant. This entry of the 3rd April is that Rs. 25 was paid by the plaintiff 'for' P. K. S. and

similarly the entry of the 17th is that Rs. 373-12-4 was debited 'for' P. R. M. S. As Mr. K. Srinivasa Aiyangar, the learned Vakil for the respondent, suggested it might be that money was taken for payment to the said two firms by the defendant himself or some one on his behalf and not actually paid on those dates or not paid at all. In the absence of any question put to the plaintiff or the witnesses asking them to explain these transactions, I do not think it would be fair to accept the evidence of the defendant's witnesses Nos. 3 and 4 showing that the entries in question in the plaintiff's books are false. I am satisfied on considering the evidence as a whole, in spite of the irregular way in which the case of the parties was conducted in the lower Court and the unsatisfactory manner of proving the entries in the books of account which were not specifically put to the plaintiff or his witnesses, that the accounts were duly kept in the regular course of business and that the entries represent true and honest transactions.

Further as regards certain items, there is corroborative evidence in the shape of vouchers and the circumstances of the case to which I have alluded also show that the items mentioned in the entries in question are true and genuine and represent a real transaction.

But, it is argued on behalf of the appellant that the evidence as it stands is not sufficient in law to found a decree on, against the defendant. Section 34 of the Evidence Act lays down that the entries in books of account, regularly kept in the course of business, are relevant, but such a statement will not alone be sufficient to charge any person with liability. That merely means that the plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. The Legislature, however, does not require any particular form or kind of evidence in addition to entries in books of account, and I take it that any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished by entries in books of account, if true. I have already pointed out that, with reference to certain specific items, there is ample corroborative evidence, and I have also mentioned the circumstances which would go to show that the transactions represented by these entries are true and honest. I am inclined to think that, apart from the oral statement there is sufficient corroboration of the entries in this case. Then I do not find that sufficient reason has been shown for not accepting the statement of the plaintiff in his examination-in-chief, that all the items in the accounts were really given to the defendant, meaning that all the payments as entered were actually made to the defendant. This is not a mere isolated statement. In the very beginning of the examination-in-chief he says: "The defendant used to take money without giving chits. If the defendant had personally asked me to pay the money to anybody, I used to pay without taking the signature of the person who takes the money. When I paid money to defendant directly, I never took his signature or got any voucher. The defendant has not made any payment over and above what I have entered in the accounts." His case was, according to his evidence, that it was he who used to make the payments. This does not necessarily mean that he used with his own hands always to hand over money to the defendant or his messenger, but only that the payments were made under his personal supervision or direction. That is the case he sought to make out. It might be that if the defendant had made an attempt he might have been able to show by cross-examination that this was an improbable statement and should not be accepted, but I do not find that he really made any such attempt. It is possible that the plaintiff did not have any direct recollection of all the items. He had independent recollection of some items, and as regards others he might have remembered them on looking into the accounts. This is suggested by a statement made by the plaintiff in his cross examination. He says with reference to certain entries: "These I remember independently even without looking into accounts." As regards the items which he did not remember in that way, I do not find that the cross-examination

was directed to show that it was improbable or unlikely, having regard to the lapse of time, or the course of business adopted by the plaintiff, or that he could not be relied upon to remember those items even on reference to the entries. It is quite true as pointed out by the learned Pleader for the respondent, that so far as it appears on the record, the plaintiff did not in so many words say that, as regards the items of which he had no independent recollection, he was sure that they were true items on examining the entries which were made and of which he had knowledge at the time or soon afterwards. That would have been the correct way of examining the plaintiff on this point, but the Pleader who conducted the case for the defence neither raised any objection to his making a general categorical statement that all the items in the accounts were really given to the defendant as entered in the accounts, nor did he attempt by cross-examination to show that these general statements could not be accepted. Having regard to the way in which the plaintiff was cross-examined, I am unable to say that the statement as regards the entries in the books of account generally should be rejected on grounds of improbability, especially as I have not the slightest hesitation in holding that the accounts of the plaintiff are genuine and *bona fide* and that the admitted facts and circumstances point to the truth of the plaintiff's case and the falsity of the defendant's case.

I do not propose to go into all the cases cited at the Bar with reference to section 34 of the Evidence Act. There is no difficulty in ascertaining what the enactment means, but the difficulty lies in applying it to the facts of a particular case. Much reliance was placed on behalf of the appellant on the ruling of the Privy Council reported as *Baboo Gunga Persad* v. *Baboo Inderjit Singh* (1). But, apart from the facts of that case, all that their Lordships laid down was that an entry in the books of account regularly kept in the course of business is merely corroborative evidence. To the same effect is the ruling reported as *Queen* v. *Hurdeep Sahoy* (2). I might here point out that the present Evidence Act does not say that an entry is merely corroborative evidence, it is substantive evidence, though by itself not sufficient to charge a person with liability. I do not find that the cases reported as *Sorab Jee Vacha Ganda* v. *Koonwur-Jee Manik-Jee* (3) and *Hingu Miya* v. *Heramba Chandra Chakravarti* (4) help the appellant any further. With reference to the latter, emphasis is laid on the fact that the learned Judges then say that each particular entry must be proved. No doubt that is the correct proceeding. But as I have already pointed out, it is merely a matter of mode of proof and, as the defendant raised no objection to the way in which the entries were proved in the lower Court, I do not think anything turns upon this point. We hope, however, that in future when entries in books of account are sought to be proved, strict attention should be paid to the method of proving them as pointed out in *Hingu Miya* v. *Heramba Chandra Chakravarti* (4), and further that the entries themselves ought to be marked as Exhibits and not the books. In *Jaswant Singh* v. *Sheo Narain Lal* (5) we find that their Lordships discuss at length not only the genuineness of the entries in the books of account, but also the character of the entries themselves as to whether they represented a real transaction with reference to certain items which were proved by evidence independently of the entries, and rely upon the general circumstances of the case showing that the accounts were *bona fide* and true. They observe: "Their Lordships need not go through other items in the books, nor deal with the evidence showing that the defendant had bill transactions with other people The cases they have examined are sufficient, in the entire absence of countervailing evidence, to establish three propositions. They prove that the defendant's sweeping denials of his connections with bill transactions are not true, and thereby they materially shake his credit. They prove that he drew *hundis* on Gobind Dass and sold them

(1) 23 W. R. 390.
(2) 23 W. R. 27 Cr.

(3) 1 M. I. A. 47; 5 W. R. (P. C.) 29; 1 Suth. P. C. J. 50; 1 Sar. P. C. J. 93; 18 E. R. 19.
(4) 8 Ind. Cas. 81; 13 C. L. J. 139.
(5) 16 A. 157 (P. C.) 21 I. A. 6; 6 Sar. P. C. J. 404; 8 Ind. Dec (N. S.) 101.

to the plaintiff, thereby displacing the defendant's flat denials of dealings with the plaintiff, and meeting the improbability that he should have drawn upon a house unknown to him, by proof of the fact that he did so. They lead to the belief that the plaintiff's books are authentic and honest, and his *gomasta's* evidence true, so that the course of the dealing alleged by the plaintiff terminating in the six *hundis* now sued on is supported." Here also enough has been proved to show that the defendant's denial that he ever drew money except on chits is untrue and the course of dealings between the plaintiff and the defendant showed that the transactions took place as evidenced by the entries. I may also here refer to the decision in *Dwarka Das* v. *Sant Bakhsh* (6). With reference to the value to be attached to the plaintiff's general statement that the items mentioned in the entries were paid to the defendant, the learned Judges point out that it was the duty of the defendant to challenge the statement, to cross-examine with reference to it and show that that it could not be believed. I am, therefore, satisfied that the judgment of the Subordinate Judge is right and must be upheld. I would dismiss the appeal with costs.

OLDFIELD, J.—I concur generally with my learned brother and I, therefore, do not think it necessary to follow him in his detailed statement of the evidence. But I desire to say a few words regarding the cases, in which it was alleged that there was no corroboration for the various items of the plaintiff's claim except the accounts and regarding which the question arose whether other evidence was in fact given. If no other evidence besides the accounts were given, however strongly those accounts may be supported by the probabilities and however strong may be the evidence as to the honesty of those who kept them, such consideration could not alone with reference to section 34 of the Evidence Act be the basis of a decree. In *Jaswant Singh* v. *Sheo Narain Lal* (5) the Judicial Committee no doubt gave a decree after testing the entries in the accounts before it with reference to the correspondence regarding certain entries in those accounts and other independent evidence regarding them. But I do not think that that decision is in any way inconsistent with the general proposition enunciated regarding section 34. In that case there was in fact some direct evidence as to the making of the *hundis* which were in question and their Lordships, no doubt, said that the direct evidence was quite untrustworthy. They must presumably have meant that notwithstanding its intrinsically untrustworthy character they were prepared to act on it in view of the other circumstances of the case and the direct evidence as to particular items.

The question is whether the evidence of the plaintiff can be accepted and taken as a basis for the decree, supplemented as it is by the evidence of the accounts. The defendant contends that the plaintiff's evidence, if rightly construed, was not direct evidence at all and what he said really amounted only to inference from the account entries, and that he should not be understood as saying that he himself had any knowledge of the payments whatever independently of the presumptions which he was drawing from the entries in the accounts regarding them. The plaintiff's evidence in chief consisted first in a statement "when I paid money to defendant directly, I never took his signature or got any voucher." There were then various particular references to particular payments, which he prefaced with the words "I paid." Lastly there was the statement: "All the items in the account were really given to defendant and entered in the accounts." Those are his statements in chief. If the defendant's were the proper interpretation of plaintiff's evidence, I should certainly hold that it did not afford the corroboration which the law requires.

No doubt, section 160 of the Evidence Act says: "The witness may also testify to facts in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document", and it was suggested that in any case the plaintiff, on the one hand, must be presumed to have correctly recorded the facts in his accounts, although on the other he

(6) 18 A. 92: A. W. N. (1895) 235; 8 Ind. Dec. (N. S.) 767.

did not say so explicitly. As regards the section, I may observe, first, that the use of the word "sure" is, I believe, unique in the Evidence Act. It does not seem to me that the degree of conviction postulated by the use of that word can be treated as equivalent to any, on which the witness may choose to say that he is sure, whether or not it is too fantastic or illogical to commend itself to reasonable men. The meaning must be, I think, that the witness satisfies the Court with reference to ordinary probabilities of his right to be sure that the record relied on by him is correct. Then again there is the reference to section 159, which provides that the witness may refer to "any such writing made by any other person and read by the witness within the time aforesaid", if, when he read it, he knew it to be correct, the time aforesaid being the time within which the Court would consider it likely that the transaction was fresh in his memory. Now if the case were only that the plaintiff must be supposed to have been speaking with reference to the accounts, it would be material that he said nothing definite as to his having looked into the accounts within the time above referred to or as to his reasons for being sure that they were a correct record. But that is not what the plaintiff said, and it is a very material point that there was no suggestion resembling that now made by the defendant in cross examination. The defendant in fact made no objection to the plaintiff making the statements he did both generally and in detail. There were no doubt some questions put to the plaintiff with reference to his residence, as to which he admitted that he stayed in Tuticorin and also in other villages 16 miles distant and that the suit transactions took place in Tuticorin. He said also, that his agents transacted business in his absence. But he said nothing at that point regarding the particular payments which are in dispute. He said only "I was present when I made those payments to the defendant." We have been referred to a number of payments which are the subject-matter of the appeal and there is no reason for adopting any such unnatural interpretation of the evidence. There was nothing further in the plaintiff's cross-examination or in the cross-examination of one of his accountants, P. W. No. 2. P. W. No. 3, another accountant, was, no doubt, asked a question, in reply to which he said: "I must refer to the account to say whether all payments were made by me or by plaintiff. I cannot say anything from memory." But there was no suggestion as regards the payments, if any, which were not made by him, the plaintiff having been present. In these circumstances it does not seem to me that there is any question of reliance by the plaintiff on section 160. The plaintiff's evidence, as I understand it, was simply that he made the payments himself. There is nothing in the case regarding the plaintiff's course of business which enables me to form any opinion as to the probability of all his statements. It is not for us to speculate as to what stringent cross-examination might have disclosed. The circumstances of the case in fact resemble those reported as *Dwarka Das* v. *Sant Bakhsh* (6). To adopt the language used there, the plaintiff's evidence should receive the favourable construction which would entitle us to treat it as substantive evidence in this case and not to conclude it as evidence which was inadmissible.

So treating it we have a foundation, on which the decree in favour of the plaintiff can be passed, supplemented by the entries in the accounts. I agree that he is entitled to a decree as regards the items in connection with which it was contended that no direct evidence was available. I agree with the decree proposed by my learned brother.

M. C. P.

Appeal dismissed.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 70 OF 1918.

July 23, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Jwala Prasad.

SRIDHAR SIRDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAGESHWAR SINGH MAHAPATRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 47—Limitation Act (IX of 1908), Sch. I, Art. 135—Execution of decree—Sale—Decree-holder auction-purchaser, position

SRIDHAR SIRDAR *v.* JAGESHWAR SINGH.

of—Possession, delivery of, whether question relating to execution—Suit to recover possession, maintainability of.

Questions relating to the possession of property purchased by the decree-holder at a sale in execution of his decree are not questions relating to the execution, discharge and satisfaction of the decree within the meaning of section 47 of the Civil Procedure Code, and that section is no bar to a suit by such decree-holder to recover possession based upon the title acquired by the sale and on the ground that by the sale the right, title and interest of the judgment-debtors in the land was extinguished and they were mere trespassers. Such a suit must be brought within the period of limitation prescribed by Article 138 of Schedule I to the Limitation Act. [p. 715, col. 1; p. 719, col. 2.]

Letters Patent Appeal from a decision of Justice Sir Ali Imam, Kt., dated the 25th July 1918 and reported as 47 Ind. Cas. 844, in Second Appeal No. 951 of 1917, reversing the decision of the District Judge, Manbhum.

Mr. *Abani Bhusan Mukerji*, for the Appellants.

Mr. *Atul Krishna Rai*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal under clause 10 of the Letters Patent by the defendants Nos. 1 to 3, who are the principal defendants in the suit, from the decision of a single Judge of this Court, dated the 25th July 1918, whereby he overruled the decision of the District Judge of Manbhum and restored that of the Munsif.

The plaintiffs and the *pro forma* defendants were proprietors of Mauza Delikhana. The principal defendants were tenants under them of a holding in the said Mauza. The rent having fallen into arrears, the landlords brought a suit against the tenants and in July 1909 obtained a decree in that suit. The property was put up for sale in execution of the decree and it was purchased by the landlords themselves. On the 6th May 1910 the sale was confirmed and in July of the following year the sale certificate was obtained. At that time a partition suit was pending between the plaintiffs and the *pro forma* defendants who were members of a joint family, and no application appears to have been made by them as auction-purchasers under Order XXI, rule 95, of the Civil Procedure Code to be put in possession of the holding purchased by them within 3 years of the confirmation of the sale. As a result of the partition suit, the Mauza in question, including the right to possession of the defendants' holding, fell to the share of the plaintiffs who, on the 5th May 1916, instituted the present suit claiming *khas* possession of the holding against the principal defendants who were still in possession.

Amongst other defences, the defendants contended that the suit was barred by section 47 of the Civil Procedure Code, the plaintiffs' remedy being to apply for delivery of possession in the Court executing the rent decree, and that a separate suit was not maintainable. The Munsif decided all issues in the plaintiffs' favour and granted the decree asked for.

On appeal, the District Judge considered that such a suit would be governed by the provisions of the Chota Nagpur Tenancy Act, 1908, and that by sections 139 and 231 of that Act it was cognizable by the Deputy Commissioner only and ought to have been brought within one year from the date when the cause of action accrued. He treated the case, however, as one in execution of a decree and held that it was barred by section 47 of the Civil Procedure Code as well as by section 92 of Act X of 1859, which was in force when the rent suit was instituted, and that in either case the limitation period of 3 years had expired. The plaintiffs appealed to this Court, and the learned Judge who heard the appeal held that the suit could not be treated as an application in execution governed by Article 180 of the Limitation Act, and that as it did not relate to the execution, discharge or satisfaction of a decree, it was not governed by section 47 of the Civil Procedure Code. He further held that the Chota Nagpur Tenancy Act had no application. In these circumstances, he held that the period of limitation was 12 years from the date when the sale became absolute, as prescribed by Article 138 of the Limitation Act, and restored the decree of the trial Court setting aside that of the District Judge. It is from that decision that the present appeal is brought.

The first contention argued before us was that the suit fell within section 139 of the Chota Nagpur Tenancy Act and was cognizable only by the Deputy Commissioner, and that under section 231 of the same Act the limitation period was one year from the date of the accruing of the cause of action. There are two answers

to this argument. First, the Act was not applied to Manbhum within which district the property is situated until the 22nd November 1909, which is after the rent-decree was obtained, and it is not shewn that the application of the Act to Manbhum had any retrospective operation. Secondly, it is quite clear that none of the cases mentioned in section 139 which are triable by the Deputy Commissioner cover the present suit. The only case relied on is that mentioned in clause 4 of the section, *viz.*: "All suits under this Act to eject any tenant of agricultural land or to cancel any lease of agricultural land." This is not a suit to eject a tenant or to cancel a lease. The defendants ceased to be tenants at the time when their holding was sold and their rights in the holding passed to the purchaser. Since then their status is that of trespassers, not tenants. The suit, in fact, is not one under the Chota Nagpur Tenancy Act at all and sections 139 and 231 can have no application.

The appellants' main contention, however, was that the case is covered by section 47 of the Code of Civil Procedure, as it raises questions between the parties to the suit in which the rent decree was passed relating to the execution, discharge or satisfaction of that decree. Although it is by no means clear that section 47 of the Civil Procedure Code applies to a case where the sale took place under Act X of 1859 and where the sale certificate was granted under section 11 of Act VIII of 1865, I assume, for the purposes of this part of my judgment, that the Civil Procedure Code applies. There can be no doubt that both the plaintiffs and defendants were parties or represent parties to that suit and the only question which arises is, whether the questions for determination relate to the execution, discharge or satisfaction of the rent-decree. This is a matter about which there has been considerable controversy in the High Courts of Calcutta, Bombay and Allahabad. The importance of the question for present purposes arises from the fact that if a separate suit is not barred by section 47 then it was instituted within time, the period for bringing such a suit being that prescribed by Article 138 of the Limitation Act, *viz.*, 12 years from the date when the sale became absolute. If it is barred by section 47, then the period in which the application in execution should have been made is 3 years and as the suit was not instituted within that period, it cannot now be treated as an application in execution under section 47.

The decisions of the Calcutta High Court are somewhat conflicting. One of the earliest decisions is that of *Kristo Gobind Kur* v. *Gunga Pershad Surma* (1) in the year 1876, which decided that the plaintiff, who was the auction-purchaser, should not be entitled to bring a fresh suit for possession as he might have enforced his rights under the decree in execution of which he purchased. The basis of the decision was that litigation might be endless if parties failed to exercise their rights under decrees and were afterwards allowed to bring fresh suits for the same relief. Whilst entirely agreeing with the general principle that litigation should not be endlessly protracted, the question we have to determine is whether in the particular instance the Legislature has in fact barred the plaintiffs' right of suit in the case before us. The decision in *Kristo Gobind Kur's case* (1) was followed with some hesitation by Sir R. Garth, C. J., and Morris, J., in 1881 in *Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty* (2). In *Krishna Lall Dutt* v. *Ratha Krishna Surkhel* (3) decided in 1884, the Court held, where formal possession had been obtained from the Court by the auction-purchaser but had not been followed by any act of possession and so had become infructuous, that a separate suit was maintainable. In 1885 the same High Court decided in the case of *Iswar Pershad Gurgo* v. *Jai Narain Giri* (4) that the decision in *Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty* (2) (*ubi sup.*) did not lay down that under no circumstances would a suit lie by the auction-purchaser who was also a decree-holder, but that so long as the remedy provided by section 318 of the Civil Procedure Code (now Order XXI, rule 95) was open to the purchaser, he

(1) 25 W. R. 372.
(2) 10 C. L. R. 258.
(3) 10 C. 402; 5 Ind. Dec. (N. S.) 269.
(4) 12 C. 169; 6 Ind. Dec. (N. S.) 115.

was bound to have recourse to that section rather than to bring a fresh suit. In that case it appears that at the date when the suit was instituted more than 3 years had passed from the time when possession was confirmed, and hence the remedy provided by section 318 of the Civil Procedure Code then in force was barred by limitation. Some attempt, however, had been made to obtain possession under that section which had proved infructuous. The Court decided that there was no reason in law why the suit should not be maintained and that the purchaser's title was not extinguished merely because the summary remedy provided by section 318 was no longer available. On the other hand, in the case of *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (5), decided in the year 1899, the Calcutta High Court held that proceedings for delivery of possession to the auction-purchasar after a sale in execution of a decree were proceedings in execution of the decree, and that when the application for possession is resisted by the legal representative of the judgment-debtor, the question so raised came within the purview of section 244 of the Civil Procedure Code of 1882 and must be decided under that section and not by a separate suit. Finally, in the case of *Sosibhusan Mookerjee* v. *Radhanath Bose* (6), which was decided in 1913, the Calcutta High Court, after reviewing the authorities at some length, decided that an order for delivery of possession to the execution-purchaser, who was himself the decree holder, was not an order relating to the execution, discharge or satisfaction of the decree nor was it one arising between the parties to the suit or their representatives merely because the decree-holder happened to be the execution purchaser. For the latter proposition reliance was placed upon the earlier case of *Nana Kumar Roy* v. *Golam Chunder Dey* (7), where it was held that an order under section 312 of the Code of 1882 setting aside an execution sale cannot be treated as an order under section 244 of the same Code because the decree-holder happens to be the auction-purchaser. The Court, after reviewing the conflicting decisions of the Calcutta High Court, followed the decision of a Full Bench of the Allahabad High Court in *Bhagwati* v. *Banwari Lal* (8), which affirmed the principle that a decree-holder whether holding a decree for sale under a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction sale held in execution of such a decree. It seems clear, therefore, that the weight of authority in the decisions of the Calcutta High Court appears to be in favour of the view that questions concerning delivery of possession to an auction purchaser at a sale in execution of a decree, whether he be a decree-holder or a stranger to the suit, are not questions relating to the execution of the decree.

The Allahabad High Court by the Full Bench decision just cited have clearly settled this question against the contention of the present appellants.

The Bombay High Court, however, has taken a different view. In the case of *Sadashiv Mahadu* v. *Narayan Vithal* (9) a Full Bench of that High Court decided that a mortgagee decree-holder, who purchased the property ordered to be sold in execution of his decree, was not entitled to bring a separate suit for possession against the mortgagors but was limited by section 47 of the Civil Procedure Code to his remedy under Order XXI of the Code.

In this conflicting state of the authorities it would have been necessary for us to exercise an independent judgment, but for the fact that, so far as this Court is concerned, the point appears to have been substantially decided by a Full Bench ruling in the case of *Haji Abdul Gani* v. *Raja Ram* (10). The immediate question for determination in that case was, whether an appeal lies from an order passed under

(5) 27 C. 34; 4 C. W. N. 417; 14 Ind. Dec. (N. S.) 23.

(6) 25 Ind. Cas. 267; 19 C. W. N. 835; 20 C. L. J. 433.

(7) 18 C. 422 (F. B.); 9 Ind. Dec. (N. S.) 282.

(8) 1 Ind. Cas. 416 (F. B.); 31 A. 82; 6 A. L. J. 71 5 M. L. T. 185.

(9) 11 Ind. Cas. 937; 35 B. 452; 13 Bom. L. R. 661.

(10) 35 Ind. Cas. 468; 1 P. L. J. 232 (F. B.); 20 C. W. N. 849; 3 P. L. W. 62.

rule 95 of Order XXI of the Civil Procedure Code. An appeal would lie only if the decision appealed from came within the provisions of section 47, and it was necessary for the Court to decide this question in order to determine whether an appeal would lie. In that case the respondents had obtained a money decree against the appellant and purchased certain property of the appellant which had been ordered to be sold in execution of the decree. Possession was obstructed by the appellant, and the respondents applied under Order XXI, rule 95, to be placed in possession of the disputed property. The respondents obtained an order from which the appellant sought to appeal. The Court, after reviewing the authorities above-mentioned and many others, unanimously decided that questions relating to the possession of property purchased by the decree-holder under the circumstances stated were not questions relating to the execution, discharge or satisfaction of the decree within the meaning of section 244 of the Code of 1882 or section 47 of the present Code. The principle upon which that decision was based appears to me to govern the present suit and I think that this appeal must be dismissed with costs.

I only wish to add that I have had an opportunity of reading the judgment about to be delivered by my learned brother and I concur with him in the reasoning by which he arrives at an independent conclusion that the questions raised in this suit are not questions relating to the execution, discharge or satisfaction of the decree.

JWALA PRASAD, J.—This is a Letters Patent Appeal from the decision of a single Judge of this Court, dated the 25th July 1918, reversing the decision of the District Judge of Purulia (Manbhum), dated the 22nd June 1917, and restoring that of the Munsif, dated the 6th March 1917.

The defendants Nos. 1 to 3 are the appellants before us. They had held in village Delikhana, Pergana Manbhum, the lands in suit as their *jote kamai* holding. The plaintiffs and the *pro forma* defendants as landlords of the 16 annas of the said Mouza obtained a decree, Exhibit 4, for rent against the principal defendants Nos. 1 to 3 for Rs. 64-15-10 on 21st July 1909, and in execution of the said decree they purchased the holding of the appellants on 4th April 1910. The sale was confirmed on 6th May 1910 and the sale certificate, Exhibit 3, was obtained on 11th July 1911, but on account of there being a partition suit No. 223 of 1911 pending between the plaintiffs and the *pro forma* defendants, the head member of the family neglected to take out delivery of possession through the executing Court.

By the aforesaid partition suit the entire Mouza with the said lands of the principal defendants in suit was allotted to the plaintiffs. The plaintiffs, therefore, brought the present suit against the appellants for recovery of possession on 5th May 1916, in the Court of the Munsif of Purulia, within 12 years of the confirmation of the auction sale.

The appellants, principal defendants, resisted the claim of the plaintiffs on all possible grounds. They stated that the plaintiffs received rents from them in 1318 and 1319 and recognized them as their tenants, and hence the relationship of landlord and tenant continued and existed between the plaintiffs and the appellants even after the confirmation of the sale, and that the latter were not trespassers and hence the suit for ejectment could not lie. They also pleaded that the rent decree and the sale were collusive and not *bona fide* and as such were not binding upon them. These questions of fact have been set at rest by the findings of the trial Court as confirmed by the first Court of appeal and are no longer before us for consideration.

The appellants, however, disputed the right of the plaintiffs to institute the present suit and contended that the suit was barred by limitation. The Munsif overruled the contentions of the appellants and decreed the suit of the plaintiffs.

On appeal the learned District Judge held that under sections 139 and 231 of Act VI of 1908 the plaintiffs' suit was cognizable only by the Deputy Commissioner and must have been brought within one year. He further held that the plaintiffs' remedy was to make an application for delivery of possession of the property purchased at the auction sale and that the present suit was barred by section 47 of

application to the present case which would rather seem to be governed by the earlier authorities of the said Court in the case of *Radha Madhub Suntra* v. *Lukhi Narain Roy Chowdhry* (13) and the Full Bench decision in *Nagendra Nath Mullick* v. *Mathura Mahun Parhi* (14). The principle upon which section 373 of the Code of Civil Procedure in the former case was not applied to bar the second suit, section 47 of the Civil Procedure Code would not apply to decrees passed and executed and sales held under the Rent Act (X of 1859). More so, when section 47 takes away the general right of instituting a suit. Hence Order XXI, rule 95, and section 47 of the Code of Civil Procedure are inapplicable to the case of the plaintiffs and do not at all bar the suit. Even if section 47 did apply, the question is whether the proceedings to obtain possession after an auction sale at which the decree-holder himself purchased the property, relate to "the execution, discharge or satisfaction of the decree." It is clear that the section has no application to a purchaser who is not a decree-holder and that his failure to obtain possession or to make an application for delivery of possession under Order XXI, rule 95 will not bar a suit for recovery of the property. Such a suit will be governed by Article 138 of the Limitation Act, the period of limitation for which is 12 years. No doubt a decree holder purchasing the property in execution of the decree is a party to the suit and as such all questions relating to the execution, discharge or satisfaction of the decree would come under section 47 and will be determined under that section and not by a separate suit. But the question is whether the question relating to the delivery of possession after the sale is one that relates to the execution, discharge or satisfaction of the decree. If it does relate to the execution, discharge or satisfaction of the decree, then a separate suit would be barred and an application should, therefore, be made under Order XXI, rule 95, the period for which is 3 years within which the application should be made. Whereas if it does not come under section 47, then a separate suit for recovery of possession will not be barred and Article 138 of the Limitation Act will govern the suit. There has been a great conflict of decisions upon the point. The earlier decisions in Calcutta seem to favour the view that a separate suit will not lie: *Vide*, *Kristo Gobind Kur* v. *Gunga Pershad Surma* (1). The view expressed there was, however, doubted by the Chief Justice Garth in the case of *Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty* (2) and was distinguished in *Seru Mohun Bania* v. *Bhagoban Din Pandey* (15) and *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (3) and latterly in *Iswar Pershad Gurgo* v. *Jai Narain Giri* (4). It was again acted upon in a latter decision of the Court in *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (5). The ruling in *Sasibhusan Mookerjee* v. *Radhanath Bose* (6) seems to settle the point so far as the Calcutta High Court is concerned. The long course of decisions in the Calcutta High Court indicates that the balance of opinion in that Court has been strongly in favour of the view that the question relating to the delivery of possession does not relate to the execution, discharge or satisfaction of the decree and does not come under section 47 of the present Code or section 318 of the old Code.

So far as the Allahabad High Court is concerned, the view appears to have been settled by a Full Bench in the case of *Bhagwati* v. *Banwari Lal* (8).

The Bombay High Court in the case of *Sadashiv Mahadu* v. *Narayan Vithal* (9) has taken a different view and entirely supports the contention of the appellants.

The matter appears to have been settled so far as this Court is concerned by a Full Bench decision in the case of *Haji Abdul Gani* v. *Raja Ram* (10). In that case it was decided that no appeal lies from an order under rule 95, Order XXI, of the Code of Civil Procedure. The basis of the decision is that such an order does not dispose of a question relating to the execution, discharge or satisfaction of the decree, even when the question is between the judgment debtor and an auction-purchaser who originally was the plaintiff in the suit and hence the order is not a decree

(13) 21 C. 428; 10 Ind. Dec. (N. S.) 916.
(14) 18 C. 368 (F. B.); 9 Ind. Dec. (N. S.) 246.

(15) 9 C. 602; 4 Ind. Dec. (N. S.) 1049.

within the meaning of section 2 of the Code of Civil Procedure. Upon the principle deduced from that ruling, section 47 will not bar a separate suit by a decree holder purchaser in order to obtain recovery of possession of the property purchased at the auction sale. This decision seems to settle the question so far as this Court is concerned and has lately been followed in the case of *Dhanindar Das* v. *Bakhshi Harihar Prasad Singh* (16), where it was directly held that the proceedings adopted to obtain delivery of possession of the property purchased in execution of a decree do not relate to the execution, discharge or satisfaction of that decree and section 47 of the Code of Civil Procedure has no application to such proceedings. In that case the decree-holder himself was a purchaser. We are thus relieved from the necessity of reviewing the authorities on the subject and coming to a definite conclusion as to which of the conflicting views is in agreement with the provisions of the Code of Civil Procedure. However, it may be mentioned that the execution of the decree terminates by the satisfaction of the decree, by payment thereof or the sale of the property in execution of the decree. Order XXI no doubt relates to and is headed by "execution of decrees and orders", and rule 95 relating to the delivery of possession by the executing Court to the purchaser at the auction sale is placed in that Chapter. It is, therefore, contended that the question relating to the delivery of possession also relates to the execution of the decree. Rule 64 of the said order provides that the Court executing the decree may direct that a certain property "shall be sold to satisfy the decree and that the proceeds of such sale or portion thereof shall be paid to the party entitled under the decree to receive the same." A decree-holder can only purchase on express permission of the Court obtained under rule 72 which provides that when the decree holder purchases the property "the purchase-money and the amount due under the decree is to be set off one against the other and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.' It is thus clear that when a decree-holder purchases a property the decree is satisfied by the very fact of his purchase to the extent of the amount at which the property is knocked down. If the sale is good, then the execution is finished and the decree is satisfied. The question regarding the possession of the property is a question, therefore, between the Court and the purchaser, whether he be a decree-holder or a stranger. When the executing Court having seized the property sells it, it is bound to give possession of the property to the auction-purchaser. This will be under the general law under which a vendor is bound to give possession to the vendee Rule 95 is simply a recognition of this principle and provides an easy and prompt method of obtaining possession from the Court that sells the property. The rule, therefore, has been placed in the chapter relating to the execution of decrees for the sake of convenience and in order to enable the executing Court to give effect to the auction sale. The placing of the section by no means shows that the proceeding relating to the delivery of possession should be regarded as relating to the execution of the decree. This contention, therefore, of the appellants fails.

The suit is not, therefore, barred by section 47 of the Code of Civil Procedure and the limitation prescribed by Article 180 of the Limitation Act, which relates to applications made under the Code of Civil Procedure has no application to the suit. The suit will, therefore, be governed by Article 138 of the Limitation Act and having been brought within 12 years of the auction sale is not at all barred.

Different considerations arise where a decree directs delivery of possession. In such a case title to the property and the right to recover possession is declared by the decree itself and the remedy to obtain possession of the property is by executing the decree, but where, as in the present case, the decree is only for rent or for money and no title to any property is created by the decree, the right of the decree-holder to recover possession arises from the sale of the property and not under the decree. His right to possession, therefore, may be enforced either by a

(16) 48 Ind. Cas. 129; 3 P. L. J. 571.

suit or by any summary procedure that the law may have provided. The remedies of such a purchaser are, therefore, two-fold: one by an application under Order XXI, rule 95, and another by a regular suit.

The result is that all the contentions of the appellants fail and this appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1061 OF 1917.

March 19, 1919.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Napier.

N. P. R. L. M. S. T. LAKSHUMANAN CHETTIAR AND ANOTHER—DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

PARASIVAN PILLAI AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 3 AND 6 TO 8 RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Limitation Act (IX of 1908), Sch. I, Art 11:—Execution of decree—Sale—Claim that property should be sold subject to mortgage, rejection of—Suit to establish right—Limitation.

A petition to a Court, asking that it be notified that certain property ordered to be sold in execution of a decree is liable to a mortgage and that the sale be held subject to the mortgage, falls within the provisions of Order XXI, rule 58 of the Civil Procedure Code, and where such petition is rejected, a suit by the petitioner to enforce his right against the property must be brought within one year under Article 11 of Schedule I to the Limitation Act. [p. 721, cols 1 & 2.]

Ganesh Krishna Kulkarni v. *Damoo Nathu Shimpi*, 36 Ind. Cas. 627; 18 Bom. L. R. 782; 41 B. 64, distinguished.

Venkataratnam v. *Ranganayakamma*, 48 Ind. Cas. 270; 41 M. 985; 8 L. W. 292; 35 M. L. J. 335; (1918) M. W. N. 599; 24 M. L. T. 197, applied.

Ponnuswami Pillai v. *Samu Amma*, 38 Ind. Cas. 937; 31 M. L. J. 247, followed.

Second appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Appeal Suit No. 97 of 1916, preferred against the decree of the Court of the District Munsif, Tuticorin, in Original Suit No. 72 of 1915.

FACTS.—Suit on a mortgage. The father of defendants Nos. 4 and 5 attached certain properties of defendants Nos. 1 and 2 in execution of a decree that he had obtained against them. The plaintiff, who held a simple mortgage against defendants Nos. 1 and 2 in respect of those properties, applied to correct the sale proclamation by adding that the sale was to be held subject to an undischarged mortgage. The petition was dismissed on the ground that it was prosecuted too late. More than a year after the order of dismissal plaintiff brought the present suit to enforce the mortgage security against the auction purchasers and their vendee. The claim was decreed by the lower Courts. Defendants Nos. 4 and 5 preferred a second appeal to the High Court.

Mr. *C. A. Seshagiri Sastri* for Mr. *K. V. Krishnaswami Aiyar*, for the Appellants.—The present suit is barred under Article 11 of the Limitation Act. The claim by the plaintiff in the prior suit that the sale should be held subject to his mortgage fell under the provisions of Order XXI, rule 58, Civil Procedure Code. The provisions relating to claim proceedings under the new Code are wider than the corresponding provisions of the old Code. Any order passed on a petition presented under rule 58 comes within the mischief of rule 63. The liability of property to a mortgage comes within rule 58. The present suit having been brought more than a year after the dismissal of the claim, Article 11 applies and the suit is barred.

Mr. *A. Subbarama Aiyar*, for the Respondent No. 1.—The plaintiffs' petition in the prior suit was not one under Order XXI, rule 58. They were, as held by the lower Appellate Court, proceedings in settling a sale proclamation and come under rule 64 and the rules following. See *Ganesh Krishna Kulkarni* v. *Damoo Nathu Shimpi* (1). The Court declined to amend the proclamation at a late stage. There was no enquiry and the order of dismissal was not passed as the result of any enquiry. The order is no bar to the suit on the mortgage within the ordinary limitation period.

JUDGMENT.—This is an appeal from a decree of the Court of the Subordinate

(1) 36 Ind. Cas. 627; 18 Bom. L. R. 782; 41 B. 64.

Judge of Tuticorin holding that a suit on a mortgage was not barred by limitation, the point taken before us being that the suit was barred. The bar is said to arise under Article 11 of the Limitation Act and purports to be based on the failure of the plaintiff in this suit to bring his suit within one year from the date of the disposal of a certain objection petition. The lower Appellate Court has held that though the proceedings were under Order XXI of the Code of Civil Procedure, they were not in a claim petition instituted under rule 58 but were proceedings in settling a proclamation under the provisions beginning with rule 64, namely, "sale generally." The learned Subordinate Judge has not given any reasons in his judgment, but it is sought to be supported by a ruling to be found in the decision of the High Court of Bombay in *Ganesh Krishna Kulkarni* v. *Damoo Nathu Shimpi* (1). There is some slight difference in the procedure in that case and in this case, but the High Court certainly considered the question on the assumption that there was an objection taken under section 278, corresponding to rule 58, yet they held that the order was not one passed under section 283 and that, therefore, there was no bar of limitation. It has been pointed out, however, by a Full Bench of this Court in *Venkatarathnam* v. *Rangonayakamma* (2) that under the new Code, the powers of a Court dealing with objections are much wider than under the old Code. The learned Chief Justice points out that under the old Code, section 283, corresponding to rule 63, was definitely limited by its own language to the three preceding sections 280, 281 and 282 and that it was only where an order had been passed under sections 280, 281 and 282 that the order was conclusive in the absence of a suit, whereas under the present rule 63, the words being "where a claim or an objection is preferred," it necessarily follows that where any claim is made under rule 58, then any order that is passed comes within the mischief of rule 63. It is clear, therefore, that the decision in *Ganesh Krishna Kulkarni* v. *Damoo Nathu Shimpi* (1) has no application to the present case. In the present case the claim made is to be found in Exhibit II. In that, claimant asks that "an order should be passed directing that it should be notified at the sale on 5th February 1912 that the petitioner's mortgage has not been discharged, and the proclamation of sale amended accordingly and the sale should be held subject to the mortgage." The order was: "The sale comes off to-morrow. The sale proclamation notifies existence of a mortgage but says it has been discharged. Enquiry cannot now be held whether it has been discharged. Petition dismissed." It seems to us perfectly clear that the provisions of rule 58 cover the claim setting up mortgages and the liability of the property to the mortgage at the time. There can be no doubt that the Court can deal and could deal under the old Code with the liability or non liability of the property to a mortgage, *Ganesh Krishna Kulkarni* v. *Damoo Nathu Shimpi* (1) being an authority for that proposition because one particular form of order in that respect is definitely provided for in rule 62 and in the old section 282, and it necessarily seems to follow that if one particular form of order on the claim on a mortgage can be passed, then any claim with respect to an alleged mortgage or existing liability of the mortgage must be a claim under rule 58. For these reasons, we are satisfied that a claim was made under rule 58, although the objection did not purport to be put in under that rule and that it was disposed of by an order which is governed by rule 63. This is the view taken in a case in *Ponnusami Pillai* v. *Samu Amma* (3), with which we concur. The result is that the suit, having been brought more than a year from the date of the order, is barred by limitation. The appeal must be allowed and the suit dismissed with costs throughout.

M. C. P.

Appeal allowed.

(2) 48 Ind. Cas. 270; 41 M. 985; 8 L. W. 292; 35 M. L. J. 335; (1918) M. W. N. 599; 24 M. L. T. 197.

(3) 38 Ind. Ca . 937; 31 M. L. J.

EKTAR SIKDAR *v.* WAJUDDI TATI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 571 OF 1917.

April 24, 1919.

Present :—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, Kt.

EKTAR SIKDAR AND ANOTHER—PRINCIPAL DEFENDANTS—APPELLANTS

versus

WAJUDDI TATI AND OTHERS—PLAINTIFFS AND *Pro forma* DEFENDANTS—RESPONDENTS.

Mortgage—Interest, high rate of, whether can be reduced—Court, duty of.

Where a deed of mortgage by way of conditional sale stipulates for the payment of interest at 30 per cent, the Court has no option but to allow this rate. [p 722, col. 2]

Appeal against the decree of the Subordinate Judge, 5th Court, Dacca, dated the 21st of December 1916, modifying that of the Mursif, 1st Court at Munshiganj, dated the 22nd of June 1916.

FACTS appear from the judgment.

Babu *Mrityunjay Chatterjee* (with him Babu *Heramba Lal Sanyal* for Babu *Hara Prosad Chatterjee*,) for the Appellants.—Defendants Nos. 1 and 2 are appellants, and the appeal arises out of a suit for possession on redemption of a mortgage by way of conditional sale. The main question for determination now is whether the appellants are entitled to interest at the rate of 30 per cent. stipulated in the mortgage-bond. The lower Appellate Court has found that because the money was secured by mortgage of immoveable property, and because half of the amount of interest was to be realized from the usufruct of the property, the interest at the rate of 30 per cent. must be unconscionable and usurious. The case of *Bouwang Raja Challaphroo Chowdhury* v. *Banga Behary Sen* (1) relied on by the lower Appellate Court has been overruled by the decision of their Lordships of the Judicial Committee reported as *Aziz Khan* v. *Duni Chand* (2) and *Lala Balla Mal* v. *Ahad Shah* (3).

(1) 31 Ind. Cas. 394; 22 C. L. J. 311; 20 C. W. N. 408.

(2) 48 Ind. Cas. 933; 23 C W.N. 130; 101 P. R. 1918; 165 P. W. R. 1918 (P. C.).

(3) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

Babu *Romesh Chandra Sen*, for the Respondents.—The finding is that the rate of interest was unconscionable and usurious and so the lower Appellate Court was justified in reducing the rate of interest. The case in *Lala Balla Mal* v. *Ahad Shah* (3) was not a case of mortgage. In the case in *Aziz Khan* v. *Duni Chand* (2) the question of penalty arising under section 74 of the Contract Act was not considered. The Court has got jurisdiction to reduce the rate of interest in any case in which it considers the stipulation to be penal

Babu *Mrityunjay Chatterjee* briefly replied.

JUDGMENT.

WALMSLEY, J.—This appeal arises out of a suit for possession on redemption of a mortgage by way of conditional sale. The plaintiffs are the purchasers of the equity of redemption from the defendant No. 3, the original mortgagor. It may be mentioned that they were also prior mortgagees and that the defendants Nos. 1 and 2 deposited the amount of their mortgage in Court. Subsequently after the withdrawal of the deposit the plaintiffs purchased the equity of redemption. There are now two questions before us. The first is with regard to interest. The learned Judge of the lower Appellate Court has cut the interest down from 30 per cent. to 12 per cent., referring to certain decisions of this Court. But since those cases were decided, the decisions of their Lordships of the Privy Council in the cases of *Aziz Khan* v. *Duni Chand*(2) and *Lala Balla Mal* v. *Ahad Shah* (3) respectively have been reported. It appears to me that, in view of these later decisions, the Court has no option but to allow the defendants the rate of interest stipulated in the bond, which is 30 per cent. per annum.

The other question is with regard to a sum of Rs. 100. It was found by the 1st Court that as a matter of fact Rs. 300 was the money paid by the defendants on the bond in favour of the plaintiff. It was further found that the defendants were entitled to add to their dues this sum of Rs. 100 with interest at the rate mentioned in the bond. That Rs. 300 paid on the bond *plus* this Rs. 100 make a total of Rs. 400. But in the ordering portion of

the judgment and in the decree, the principal sum is mentioned as Rs. 300 and not Rs. 400. That formed the subject-matter of a cross-appeal in the lower Appellate Court, but the learned Subordinate Judge disposed of it with the words "cross appeal is dismissed." The defendants now urge that they ought to have that Rs. 100 with interest. On the other hand, it is said by the plaintiffs that there ought to be a remand for a finding with regard to this Rs. 100, and it is suggested that the plaintiffs are being prejudiced by being unable to advance arguments which they might have advanced if the cross appeal had been pressed in the lower Appellate Court. I see no reason to think that the cross appeal was not pressed and I think the defendants ought to have this sum of Rs. 100 added to their principal money.

The appeal will be decreed with costs in all Courts and a fresh account will be prepared on this basis. That the plaintiffs owe to the defendants Nos. 1 and 2 Rs. 300 with simple interest at 30 per cent. per annum from the date of the advance to the date of the recovery of possession by the defendants and thereafter at 15 per cent. per annum up to the date of the institution of this suit and also Rs. 100 with simple interest at 6 per cent. per annum from the date of the deposit to the date of the institution of the suit. The decree will be prepared in the form prescribed by the Code of Civil Procedure for a mortgage by way of conditional sale. The period of grace will be six months from the date of this decree.

SHAMSUL HUDA, J.—I agree

Appeal allowed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL NO. 12 OF 1919.

May 21, 1919

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

Gosain BHAUNATH GIR—DEFENDANT—APPELLANT

versus

BIHARI LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to His Majesty in Council—Value, determination of, method of—One of several parties desiring to appeal.

In order to determine the value for the purposes of an appeal to His Majesty in Council in a case where there is a dispute as to property valued at more than Rs. 10,000, and only one of the parties affected by the decision desires to appeal, what must be looked at is the detriment to that party, and if, in fact, the total amount of the subject-matter of the suit so far as his interest is concerned is under Rs. 10,000, it does not come within the terms of section 110 of the Civil Procedure Code, and, therefore, an appeal is not permissible. [p. 725, col. 1.]

Privy Council appeal from a decision of the Patna High Court affirming a decision of the Subordinate Judge, Gaya.

Messrs. *Bulwant Sahai* and *Rai Gurusaran Parsad*, for the Appellant.

Mr. *Abani Bhusan Mukerji*, for the Respondents.

JUDGMENT.

MILLER, C. J.—In this case the defendant No. 2 in a mortgage suit instituted before the Subordinate Judge of Gaya seeks leave to appeal to His Majesty in Council from a decision of this Court, dated the 9th August 1918, affirming a decision of the Subordinate Judge in execution proceedings arising out of the decree obtained by the plaintiffs in the mortgage suit.

In order to understand how the question now under discussion arises, it is necessary to state the facts because the petitioner contends that notwithstanding that the judgment of this Court was a judgment of affirmance, there is a material question of law to be determined by their Lordships of the Privy Council. But before it becomes necessary to consider that question, the petitioner must make out that the subject-matter of the suit in the Court of first instance and the subject-matter of the dispute on appeal to His Majesty in Council is of the sum of Rs. 10,000 or upwards.

The plaintiffs were mortgagees of a 16-annas share in Mauza Panania Azimgarh and also of a 16-annas share in Mauza Panania Mani Chak. They brought a suit against the mortgagors on the basis of their mortgage. They added the present petitioner as a defendant, he being interested in a 4-annas share of Panania Azimgarh as subsequent mortgagee. When the decree was made, it was directed that there should be a sale first of all of a 12-annas share of Mauza Panania Azimgarh and a 16-annas share of Mauza Panania Mani Chak leaving the 4-annas share of the first mentioned

property in which the defendant No. 2, the present petitioner, was interested for subsequent sale, if the sale of the remainder of the property did not satisfy the plaintiffs' decree. When execution proceedings were taken out, the appellant objected to the valuation given in the sale proclamation by the plaintiffs, who had assessed the value at Rs. 4,000 for one of the properties and Rs. 500 for the other. The present petitioner put the values at Rs. 16,000 and Rs. 4,000 respectively and these values were accepted by the Subordinate Judge. Subsequently that execution case was struck off for default of the decree-holders. A second execution case was then instituted and again the decree-holders put the value of these properties at Rs. 4,000 and Rs. 500 as previously. Again there was an objection by the petitioner and the objection was allowed. That execution case also was dismissed for default. A third attempt at execution was made, the values being stated as before, and this also failed. Eventually a fourth application was made in January 1917, when the decree holders put the value of Mauza Panania Mani Chak at Rs. 500, the value of 12 annas of Panania Azimgarh at Rs. 4,000 and the value of the 4-annas share of the same property at Rs. 1,300. On this occasion they were successful and the sale took place in April 1917, the property being purchased by the decree holders for the sum of Rs. 4,600 for the 12-annas share of Panania Azimgarh, Rs. 1,400 for the 4 annas share of the same property and Rs. 650 for the Panania Mani Chak property. The petitioner then applied in September 1917 to have the sale set aside, urging the same grounds as he had previously taken. That application was dismissed by the Subordinate Judge and on appeal to this Court this Court affirmed the decision of the Subordinate Judge and dismissed the appeal. It is from that decision that it is now sought to appeal to His Majesty in Council.

It will be observed from what I have already said that the only interest which the petitioner has in the subject matter of this suit is an interest which he himself places at a valuation of Rs. 4,000. Therefore, *prima facie*, it would appear that he was not entitled to appeal in a matter concerned with a claim to property of that amount. But his contention is that what he is asking the Court to do and what he is entitled to obtain is an order setting aside the sale of property valued according to him at a sum of well over Rs. 10,000, that is to say, setting aside not only the sale of the property in which he is interested as mortgagee but also setting aside the sale of the other property which had been ordered to be sold first before that in which he was interested should be sold. It is quite true that he has an interest in seeing that that property is sold for an adequate sum and that the sale proclamation contains a proper valuation, but the decree, in so far as it affects his interests, deals only with property on his own shewing which is valued at Rs. 4,000 and, in my opinion, in order to determine the value of the subject matter in dispute it is necessary to look at it as it affects the interests of the party prejudiced by the order or decree objected to. Whatever may be the value of the property in which the petitioner is interested, his interest in that property cannot, it seems to me, from any point of view, be regarded as more than Rs. 4,000. In the case of *De Silva* v. *De Silva* (1) it was laid down by Sir Lawrence Jenkins, C. J., that in order to determine the value prescribed by section 596 of the Civil Procedure Code then in force, which is similar in its terms for present purposes to the present Code, the decree has to be looked at as it affects the interests of the parties prejudiced by it and where the detriment to the party seeking relief is estimated at less than Rs. 10,000, then the value of the matter in dispute in appeal is not of the prescribed value, and the decree itself does not involve any claim or question to or respecting property of the prescribed value, and the case does not fulfil the requirements of the Code. In that case the plaintiff sued for a declaration that he was entitled to one third share in certain property which had belonged to his mother and for an order that the property should be partitioned and his share given to him with mesne profits. He established his claim in the Appeal Court and obtained a decree. The defendants then applied to obtain leave to appeal to the Privy Council against that decree, and the argument on their behalf was that the decree directed a partition of the whole property which was valued at over Rs. 12,000 and, therefore, the

(1) 6 Bom. L. R. 403.

subject-matter in dispute exceeded the prescribed value, although the plaintiff's share in that was less than Rs. 10,000. In dealing with this argument the learned Chief Justice laid down the proposition which I have just referred to. He said: "The argument has been that inasmuch as the whole property is valued at Rs. 12,000, there is a compliance with the terms of the section though the loss to the defendant by reason of the decree is limited to one-third of that property and profits. If we were to give effect to the contentions urged before us, it would follow that if the sole subject matter in dispute were an easement of trifling value, but affecting property worth Rs. 10,000 or upwards, then a right to appeal to His Majesty in Council under the Civil Procedure Code would exist. It appears to me that this would be giving to the words of the section an operation that could not have been intended and the answer to the argument, in my opinion, is that while the detriment to the applicant under the decree must be estimated at less than Rs. 10,000, it has not been suggested that there is any other property outside the subject-matter in dispute which can be affected by our decision, so that the decree does not involve any claim or question to or respecting property of the required amount." It seems to me, agreeing as I do with that decision, that the principle there referred to applies with equal force to the present case. It is true that there is a dispute here as to property valued at more than Rs. 10,000 but what one really has to look to in all these cases, in my opinion, is what is the detriment to the person seeking to appeal to the Privy Council and whatever may be the value of the property in respect to which the claim is brought, if in fact the total amount of the subject-matter of the suit so far as the appellant's interest is concerned is under Rs. 10,000, then it seems to me that it does not come within the terms of the section. In the present case I think that the appellant has failed to shew that the subject-matter of the suit or of the dispute in appeal is of the value of Rs. 10,000 or upwards and this application must be dismissed with costs. Hearing fee five gold *mohurs*.

COUTTS, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 60 OF 1918.

February 12, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Sri GAJAPATI NARASIMHA DEO GARU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Sri GAJAPATI KRISHNACHENDRA DEO GARU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 6, 7, 8, 15 (2), Sch I, Art. 127—Joint property, exclusion from, what constitutes—Denial of co-parcenary rights, effect of—Applicability of Art. 127 to minors—Guardian, knowledge of, whether binds minor—Extension of time by reason of disability of minority, limits of, doctrine of—Notice, statutory requirement of, effect of, on period of minority.

In order that lapse of time may deprive a co-parcener of his rights in the joint family property by the operation of Article 127 of Schedule I to the Limitation Act it has to be established that he has been excluded from the enjoyment of the property to his own knowledge If exclusion for twelve years to the knowledge of the excluded co-parcener is established, his rights will be barred but not otherwise The mere fact that a co parcener has not enjoyed any portion of the family property for 12 years or more cannot deprive him of his rights. Possession of one co-parcener is deemed in law to be possession on behalf of all co-parceners, although other co-parceners may take no part in the management and may not even enjoy any of the income of the property. What amounts to exclusion in a given case must be determined in the light of its peculiar facts [p 730, col. 1.]

If a person is allowed maintenance and permitted to live in the family house, not as a co-parcener but as a mere dependant, while his claim as co-parcener is distinctly denied, the enjoyment of such residence or maintenance is not sufficient to prevent time running against his claim [p 730, col. 2: p 731, col. 1.]

Maharajulungaru v. *Rajah Row Puntula*, 5 M. H. C. R. 31 and *Krishnabai* v *Khangowda*, 18 B. 197: 9 Ind. Dec. (N. s.) 639, distinguished.

Article 127 of Schedule I to the Limitation Act applies equally to minors as to adults [p. 731, col. 2.]

The effect of sections 6, 7 and 8 of the Limitation Act is that time runs against a minor just as against a person *sui juris* but in the case of a minor, he will have three years more after the cessation of the disability if the period of time allowed for the suit or application expired before he attained majority. [p. 731, col. 1.]

The knowledge of the guardian must be imputed to the minor within the meaning of Article 127. The Article contemplates that in the case of minors, the knowledge of the guardian is quite sufficient. [p 731, col. 2]

Section 15, sub-section 2, of the Limitation Act has nothing to do with the extension of time allowed to persons under disability under sections 6 and 8 of

the Act. The period of limitation is calculated according to the Article applicable to a particular case, and, therefore, the period of notice required is to be added to the time allowed by the Article applicable to such a case What sections 6 and 8 allow to a minor or a person under disability is 3 years and no more from the cessation of the disability and the 3 years' extension cannot be made into 3 years and 2 months by reason of section 15, sub-section 2 of the Act. [p. 732, col. 1.]

Per *Spencer, J.*—The concession which section 6 of the Limitation Act allows to minors is that they may sue within the same period after the disability has ceased as would be allowed by the appropriate Article of the Schedule to the Act. This concession is, however, limited by section 8 to a maximum of three years from attainment of majority. Where the 2nd column of the Schedule provides for a longer period of limitation than three years, the disability of minority cannot have the effect of extending the period which is running during the minority of a plaintiff to more than three years. This is the effect of section 8, read with section 6. [p. 733, col. 2.]

Faki Abas v. *Faki Nurudin*, 16 B. 191; 8 Ind. Dec. (N. S.) 605, not approved.

Appeal against the decree of the District Court, Ganjam at Berhampore, in Original Suit No. 12 of 1917.

FACTS.—Suit for partition. The parties are related as follows:

GAJAPATHY VASUDEVA DEO, DIED 1898.

1st wife (called Pattamma Devi).	2nd wife (Koolamma Devi).
1st defendant, became major on 29.9.1916, (21 years).	
1st plaintiff, became major, November 1909 (18 years).	2nd plaintiff, became major, August 1913 (18 years).

The suit was filed on 27th September 1916.

Gajapathi Vasudeva Deo died in 1898 and the estate was taken over by the Court of Wards on the 1st defendant's behalf as heir to the deceased. Thereupon the mother of plaintiffs, whom the defendant contends to be only a concubine, applied (in pursuance of a Will of the deceased leaving $\frac{3}{4}$ths of his estate to the 1st defendant and his mother and $\frac{1}{4}$th to the plaintiffs and their mother) that separate accounts should be kept. The Court of Wards, holding the Will to be invalid (as being in respect of joint family property) after consultation with the local Government Pleader, dismissed the application saying that the Koolamma Devi was only entitled to maintenance. The lower Court, holding that plaintiffs were excluded from this date, held that the suit was barred under Article 127 of the Limitation Act. Plaintiffs appealed.

Mr. *K. V. L. Narasimham*, for the Plaintiffs-Appellants — Our cause of action arose only in 1916, when the Court notified that the whole estate was to be handed over to the 1st defendant under section 55 of the Court of Wards Act. There was no exclusion till then. My reasons are:—

(1) Knowledge of exclusion is the starting point; so exclusion cannot begin at least until the period of minority is over. See *Krishnabai* v. *Khangowda* (1) and *Faki Abas* v. *Faki Nurudin* (2). Both are cases under clause (13), section 1 of the Limitation Act of 1859. Such cases have been held to govern the application of Article 127 of the present Act. See also Second Appeal No. 2402 of 1912, where the intervening period in question was more than 12 years. Articles 32, 48, 90, 91, 92, 95, 96, 113, 114, 115, 127, 164 of the Limitation Act use the word 'knowledge'. 'Plaintiff' is defined in the interpretation clause as including the person from whom he derives his right to sue. A guardian is not such a person. See *Maharajulungaru* v. *Rajah Row Puntulu* (3), where an order of the Court of Wards similar to the one in the present case was held not to have the effect of exclusion as against the minors.

(2). The law is that where a person is not in possession and is not receiving any benefit from the joint family property, there is exclusion. But there is no exclusion if the person lives and is maintained out of the joint family property. *Jaganatha* v. *Ramabhadra* (4). See also *Kumarappa Chettiar* v. *Saminatha Chettiar* (5), which cites a passage from *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyana Rangappa*

(1) 18 B. 197; 9 Ind. Dec. (N. S.) 639.
(2) 16 B. 191; 8 Ind. Dec. (N. S.) 605.
(3) 5 M. H. C. R. 31.
(4) 11 M. 389 at p. 392; 4 Ind. Dec. (N. S.) 265.
(5) 52 Ind. Cas. 470; 36 M. L. J. 612; 42 M. 431; (1919) M. W. N. 328.

Kalakka Thola Udayar (6) with approval. In the present case the plaintiffs are living in the family fort and are being maintained from the family income on an equally liberal scale as the first defendant.

[ABDUR RAHIM, J.—But the Court of Wards assumed management expressly on behalf of the 1st defendant alone as heir and owner.]

But we are receiving maintenance as shown by the order of the Court of Wards and the receipt of maintenance means no exclusion. That is the case law. See *Jagannatha* v. *Ramabhadra* (4) and others cases referred to.

[ABDUR RAHIM, J.—That is only if you receive maintenance being an heir. But if you are only a maintenance-holder?]

That question, raised in a specific issue, has not been gone into. The only question argued and tried was that of limitation. There being no time bar the case must go back for trial on the other issues.

Mr. *V. Ramesam*, for Defendant-Respondent No. 1.—Conceding that mere non participation will not be exclusion, the law is that if it is accompanied by a notoriously adverse denial of title, there is exclusion. The report in *Jagannatha* v. *Ramabhadra* (4) shows that there was no such denial by the Court of Wards which we have in the present case. Further mere maintenance and living on in the family house have been held to be consistent with exclusion. See *Raghunath Bali* v. *Maharaj Bali* (7). For mere living is not possession in law.

[SPENCER, J.—But the denial was by the Court of Wards to the plaintiffs' mother. How can it affect the minors?]

The denial was by my agent to their guardian. No doubt the presumption is that there is no adverse possession by one co-owner against another. But it is reversed if there is a notorious denial of title. See *Ittapan* v. *Manavikrama* (8), and *Ujalbi Bibi* v. *Umakanta Karmokar* (9).

(6) 24 M. 562 at p. 582; 11 M. L. J. 191.

(7) 11 C. 777 (P. C.); 12 I. A. 112; 4 Sar. P. C. J. 642; Rafique & Jackson's P. C. No. 90; 5 Ind. Dec. (N. S.) 1277.

(8) 21 M. 153 at p. 159; 8 M. L. J. 92; 7 Ind. Dec. (N. S.) 465.

(9) 31 C. 970 at p. 973; 9 C. W. N. 32.

And the guardian and the ward are one legal person in law. The guardian's knowledge is the ward's knowledge. See Mitra's Law of Limitation, page 143. The law is also the same as regards agents, the analogy whereof can be applied to the present case. *Rampal Singh* v. *Balbhaddar Singh* (10), *Rohini Kumar Panja* v. *Raghu Nath Das* (11). See also *Soundararajan* v. *Saravana Pillai* (12).

JUDGMENT.

ABDUR RAHIM, J.—The suit of the appellants has been dismissed on the ground of limitation, none of the other issues raised in the case having been tried at all. I may say at the outset that though in the result, I agree in the conclusion of the learned District Judge, I do not think that it was a prudent course on his part to have confined himself to the issue of limitation.

The suit was to enforce partition of a partible Zemindari in the district of Ganjam. The two plaintiffs claim to be the legitimate sons of the last proprietor Vasudeva Deo, and their case is that they are entitled to one-third share each in the estate while the 1st defendant, the son of Vasudeva Deo by another wife, is entitled to the remaining one third. The plaintiffs further allege that Vasudeva Deo left a Will under which the plaintiffs were entitled to one-fourth share, their claim, therefore, is in the alternative to one fourth share of the estate in case they fail to prove that they are the legitimate sons of Vasudeva Deo. Vasudeva Deo died in January 1898 and the Court of Wards took charge of the estate and managed it till the 1st defendant attained majority sometime in 1916 and then made over the estate to him. The mother of the plaintiffs, who claimed to be the married wife of the deceased proprietor, lived till April 1911. Immediately after his death, she tried her best to establish the status as a widow and that of her sons as the legitimate sons of Vasudeva Deo. Both the two plaintiffs and the 1st defendant were infants at the time of the proprietor's death, the 1st defendant being the youngest of them.

(10) 25 A. 1; 4 Bom. L. R. 832; 6 C. W. N. 849; 29 I. A. 203; 8 Sar. P. C. J. 340 (P. C.).

(11) 4 C. L. J. 472

(12) 34 Ind. Cas. 794; 30 M. L. J. 592.

NARASIMHA DEO *v.* KRISHNA CHENDRA DEO.

The 1st plaintiff attained majority, that is to say, the age of eighteen in November 1909. The 2nd plaintiff attained the age of eighteen in August 1913. The suit was filed on the 27th September 1916, that is, nearly seven years after the 1st plaintiff became eighteen years old and three years and a little more than a month after the 2nd plaintiff became eighteen years of age.

The main point on which the learned District Judge has found that the suit is barred is that, as far back as 1898 when the mother of the plaintiffs was acting as their guardian, their title to any share in the estate as heirs or under the alleged Will of Vasudeva Deo was denied and the Court of Wards obtained possession of the estate on behalf of the 1st defendant and excluded the plaintiffs from possession. Admittedly, if these facts are correctly found, the suit would be barred under Article 127 of the Limitation Act, unless the proposition of law contended for on behalf of the appellants can be established that Article 127 of the Limitation Act has no application to the case of minors because no knowledge of exclusion can be imputed to them.

There is really no dispute about what happened. It is quite sufficient to go through the different letters and petitions written to the Court of Wards by the mother of the plaintiffs and the replies and the orders thereon to form a conclusion as to whether there was or not exclusion of the plaintiffs within the meaning of Article 127 of the Limitation Act. I may say at once that it can hardly be disputed upon the facts that the Court of Wards took possession of the estate purporting to act solely on behalf of the 1st defendant and not on behalf of any persons who may be found entitled to the estate. It is unnecessary to decide whether under the Statute the Court of Wards can take charge of an estate in that way, that is, on behalf of any one who may be found entitled to it. In this case, there can be no doubt whatever that it treated the 1st defendant alone as its ward and managed the estate on his behalf. I may mention, however, that the Court of Wards Act in its various sections contemplates that when it takes charge of an estate, it is to act on behalf of a particular ward or wards who may be suffering from disability, such as minority or otherwise, specified in the Act. I need only mention some of the sections which make this clear.—Sections 9, 10, 17, 19, 20, 21, 22, 23, 24, 34 and 56. The mother of the plaintiffs presented an *arzi*, Exhibit VII, dated 20th April 1898, to the Collector. There she calls herself as the junior wife or widow of the late Vasudeva Deo, Zemindar, and asserts that her status is the same as that of the senior widow, the mother of the 1st defendant, and that her sons also have the same status as the 1st defendant. She also propounds the alleged Will under which her sons are to get one-fourth share of the estate, and then prays that she and her sons along with the senior Mahadevi's sons be kept under the protection of, and supported by, the Court of Wards and separate accounts maintained in respect of their shares. That was quite a distinct claim put forward on behalf of the plaintiffs both as sons of Vasudeva Deo and under the alleged Will. A report was in due course called for and submitted by the Collector and upon that report, the Court of Wards passed a resolution on the 6th July 1898 to this effect:—that the alienation made by the late proprietor is invalid and that the "Poovvula Mahadevi (that is how the mother of the plaintiffs was styled) is entitled only to maintenance." By this, it is quite clear, it was meant to include not merely the mother of the plaintiffs personally but also as guardian of her two sons. Thereupon the Collector sent a reply to that effect (Exhibit XLVIII) on 16th July 1898 to the petitioner (mother of the plaintiffs), and we have the endorsement that the reply was in fact forwarded to the petitioner by the Deputy Tahsildar on the 7th August 1898. I mention this because the Counsel for the appellants raised a question as to whether the order of the Court of Wards was at all communicated to his client. There is no doubt that it must have been communicated in due course as it purports to have been. Otherwise the mother of the plaintiffs would not have sat quiet but insisted upon an answer. In fact the further correspondence shows that she fully knew that her claim had been distinctly rejected by the

Court of Wards. Then we come to Exhibit XL, dated 23rd August 1900. That was a petition submitted by the mother of the plaintiffs protesting against the registration of a certain village belonging to the Zemindari in the name of the 1st defendant's mother's father, who apparently claimed it under a grant. There again in the last paragraph she asserted that she and her minor sons were entitled to a share in the estate, and, therefore, had an interest in the village in question as well. The order passed thereon was that the petitioner was not recognised as the widow of the late proprietor and the petition was, therefore, rejected. She was not satisfied with that and went on pressing her claim as the junior widow of the Zemindar. In 1903 we find that she submitted a petition Exhibit XLI, claiming that she was the junior widow or Sanna Mahadevi and that she must be treated as such. There she also cited some correspondence in which she was so styled. But on enquiry it was ascertained that she was so designated in some of the letters through a mistake of the clerk and that she was only Poovvula Mahadevi, that is to say, a woman occupying the status of a concubine and not a wife at all, and the Collector also pointed out that the amount of the allowance given to her and to her sons was on the basis not of a widow at all. Then she presented a petition to the Court of Wards against the order of the Collector. That was in May 1904 Exhibit XXIX. The Court of Wards upheld the decision of the Collector and the order was communicated to her in due course. We also find that the receipts for maintenance, etc., which she had given and in which she had styled herself as Sanna Mahadevi or junior widow, were returned to her for correction and she was asked to sign them as Poovvula Mahadevi. This was in August 1904. On her death, the plaintiffs' maintenance allowance was reduced from Rs. 55 to Rs. 35. Thereupon the 1st plaintiff who attained majority in 1909 filed a petition before the Court of Wards in January 1910—Exhibit IX—in which he prayed for maintenance to be paid at the original rate without any reduction, and there he describes both himself and his brother as 'dependants on the estate,' again as 'maintained by the estate,' in another place as being 'protected by the estate' and then as 'attached to the family of the deceased proprietor.' That shows how the plaintiffs themselves understood the attitude of the Court of Wards towards them. I may also mention another petition Exhibit VI, dated 26th January 1911, in which leave was asked for by the 1st plaintiff to go to Berhampore in order to obtain a certificate from the Surgeon to the effect that the 1st plaintiff had attained majority so that he might have his rights to the estate established.

Upon these facts the conclusion seems to be irresistible that the Court of Wards purported to act and did act solely and entirely on behalf of the 1st defendant and treated the 1st defendant as the sole heir to the estate of the deceased proprietor, and that since 1893 it refused distinctly and repeatedly to recognise the plaintiffs' mother as a lawfully wedded wife of the proprietor and her sons as his legitimate children and it also held that the claim of the plaintiffs to a share in the estate under the Will was invalid. The decision of the Court of Wards was communicated in due course to the plaintiffs' mother who, as their natural guardian, was pressing their claims to be recognized as heirs or as legatees by the Court of Wards. The plaintiffs' mother was allowed maintenance for herself and her two children and they were allowed to live within the precincts of the fort, not with the 1st defendant and his mother but in some other part of the palace. It appears that the Zemindar had a number of concubines and they were all allowed maintenance though smaller in amount. The plaintiffs' mother was allowed somewhat more by way of maintenance for herself and her children. The reason why she was allowed more is not quite clearly stated in the correspondence, but as far as it can be gathered, it was because she belonged to a somewhat higher caste than the other concubines or may be because she had children by the late Zemindar. But the Court of Wards distinctly refused to recognize either that the plaintiffs' mother was the wife of the late Zemindar and her sons were his legitimate sons, or that the plaintiffs were entitled to any share whatever in the estate. Under these circumstances, the possession of the Court

of Wards must be treated as possession on behalf of the 1st defendant alone, and it seems to me that there is no way of escaping the conclusion that the Court of Wards, acting on behalf of the 1st defendant, excluded the minors from any share in or possession of the estate or any properties belonging to the estate.

We have been referred to a number of rulings on behalf of the appellants, but it does not seem to me, though I shall notice them very briefly, that any of them can help us very much in arriving at a proper conclusion in this case, for the question really depends entirely upon the appreciation of the evidence. So far as the law bearing on the subject of limitation of suits instituted by a person claiming to be a member of a joint Hindu family is concerned, there can be no doubt whatever, for it is well settled. The mere fact that a co-parcener has not enjoyed any portion of the family property for twelve years or more, cannot deprive him of his rights. Possession of one co-parcener is deemed in law to be possession on behalf of all co-parceners, although other co-parceners may take no part in the management and may not even enjoy any of the income of the property. In order that lapse of time may deprive a co parcener of his rights in the joint family property, it has to be established that he has been excluded from enjoyment of the property to his own knowledge. If exclusion for twelve years to the knowledge of the excluded co-parcener is established, his rights will be barred but not otherwise. What will amount to exclusion in a given case will have to be determined in the light of its peculiar facts. In some cases, receipt of maintenance by a junior member of a Zemindar's family may be good evidence to negative the allegation of enjoyment of the Zemindari or its properties as in *Raghunath Bali* v. *Maharaj Bali* (7). In some cases on the other hand receipt of maintenance may be evidence of recognition of a person's claim as a co-parcener in a joint Hindu family. On behalf of the appellants, much reliance was placed on the ruling in *Maharaju Jungaru* v. *Rajah Row Puntulu* (3). But there the learned Judges found, having regard to the attitude taken up by the Court of Wards in that case, that it did not profess to decide as to which of the claimants was entitled to the Zemindari and, therefore, it would not be said that it purported to exclude the plaintiff in that suit, if he was the rightful heir. This is what they say at page 43:—"The most that, it seems to us, the evidence can fairly be considered as proving is that the funds have been held by the Court of Wards since the late Zemindar's death in trust for the person or persons entitled to them." In this case, nothing can be clearer than that the Court of Wards definitely recognized from the very beginning the 1st defendant as the heir and rejected the claim of the plaintiffs to any share in the estate either as heirs of the Zemindar or as his legatees. It was also contended on behalf of the appellants that the decision of the Bombay High Court reported as *Krishnabai* v. *Khangowda* (1) shows that such action of the Court of Wards as has been proved in this case would not amount to an ouster. In the first place, there is really not much similarity between the facts of the two cases and the Bombay case was decided under the Limitation Act—Act IX of 1871—where the starting point of limitation was from demand and refusal, and it was found that no demand or refusal had been proved. It was pointed out in that case that the brother who did not receive a share in the partition effected by the other two brothers had lived as a member of the family of one of the brothers till he died leaving the plaintiff in that suit, his minor son, as his heir and that fact was relied on by the learned Judges as showing that he was not excluded from the enjoyment of the joint family property. Whether that conclusion was justified by the facts of that case or not, it is not for us to pronounce any opinion upon. Suffice it to say that in this case the exclusion of the plaintiffs is, to my mind, absolutely clear on the evidence. They were allowed to live within the precincts of the palace as dependants, as sons of a concubine of the Zemindar. I do not know of any proposition of law to the effect that, if a person is allowed maintenance and permitted to live in the family house not as a co-parcener but as a mere dependant,

while his claim as co-parcener is distinctly denied, the enjoyment of such maintenance or residence in the family house would suffice to prevent time running against his claim.

I come to the next contention that the plaintiffs being minors till 1909, there could be no exclusion to their knowledge at least until that date, that is to say, Article 127 of the Limitation Act, we are asked to hold, has no application to the case of minors. This seems to me a very sweeping proposition and not warranted by the provisions of the Limitation Act. The scheme of the Limitation Act is that the several articles apply to all suits and applications mentioned therein and that in the case of persons under disability, a certain extension of time is allowed to them to enable them to file suits after the disability has ceased. Section 6 says that "where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor,..... he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the First Schedule." Section 7 deals with the case of disability of one of several plaintiffs. Section 8 says, "nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption (with which we are not concerned) or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made." The effect is that time runs against a minor just as against a person *sui juris*, but in the case of a minor, he will have three years more after the cessation of a disability if the period of time allowed for the suit or application expired before he attained majority. In some cases, it may be that the time would not, as provided in the articles, expire before a minor attains majority. Then he will have that time within which to institute the suit, that is, in no case he shall have less than the time allowed by the articles, but in certain cases, he will have three years more after the cessation of the disability. The argument on behalf of the appellants is that a minor cannot be imputed with any knowledge. It is unnecessary for me in this case to express any opinion on the question "whether the knowledge can be imputed to a minor direct where there is no guardian to act for him, and if so, under what circumstances." But I have no doubt that where there is a guardian such as here, knowledge of the guardian must be imputed to the minor. Article 127 to my mind contemplates that in the case of minors, the knowledge of the guardian is quite sufficient. A minor is allowed by the law to act through his guardian and as expressed by a learned Jurist, the guardian and the ward are identified and form one complete person. For purposes of litigation the act of a guardian, is binding on the minor. For instance, a decision against a minor represented by a guardian, unless it is impeachable on the ground of fraud or on other similar grounds operates as *res judicata*. Then there are a number of other articles of the Limitation Act under which time runs from the date of the knowledge of the plaintiff. I should like to have some authority for saying that all these articles have no application to the case of a minor. I may especialy mention one article—Article 164, which requires that an application by a defendant to set aside an *ex parte* decree must be made within thirty days of the date of the decree. If the general contention of the appellants were well-founded, an *ex parte* decree against a minor can be set aside years after it had been passed, although the Legislature in laying down thirty days as the limit of time for such an application intended that a matter of that sort should be decided as soon after the decree had been passed as possible. In my opinion Article 127 applies.

I am also of opinion that section 7 of the Limitation Act applies to this case. The 1st plaintiff attained majority in 1909, and then, as the eldest member of the family, supposing he was a member of a joint Hindu family as claimed, he could give a discharge on behalf of himself and his younger brother, the 2nd plaintiff. I do not think that the application of section 7 is

excluded because in this suit the plaintiffs have asked for partition. They had been excluded from their family property, and it was open to the 1st plaintiff to have instituted a suit to recover the property for himself and his younger brother, the 2nd plaintiff. A Full Bench ruling of this Court has held that section 7 is applicable to such cases, and, therefore, the non failure of the 1st plaintiff to sue within three years after attaining majority would be sufficient in itself to bar the suit [*Doraisami Sirumadan* v. *Nondisami Saluvan* (13) and *Soundararajan* v. *Saravana Pillai* (12)].

The 2nd plaintiff attained eighteen years of age in August 1913 and even apart from section 7 he would be barred unless under section 15, sub section 2 of the Limitation Act, read with sections 6 and 8, he would have three years and two months for filing the suit after attaining majority, in which case his suit would be in time The Court of Wards Act, section 49, requires that two months' notice should be given before the institution of the suit and what section 15, sub-section 2, says is:—"In computing the period of limitation prescribed for any suit of which notice has been given in accordance with any enactment for the time being in force, the period of such notice shall be excluded." Now the period of limitation is calculated according to the article applicable to a particular case, and, therefore, the period of notice required is to be added to the time allowed by the article applicable to such a case. Section 15, sub-section 2, has nothing to do with the extension of time allowed to persons under disability under sections 6 and 8. What those sections allow to the minor or person under disability is three years and no more from the cessation of the disability, and I do not see how three years is to be made into three years and two months by reason of section 15, sub-section 2.

This really disposes of the appeal. The learned Counsel for the appellants raised a question as to the proper amount of Court-fees payable. The plaintiffs have been made to pay both in the lower Court as well as in this Court Court-fees calculated on the market value of the properties claimed. He says that the plaintiffs are entitled to value the subject matter of the dispute as they like, the contention being that the suit being one for partition, section 7 (*iv*) (*b*) applies. But I do not wish to express any opinion as to what is the proper fee leviable in this case, because the decision as to what fee is payable is final. Chapter II of the Court Fees Act provides for fees in the High Court, and section 5 which is in that chapter says: "When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter and any suitor or attorney as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the Taxing Officer whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf" There has been no such reference in this case. Under section 5, the order of the Registrar, so far as the fee paid on the memorandum of appeal is concerned, would be final, unless, as argued, section 5 only deals with cases on the original side of this Court. That chapter, however, is not confined to fees payable on the original side but also provides for fees payable on the appellate side—see section 4 So far as section 5 is not applicable and section 7 applies, that is, so far as the fee payable on the plaint is concerned, according to section 12, the decision of the Court will be final and we have not been referred to any authority which lays down that such an order is appealable.

The result is that the appeal must be dismissed with costs

The memorandum of objections is not pressed and is dismissed with costs.

SPENCER, J.—This suit was brought to recover possession of shares which the plaintiffs claim in an estate which they allege to be their ancestral family property. Although it would have been more satisfactory for all concerned if the issues which relate to the question of plaintiffs' status as legitimate sons of the late Vasudeva Deo and their title as legatees under the Will had been decided on their merits, I think that this

(13) 21 Ind. Cas. 410; 38 M. 118; 25 M. L J. 405; 14 M. L. T. 401.

appeal must be dismissed upon the short point that the plaintiffs, having a right of suit on attaining majority to obtain a declaration as to their title to their ancestral property, are limited by section 8 of the Indian Limitation Act to a period of three years from that date to institute their suit. In this case, 1st plaintiff, having been born in November 1891, became eighteen in November 1909 and the 2nd plaintiff, having been born in August 1895, became eighteen in August 1913. The plaint was filed on 27th September 1916 after three years had expired from the cessation of the disability of minority of both plaintiffs. The period of three years cannot be extended by two months under section 15, as that section refers only to the time for computing the period of limitation under the appropriate article of the Schedule. Neither can the Indian Majority Act be availed of for extending the age of minority of these plaintiffs to twenty-one, because the provision under section 3 of that Act applies only to cases where the superintendence of the minor's property has been assumed by the Court of Wards, and because in this case the Court of Wards never assumed the superintendence of the estate of these minors, for, as it appears from the evidence, the Court of Wards and the Collector all along consistently repudiated plaintiffs' claim to anything more than such an allowance as might be granted out of commiseration and as a matter of grace to children born of an irregular connection resembling concubinage rather than wedlock. On this point, the lower Court's decision is in my opinion unassailable. In the plaint, the cause of action is said to have arisen when the Court of Wards issued a notification that all the suit properties and all records appertaining thereto would be handed over to the 1st defendant alone, that is, to the legitimate heir of Vasudeva Dao, on the 29th September 1916 when he attained majority and ignoring the plaintiffs' rights in the suit properties. That notification has not been exhibited in the suit and we thus are kept in the dark as to its contents. But it is clear that if the suit is based on a denial of plaintiffs' title to a share in the Nandigam estate, the first denial by the 2nd defendant was much earlier than May 1916, which is given as the date of plaintiffs' coming to know of the said notification. As my learned brother has dealt in some detail with the evidence, I will only refer to Exhibit XLVIII, dated 16th July 1898, and the proceedings part of Exhibit A, dated 6th July 1898, Exhibit V-A of the same date, and Exhibit IX (*a*), dated 8th August 1911, in which the Collector and the Court of Wards declare that plaintiffs' mother the "Poovvula Mahadevi" or flower consort and her children were entitled to maintenance only. After this, it is clearly impossible to treat the Court of Wards' possession as being possession on behalf of plaintiffs or as possession of which plaintiffs were unaware at the time when the Court of Wards assumed management in 1898. (*Vide* Exhibit I and its enclosures.) For the application of Article 127 of the Limitation Act, plaintiffs have not given any other date than May 1916 when they came to know of their exclusion; but that date cannot be accepted for the reasons I have given, and it is clear that, though minors, they must have come to know of their exclusion through their mother, long before that date. If plaintiffs' mother who died on 7th April 1911 (see Exhibit O), as guardian of plaintiffs had just before her death filed a suit to enforce their right to share in the family property, the suit would undoubtedly have failed on account of her knowledge in 1898 of the exclusion of herself and her children. The concession which section 6 of the Limitation Act allows to minors is that they may sue within the same period after the disability has ceased as would be allowed by the appropriate article of the Schedule to the Act. This concession is, however, limited by section 8 to a maximum of three years from attainment of majority. Where the 2nd column of the Schedule provides for a longer period of limitation than three years, the disability of minority cannot have the effect of extending the period which is running during the minority of a plaintiff to more than three years. This is the effect of section 8 read with section 6. Without any greater authority than a stray observation made by Sargent, C. J., in the course of the arguments in *Faki Abas* v. *Faki Nurudin* (2), that minors could not be excluded to their knowledge, I am not disposed to accept Mr. Narasimham's sweeping contention that

a minor is by reason of his minority incapable of taking notice or of becoming aware of such a fact as his exclusion from family property.

On the other question raised at the hearing, the decision of the lower Court on the question of valuation for purposes of Court fees is, in my opinion, final under section 12 of the Court Fees Act.

The memorandum of objections which relates to Pleader's fee is not pressed.

The appeal and the memorandum of objections must be dismissed with costs.

M. C. P.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 484 OF 1918

July 11, 1919.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Das.

HANUMAT MAHTON AND OTHERS — DEFENDANTS — APPELLANTS

versus

SONADHARI SINGH AND OTHERS — PLAINTIFFS AND CHINTAMAN MAHTON AND ANOTHER — DEFENDANTS — RESPONDENTS.

Hindu Law—Joint family—Debt incurred to defend member against criminal charge, whether binding on joint family property.

The stigma of a criminal charge against a member of a joint family being regarded among the Hindus as a disgrace to all the members of the family, any expense incurred to protect the family from such a threatened disgrace is necessarily in the interests of all the members of the family. Where, therefore, the *karta* of a joint family raises money to defray the expenses of defending a criminal case against him, the family property is liable for the debt so incurred. [p. 735, col. 1.]

Appeal from a decision of the District Judge, Patna.

Mr. *Bimola Charan Sinha*, for the Appellants.

Mr. *Achalendra Nath Das*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This appeal arises out of a suit instituted on 3rd January 1917 to enforce a mortgage-bond, dated the 5th January 1904, executed by defendant No. 1.

Originally defendant No. 1, the executant of the bond, and his brother defendant No. 2 only were impleaded, but on the objection of the defendants, their sons also were added as defendants on the 5th March 1917. The defendant No. 2 and his sons were, however, subsequently on the application of the plaintiff deleted from the category of defendants. The suit, therefore, proceeded to trial against defendant No. 1 and his sons, who are appellants here.

The first Court held that the mortgage-bond in question is a genuine document and was duly executed for valuable consideration. It, however, dismissed the suit on the grounds (1) that certain necessary defendants were not impleaded in time, and (2) that the sons were not benefited by the loan and hence they or the joint family property mortgaged in the bond could not be made liable for the debt.

On appeal the learned District Judge agreed with the Munsif that the suit as against the appellants was barred by time, but disagreeing with the Munsif on the second point gave a mortgage decree against defendant No. 1 alone, with the usual direction that the property mortgaged in this bond was liable to be sold for the satisfaction of the decree. This property is said to be the ancestral property of the family in which the appellants as members of the joint family are interested. They have, therefore, come to this Court in second appeal and contended that the order in the decree of the lower Appellate Court directing the sale of the family property is illegal and should be set aside. There is no substance at all in their contention. The ground upon which the mortgage decree is assailed is said to be that there was no family necessity for which the mortgage debt was incurred and hence the family property could not be mortgaged by defendant No. 1 and be liable for the debt. The bond in question recites that the money was taken to meet the expenses of litigation. The finding of fact of the Court below that the money was borrowed to meet the expenses of a cattle trespass case brought against the defendant No. 1, the *karta* of the family, that the family was benefited by this loan, and the family property was liable disposes of this appeal.

It is, however, contended that the purpose set forth above, namely, to defray the expenses of a criminal case against the defendant No. 1, was not a legitimate purpose for which

the family property could be liable and that the loan in question did not in fact benefit the other members of the family, notably the appellants in this case.

The point seems to have been settled by the decisions of several High Courts and particularly of this Court. In the case of *Beni Ram* v. *Man Singh* (1) it was held that the necessity of raising money to pay for the defence of the head member of a joint family committed to the Court of Session on serious criminal charges of forgery and fabrication of documents under sections 467 and 471, Indian Penal Code, was valid and legal, such as would support a mortgage of the family property executed by the father and one of the sons as security for the debt incurred. It was there pointed out that according to the Mitakshara Law one member of a joint family may effect a gift, mortgage or sale of the family property in time of dis ress and for family purposes. The stigma of a criminal charge against a member of a joint family is regarded among the Hindus as a disgrace to all the members of the family and any expenses incurred to protect the family from such a threatened disgrace would necessarily be in the interest of all the members of the family.

The principle was reiterated in the case of *Ramalingam Pillai* v. *Muthayyan* (2). The early authorities on the subject have all been cited in the aforesaid two cases. No doubt in the case of *Nathu Rai* v. *Dindayal Rai* (3), decided by a Division Bench of this Court on the 4th January 1917, it was held that the manager of a Hindu joint family is not entitled to spend the family funds in his own defence to a criminal charge, nor is he entitled to hypothecate the family property in order to raise money to meet the expenses of such a defence, except upon the ground of consent of the members of the joint family or upon the ground that from the circumstances it could be inferred that the other members of the family had consented. In that case no family property was, however, hypothecated in the bond, nor was there anything in the bond to shew that the debt was incurred by the manager of the family in his representative capacity. Upon the facts of that case the manager of the family intended that the debt should be his own personal debt. If the decision, however, intended to lay a general proposition that in no case the *karta* of a joint Mitakshara family can bind the other members in respect of debts incurred by him in defending himself against a criminal charge, its authority would be liable to objection. It is obvious, however, that there was no such intention of the learned Judges in that case to lay down such a broad proposition, for the judgment of the Court was delivered by Mr. Justice Chapman, who only a few months later on the 22nd of March 1917 held in the case of *Chuman Chaudhury* v. *Musammat Ram Sunder Chudhurain* (4), which is on all fours with the present case, that the son would be bound to pay the debts incurred by his father in defending himself against a criminal charge, especially when the offence charged did not involve any moral turpitude.

This last case was, therefore, rightly followed by the Court below. The contention of the learned Vakil is, therefore, overruled and the appeal is dismissed with costs.

DAS, J.—I agree.

Appeal dismissed.

(1) 11 Ind. Cas. 663; 34 A. 4; 8 A. L. J. 1015.
(2) 24 Ind. Cas. 356; 25 M. L. J. 528; 16 M. L. T. 76; 1 L. W. 544.
(3) 39 Ind. Cas. 665; 2 P. L. J. 166.
(4) 39 Ind. Cas. 861.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1053 OF 1918.
February 11, 1919.

Present:—Mr. Justice Bakewell and Mr. Justice Phillips.

MELANCHERI PARKUM PALLIKKARA KUNIYATI *alias* KUNIYATI GOVINDA VARIYAR *alias* GOVINDA MENOKKI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KIZHAKKE VEETTIL APPU *alias* GOVINDA KURUP AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 1—Res judicata—*Suit to redeem as karnavan of tarwad, dismissal of*—*Subsequent suit to redeem as successor of tarwad, maintainability of*—*Joinder of causes of action in alternative when allowed.*

LAXMAN *v.* GANPAT SURYABHAN.

A plaintiff is not entitled to set up a false case to the relief which he claims and when he has failed, to plead a fresh case If he be in doubt as to which case is true, he should set out the two cases in the alternative, each case being one which ought to be made a ground of attack, so as to afford ground for a final decision upon the subject in dispute.

Where the plaintiff filed a suit for redemption as *karnavan* of a *tarwad*, and on its dismissal for want of proof of the title set up, brought the present suit for the same relief as successor of the *tarwad* which had become extinct:

Held, that the suit was barred as *res judicata*

Masilamania Pillai v *Thiruvengadam Pillai*, 31 M. 385 and *Gariya Rangaswamy Patruda* v *Majji Appalaswamy*, 34 Ind. Cas. 456; (1916) 1 M. W. N. 286, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 523 of 1916, preferred against the decree of the Court of the District Munsif, Quilandy, in Original Suit No. 204 of 1914.

FACTS appear from the judgment.

Mr. *K. Kuttikrishna Menon*, for the Appellants.—The allegations in the two suits are different. In the prior suit the claim was as Karnavan of the Tarwad. In the present case the plaintiffs set up title as successors of the Tarwad. The evidence to substantiate the one is different from that of the other. The doctrine of *res judicata* cannot apply.

Mr. *A. V. K. Krishna Menon*, for the Respondents.—The relief claimed is the same in both suits. Plaintiff ought to have alleged the title now set up in the prior suit and made it a ground of attack. He set up a false case and when that was found against, he now sets up a new case. The suit is barred as *res judicata*.

JUDGMENT.—The question in the former suit was whether the plaintiff was entitled to redeem a mortgage, that is, the matter in issue was whether the rights of the mortgagor had passed to the plaintiff The same matter is in issue in the present suit. It is, however, argued that in the former suit the plaintiff set up a title as Karnavan of the Mundoli Madham Tarwad, but in the present suit the plaintiffs set up a title as successors of that Tarwad, which has become extinct. No doubt the averments of the facts which conferred title upon the plaintiff, and the evidence which would be given by him, differed in the two cases, but the relief claimed is the same.

We think that a plaintiff is not entitled to set up a false case to the relief which he claims, and, when he has failed, to plead a fresh case; if he be in doubt as to which case is true, he should set out the two cases in the alternative; each case is one which ought to be made a ground of attack, so as to afford ground for a final decision upon the subject in dispute. (*Vide* Order II, rule 1).

We think that the case falls within the decisions in *Masilamania Pillai* v. *Thiruvengadam Pillai* (1) and *Gariya Rangaswamy Patrudu* v. *Majji Appalaswamy* (2) and the observations at page 77[illegible] in *Ramaswami Ayyar* v. *Vythinatha Ayyar* (3). The actual decision in the last case does not apply The joinder of the two titles in the former suit would not have caused any embarrassment in the trial. We, therefore, agree with the lower Court that the present suit is barred by *res judicata* and dismiss the second appeal with costs.

M. C. P.

Appeal dismissed.

(1) 31 M. 385.
(2) 34 Ind. Cas. 456; (1916) 1 M W. N. 286.
(3) 26 M. 760; 13 M. L. J. 448.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 166 B OF 19.8.
February 13, 1919.
Present:—Mr. Mittra, A. J. C.

LAXMAN AND OTHERS—DEFENDANTS NOS. 2 TO 4—APPELLANTS
versus
GANPAT SURYABHAN AND OTHERS—PLAINTIFF AND DEFENDANT NO. 1—RESPONDENTS.

Civil Procedure Code Act V of 1908, s. 47, O. XXI, r. 100—Mortgage suit—Paramount title, claim of—Defendant, discharged, whether party to suit Possession suit for—Events subsequent to date of suit, whether can be subject-matter of enquiry in suit or appeal.

To constitute a person a party to a suit within the meaning of section 47 of the Civil Procedure Code, there must be a decree either dismissing the suit or decreeing the claim in favour of or against him, but a defendant, against whom the claim is neither dismissed nor decreed who is discharged

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as not being a proper party to the suit, ceases to be a party to the trial of the suit. [p. 737, col. 2.]

A person, who is discharged from a mortgage suit because he pleads a paramount title, is not a party to the mortgage suit within the meaning of section 47 of the Civil Procedure Code and a separate suit by such a person or his transferee is not barred under that section. [p. 737, col. 2.]

So far as such a person is concerned, he is entitled to object to the delivery of possession of property under Order XXI, rule 100, of the Civil Procedure Code, and if such objection fails, a regular suit lies at his instance within the period fixed by the law of limitation. [p. 737, col. 2.]

Krishnappa Mudaly v. *Periaswamy Mudaly*, 38 Ind. Cas. 297; 40 M. 964; 21 M. L. T. 121; 5 L. W. 369; 32 M. L. J. 532, followed.

A plaintiff's right to possession must be determined with reference to the state of things at the date of the suit. Ordinarily, any subsequent changes which may take place cannot be made the subject-matter of fresh enquiry in an appellate or later stage of the case. [p. 738, col. 1.]

Appeal against the decree of the Additional District Judge, Amraoti, in Civil Appeal No. 221 of 1917, decided on 28th February 1918, arising out of Civil Suit No. 92 of 1917, in the Court of the Additional Munsif, Amraoti, decided on the 21st October 1917.

Mr. *G. V. Deshmukh*, for the Appellants.

Mr. *K. K. Gandhe*, for the Respondents.

JUDGMENT.—The plaintiff-respondent is a lessee from the original defendant No. 1, *Musammat* Rukhma, under a registered lease, dated the 24th September 1914. He sued for possession as also for a declaration that he has a right to have certain entries regarding the Patta made in the Register of Record of Rights. Defendants Nos. 2, 3 and 4, who are the appellants before me, had instituted a suit upon a mortgage (Suit No. 103 of 1912) in which they obtained a foreclosure decree. Neither the judgment nor the decree of the original Court in the mortgage suit has been filed, but from Exhibit D-8 it would appear that *Musammat* Rukhma had filed an appeal which was dismissed, upon an objection taken on behalf of the mortgagees, on the ground that there was no decree against her and that she had been discharged from the mortgage suit, as she had set up a paramount title and was not entitled to redeem. It does not appear when the decree was made final, but from Exhibit P-11 it seems that Rukhma put in a petition under Order XXI, rule 100, objecting to the delivery of possession of the field now in dispute. This was eventually dismissed, because she did not wish to proceed with her application (Exhibit D-2).

The argument on behalf of the defendants-appellants is that the plaintiff, being a transferee *pendente lite*, stands in no better position than *Musammat* Rukhma and it is urged that as a separate suit did not lie at her instance, the plaintiff also cannot maintain this suit. It seems to me that section 47 of the Civil Procedure Code, 1908, as now amended, does not bar a suit by Rukhma. She was a party to the mortgage suit, but having set up a paramount title was discharged from the suit, and no decree was passed either in her favour or against her. The appellants rely upon the judgments of this Court in *Vithal Mukund* v. *Ganesh Mal* (1) and *Balaram Kunbi* v. *Sadoba Mali* (2). These cases were decided under the Code of 1882. But there was a conflict of judicial opinion as to the right interpretation of section 244 of the Civil Procedure Code, 1882. The matter has now been set at rest by the Legislature, and we have to look to the terms of section 47 as it stands now. The explanation attached to the section says that for the purposes of this section a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. In other words, to constitute a person a party to a suit within the meaning of section 47, there must be either a decree dismissing the suit or decreeing the claim in favour of or against a party. But a defendant against whom the claim is neither dismissed nor decreed, but is discharged as a person not a proper party to the suit, ceases to be a party to the trial of the suit. So far as such a person is concerned, he is entitled to object to the delivery of possession of property under Order XXI, rule 100, and if such objection fails, a regular suit lies at his instance within the period fixed by the law of limitation. No objection can be taken so far as this case is concerned on the ground of limitation, the suit having been filed within three months of the dismissal of the petition under Order XXI, rule 100. If, therefore, Rukhma could file a suit for possession, it is obvious that her transferee Ganpat can equally file it. The view which I have taken is supported by the judgment of the Madras

(1) 15 C. P. L. R. 106.
(2) 17 C. P. L. R. 178.

High Court in *Krishnappa Mudaly* v. *Periaswamy Mudaly* (3).

Since the decree of the Munsif in this suit Rukhma died. The appellants, therefore, seek to raise the question whether her interest has ceased or not. It appears that the field in dispute was allotted to Rukhma by way of maintenance. The lower Appellate Court has correctly held that the plaintiff's right to possession must be determined with reference to the state of things at the date of the suit, which state of things continued right up to the date of the decree of the first Court. Ordinarily, any subsequent changes which may have taken place cannot be made the subject-matter of a fresh inquiry in an appellate or later stage of the case.

The plaintiff asked for a particular declaration which has not been given, and he has been given a declaration which he never asked for. I think it is unnecessary in this case to give the plaintiff any relief by way of declaration, certainly not the relief which the Munsif has granted.

The result is that the decree of the Munsif is modified by striking out the words "the plaintiff is entitled to hold the possession of the field survey No. 62 (whole) of Haturna, Pargana Badnera, Tahsil Amraoti, till the expiry of his present lease in the year 1928 (1338 Fasli) and." With this modification the decree of the lower Courts is upheld and the appeal dismissed with costs.

Appeal dismissed.

(3) 38 Ind. Cas. 297; 40 M. 964; 21 M. L. T. 121; 5 L. W. 369; 32 M. L. J. 532.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 599 OF 1918.

February 17, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

NAVUNNI AND OTHERS—DEFENDANTS NOS. 2 TO 4—APPELLANTS

versus

RAMASAWMY PATTER AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 1—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Mortgage, payment of part consideration for—Declaration, suit for that mortgage is good only to extent of consideration actually paid, maintainability of.

A suit by a mortgagor for a declaration that the mortgage is good only to the extent of the part consideration actually paid, is not barred under section 42 of the Specific Relief Act where the term fixed for redemption has not expired at the date of suit.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suit No. 299 of 1917 (Appeal Suit No. 603 of 1917, District Court), preferred against the decree of the Court of the District Munsif, Alatur, in Original Suit No. 289 of 1916.

Mr. *K. V. Madhavan Nair*, for the Appellants.—The suit is not maintainable under section 42 of the Specific Relief Act The plaintiff could have asked for consequential relief. He must have prayed for redemption or for payment of the balance of the consideration.

Mr. *T. S. Anantarama Iyer*, for the Respondents.—Plaintiff need not have asked for further relief. The period for redemption has not expired and he is not bound to redeem at any earlier date. He need not have sued for the deficient amount. What the mortgagee is entitled to is what he actually paid The suit is maintainable.

JUDGMENT.—The argument addressed to us is that the suit should have been dismissed, because it offended against section 42, Specific Relief Act, in that plaintiff could have claimed further relief than he did by suing either for redemption or for payment to him of the amount by which he alleged that the consideration already paid was deficient. The answer as regards redemption is that the term fixed in the suit mortgage had not elapsed. The answer as regards the deficient amount is that, as pointed out by Kumaraswami Sastri, J., in *Abdul Hashm Sahib* v. *Kader Batcha Sahib* (1), plaintiff cannot be compelled to receive or claim the balance payable, if he prefers to do without it, the amount eventually recoverable on the mortgage being only that actually advanced. The second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

(1) 48 Ind. Cas. 370; 42 M. 20; 35 M. L. J. 740; 8 L. W. 543; (1918) M. W. N. 769; 24 M. L. T. 478.

PURGAN PANDE *v.* DHANPAT TEWARI.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 182 OF 1918.

July 14, 1919.

Present:—Mr. Justice Das.

PURGAN PANDE AND OTHERS—DEFENDANTS—APPELLANTS

versus

DHANPAT TEWARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Estoppel, question of, how to be raised—Pleading—Landlord and tenant—Admission by landlord, whether binding on tenant—Compromise between landlord and third party, whether binding on tenant—Execution of decree—Sale - Purchaser, whether bound by statement in sale certificate as to situation of property—Appeal, second—Finding of fact, erroneous, whether can be interfered with.

A question of estoppel can only be raised by pleading, and where no facts are pleaded which would enable a Court to come to a conclusion whether the principle of estoppel is or is not applicable to the suit, the Court will refuse to go into the matter. [p. 741, col. 1.]

An admission made by a landlord is not binding on his tenant, and this being so, a compromise entered into between the proprietors of certain land and others, whereby the parties to the compromise become joint proprietors of the land, has no binding effect upon tenants of the land. [p. 741, col. 2.]

An auction-purchaser of land is not bound by a statement in the sale certificate as to the situation of the land purchased by him. [p. 741, col. 2.]

A finding of fact by a lower Appellate Court, however erroneous, will not be disturbed in second appeal. [p. 742, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 27th September 1917, affirming a decision of the Munsif, 3rd Court, Arrah, dated the 15th March 1917.

FACTS.—The village Mamani Upadhya was divided into 5 Touzis. Two of the Touzis were numbered 6057 and 6059. Touzi No. 6057 belonged to defendants Nos. 1 to 3, and Touzi No. 6059 belonged to defendants Nos. 5 and 6. The plot of land in dispute was Shamilat land between the two Touzis and defendant No. 4 was its tenant. In 1911 at the Survey Settlement there was a dispute among the proprietors of Touzi No. 6057, *viz.*, defendants Nos. 1 to 3, and the proprietors of No. 6059, *viz.*, defendants Nos. 5 and 6, as regards the disputed land, but ultimately the dispute was compromised and the disputed land was allowed to be recorded as Shamilat of both the Touzis. On 13th March 1912 the plaintiffs purchased the disputed land in execution of a simple money decree as against defendant No. 4, who was its tenant. In the sale certificate obtained by the plaintiffs the plot of land was described as Shamilat in both the Touzis Nos. 6057 and 6059. In 1915 the plaintiffs brought the present suit for a declaration amongst other things that this plot in dispute was situated only in Touzi No. 6059 and defendants Nos. 5 and 6 were its sole proprietors, and that the defendants Nos. 1 to 3 had nothing to do with the land. Defendants Nos. 1 to 3 entered defence amongst other things that the plaintiff was estopped from maintaining the present suit. The first Court decreed the plaintiffs' suit and the District Judge of Shahabad on appeal confirmed the decision of the Court of first instance. Defendants Nos. 1 to 3 appealed to the High Court.

Mr. *Parmeshwar Dyal*, for the Appellants, contended that the plaintiffs in any case were estopped from maintaining this suit. The plaintiffs had purchased the right, title and interest of defendant No. 4, who was a tenant of the land, in execution of a simple money decree. The plaintiffs were, therefore, representatives of defendant No. 4 and claimed title under him. Defendant No. 4 was the tenant jointly of the proprietors of both the Touzis Nos. 6057 ann 6059 at the time when his holding was sold off and purchased by the plaintiffs. The plaintiffs, claiming their title under defendant No. 4 who was a joint tenant of defendants Nos. 1 to 3 and 5 and 6, were estopped from seeking a declaration that defendants Nos. 1 to 3 had no title to the land. It was virtually the denial of title of some of the landlords by a person who claimed under the joint tenant of all the landlords. The plaintiff, could not do so under section 116 of the Evidence Act. He relied further on Bigelow on Estoppel, page 554; Casperez on Estoppel, 4th Edition, pages 608, 248; *Doe* v. *Mills* (1), *Taylor* v. *Needham* (2), *Gulzari Lal* v. *Madho Ram* (3).

The plaintiff's own title-deed, the sale certificate, described the plot he purchased as Shamilat in both the Touzis. He must

(1) (1834) 2 Ad. & El. 17; 4 N. & M. 25; 4 L. J. K. B. 10; 111 E. R 7; 41 R R 364.

(2) (1810 2 Taunt 278; 127 E. R. 1084; 11 R. R. 572.

(3) 26 A. 447; A. W. N. (1904) 61; 1 A. L. J. 65.

rely on his title deed as a whole. He could not go behind it and say that it was not situated in Touzi No. 6057. Caspersz on Estoppel, Edition 4th, page 319.

Besides when the landlords of both the Touzis had compromised long before the plaintiff's purchase and had declared that the land was in the joint proprietorship of the Maliks of both the Touzis, it was not open to a tenant to come and say that it belonged only to the proprietors of one of the Touzis. The compromise amongst the landlords incorporated in the order of his Settlement Officer had the effect of transferance of the proprietary interest in the land from the proprietors of Touzi No. 6059 to the proprietors of Touzi No. 6057, in case the latter had no interest in the land prior to the compromise. The tenant could not come a year or so after the compromise and annul the effect of it. If instead of a compromise, the proprietor of Touzis No. 6059 had executed a registered deed transferring a portion of their proprietary interest in the land to defendants Nos. 1 to 3, the plaintiff who was a mere tenant could not come to seek a declaration that the transferees had no interest in the land after the transfer. The tenant is the holder of a subordinate interest in the land. He is concerned only with the payment of the rent and occupation of the land. He has got no interest in the proprietary title in the land. He could, therefore, maintain no suit which would have the effect of setting at nought the compromise arrived at amongst the proprietors in respect to their proprietary right.

Messrs. *Kulwant Sahai* and *Shivanandan Rai*, for the Respondents, not called upon.

JUDGMENT.—This appeal arises out of a suit brought by the respondents against the appellants, who were defendants Nos. 1, 2 and 3 in the suit, for the following reliefs:—

1. That it may be decided that the disputed land, whereof boundaries and details are given below, forms the plaintiffs' Gujasta Kasht land as it was purchased by them in an auction-sale; that defendant No. 4 has no *raiyati* right therein; and that it is in Touzi No. 6059, the Milkiat of defendants Nos. 5 and 6.

2. That it may be decided that the said land is not in Touzi No. 6057, the Milkiat of defendants Nos. 1 to 3, that it is not in the joint Takhta, that the defendants Nos. 1 to 3 have no right to get rent for the said land, that the decree obtained by defendants Nos. 1 to 3 against defendant No. 4 for arrears of rent is fraudulent, and that defendants Nos. 1 to 3 have no right to get the disputed land sold in execution of the aforesaid fraudulent decree.

3. That on a consideration of the above the execution and sale proceedings in Execution Case No. 525 of 1915 be stayed until the disposal of this suit by sending a Rubkar to the 3rd Court of the Munsif therefor.

It will be noticed, therefore, that the plaintiffs in the action are seeking first of all to establish their *raiyati* interest in the land in dispute as against defendant No. 4 as the purchasers from him, secondly, to establish that their holdings are in Touzi No. 6059 and not in Touzi No. 6057, and, thirdly, they are seeking to get a declaration that the decree and execution proceedings obtained by defendants Nos. 1, 2 and 3 against defendant No. 4 are fraudulent.

Defendants Nos. 1, 2 and 3 entered appearence, and they contested the suit on the ground that the decree obtained by the plaintiffs against defendant No. 4 was entirely fraudulent and that by virtue of the purchase made by the plaintiffs they never obtained possession of the holding belonging to defendant No. 4, and that the plaintiffs have never been accepted as tenants by the defendants. They put forward the title of defendant No. 4 to the land in dispute and they assert in emphatic language that in spite of the purchase made by the plaintiffs, they have a right to realise rent from defendant No. 4 so long as they do not admit the plaintiffs as their *raiyats*. This is how I read paragraph 12 of the written statement. Therefore, on the pleadings between the parties the whole question was, was the purchase made by the plaintiffs a genuine purchase and whether defendant No. 4 was a tenant in possession of the land in dispute. It is obvious to me that the plaintiffs have been put forward by defendants Nos. 5 and 6, whereas defendants Nos. 1 to 3 are championing the cause of defendant No. 4.

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The lower Appellate Court has found that the land in dispute falls within Touzi No. 6059, the Patti owned by defendants Nos. 5 and 6, and is not included in Touzi No. 6057, the Patti owned by defendants Nos. 1 to 3, and that the plaintiffs have been recognized as tenants by defendants Nos. 5 and 6. The lower Appellate Court has come to this conclusion on a consideration of the Amin's report to which, it appears, no valid objection was ever taken by the appellants and on a consideration of oral evidence. The lower Appellate Court finds that the respondents are in possession of the land in dispute by paying rent to defendants Nos. 5 and 6. On these findings it would seem that there is no merit in this appeal and that the same ought to be dismissed by this Court. But the learned Vakil appearing on behalf of the appellant has argued this appeal as a first appeal and has asked me to consider the various documents in the case, which he says were not considered by the lower Appellate Court.

His point is that the plaintiffs, having purchased the interest of defendant No. 4, are estopped in this suit from denying the title of defendants Nos. 1, 2 and 3 to the land in dispute. I have always understood that a question of estoppel can only be raised by pleading and that if no question of estoppel has been raised in the pleadings, the Court will refuse to go into the matter, because after all the doctrine of estoppel is merely an extension of the doctrine of admission which depends on the facts of each case, and that the Court is clearly unable to examine the facts unless those facts are pleaded. No doubt there is a stereotyped plea that the principle of estoppel is applicable to the suit, a plea which is to be found in every printed copy of written statement available in the Mofussil Courts, but no facts are pleaded in the written statement which would enable the Court to come to a conclusion whether the principle of estoppel is or is not applicable to the suit. On the contrary the whole written statement shows that the plaintiffs have no right at all to the land in dispute and that defendant No. 4, in spite of the purchase made by the plaintiffs, still continues as the tenant on the land and is liable to the defendants for rent. In my opinion it is not open to the defendants on this written statement to argue the question of estoppel. They emphatically assert that defendant No. 4 is still a tenant and that the plaintiffs have nothing to do with the land in dispute. I do not think that they can now turn round, because the findings of the Courts below are against them, and say that the plaintiffs are their tenants and must pay rent to them. But I do not propose to decide the question on a technical point. I desire to examine the ground on which it has been argued by the learned Vakil that the principle of estoppel is applicable to this suit.

He says, first of all, that the proprietors of the land, that is to say, defendants Nos. 1, 2 and 3 on the one hand and defendants Nos. 5 and 6 on the other hand entered into a compromise by which they became joint proprietors in respect of the land in suit. The argument is that the tenant is bound by the compromise entered into by the landlords. I am unable to agree with the learned Vakil that an admission made by a landlord is binding on the tenant at all. Secondly, it is argued by the learned Vakil that the sale certificate obtained by the plaintiffs shows that the land in dispute is situated in Touzi No. 6057 as well as in Touzi No. 6059. No doubt the sale certificate shows that, but I am unable to hold that because the sale certificate shows that the property in dispute is partly situated in Touzi No. 6057, therefore, the plaintiff, who is a complete stranger to the land, must be bound by a statement appearing in the sale certificate, especially when the Amin's report shows that no portion of the land is situtated in Touzi No. 6057. I do not think that even if the lower Appellate Court has misconstrued these documents, necessarily the judgment of the lower Appellate Court must and ought to be set aside. These are items of evidence which have to be considered along with the other evidence admitted or proved in the case. The lower Appellate Court has considered a very important piece of evidence, that is to say, the Amin's report, to which, as the lower Appellate Court says, no valid objection was taken at any time. The lower Appellate Court further considered the oral evidence in the case I cannot say reading the judgment of the lower Appellate Court that it did not consider the docu-

ments on which the learned Vakil so strongly relies.

In my opinion the finding of the lower Appellate Court, however erroneous it may be, is a finding of fact which is binding on me. I would, therefore, dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 95 OF 1919.

August 8, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

Seth SHYAM KARAN AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

THE COLLECTOR OF BENARES—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48, Sch. III, para. 11 (3), applicability of—"Period of limitation," whether includes period provided by s. 48.

The provisions of clause (3) of paragraph 11 of the 3rd Schedule to the Civil Procedure Code are wide enough to include the case of an application for the execution of a decree to which section 48 of the Code applies. The words "period of limitation" in the clause are intended to apply to the restrictions placed upon the right of a decree-holder to take out execution of his decree both by the Limitation Act and section 48 of the Civil Procedure Code. [p. 743, col. 1.]

Execution second appeal against the decision of the District Judge, Cawnpore, dated the 6th January 1919.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *R. Malcomson* (for Mr. *A. E. Ryves*), for the Respondent.

JUDGMENT.—This and the connected appeal arise out of execution proceedings in connection with a simple decree for money passed on the 18th of December 1897. Various applications for execution were made between that year and the year 1906. In 1905 the property of the judgment-debtors in the District of Hamirpur was taken charge of by the Collector, apparently under the provisions of section 326 of the Code of Civil Procedure, 1882. The management of the Collector continued down to 1917, when he released the property. On the 4th of April 1917 the Court of Wards, now in charge of the estate of the decree-holder, applied for attachment and sale of the property situated in the Hamirpur district. This application was resisted by the judgment-debtors on the ground of limitation. They contended that the application was barred by the three years' rule of limitation prescribed by the Limitation Act and also under section 48 of the Code of Civil Procedure. The objection was allowed by the Court of first instance, which held that having regard to the fact that more than twelve years had elapsed since the date of the decree, section 48 of the Code of Civil Procedure was applicable and the present application for execution could not be maintained. This decision has been overruled by the lower Appellate Court, which has held that the application for execution is within time.

The learned Vakil for the appellants has conceded that the three years' rule of limitation under the Limitation Act would not apply to the present case in view of the provisions of clause (3), paragraph 11 of the 3rd Schedule to the Code of Civil Procedure, 1908. He contends that section 48 is applicable and as more than twelve years have expired since the date of the decree, the present application cannot be granted. There can be no doubt that the present application is a substantive application and a fresh application for the execution of the decree. It is not an application in continuance of any previous application for execution. The question to be decided is whether clause (3) of paragraph 11 of the 3rd Schedule is applicable to the present case, so far as the question of the bar of section 48 arises. Clause 2 of paragraph 11 provides that during the period that the property of the judgment-debtor is under the management of the Collector, no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7. Clause (3) provides that the same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in

respect of any remedy of which the decree-holder has been temporarily deprived. It is contended on behalf of the appellants that this clause applies to the period of limitation prescribed by the Limitation Act for the execution of a decree and that the period after which an application for execution cannot be made in view of the provisions of section 48 of the Code of Civil Procedure is not a "period of limitation" within the meaning of this clause. We think that the words "period of limitation applicable to the execution of any decree" in clause (3) have been used in a general sense and that they are intended to apply to the time beyond which an application cannot be made for execution of a decree. This was the view taken by the Judicial Commissioner's Court of Oudh in *Mohammad Abdul Karim Khan* v. *Nawaz Singh* (1). In that case a question similar to the one which arises in this appeal was considered and decided. The learned Judicial Commissioners were of opinion that clause (3) of paragraph 11 was wide enough to include the case of an application to which section 48 of the Code of Civil Procedure applies. As the learned Judicial Commissioners point out in that case, there are two descriptions of limitation provided for applications for execution. One is that prescribed by the Indian Limitation Act and the other is that provided in section 48 of the Code of Civil Procedure. Section 48 forbids the granting of an application after the expiry of 12 years from the date of the decree except in the cases specified in the section. This provision lays down a limitation to the right of the decree-holder to execute his decree as much as the Limitation Act prescribes different periods of limitation for repeated applications for execution. It seems to us that in clause (3) of paragraph 11 the words 'period of limitation' are intended to apply to both kinds of restrictions placed upon the right of the decree-holder to take out execution of his decree, and in this sense that clause would be applicable to a case to which section 48 applies. Much reliance was placed on behalf of the appellants upon certain observations contained in the judgment of this Court in *Jurawan Das* v. *Mahabir Dube* (2). In that case the real question to be decided was whether section 15 of the Limitation Act was applicable to the case and whether the word 'prescribed' in section 15 of that Act could be construed as including any period of limitation prescribed otherwise than by the provisions of the Limitation Act. It was held that the word 'prescribed' in section 15 meant prescribed by the Indian Limitation Act. In the course of the judgment, however, it was stated that "section 48 of the Code of Civil Procedure does not in a strict sense provide a 'period' of limitation." These observations are relied upon in support of the contention that the words "period of limitation" mentioned in clause (3) do not include cases to which section 48 of the Code of Civil Procedure applies. No doubt in a strict sense section 48 does not prescribe a period of limitation, but in a *general* sense it imposes a "limitation" on the right of the decree-holder to apply for execution after the expiry of twelve years from the date of the decree. In that general sense, although by section 48 a "period of limitation", strictly so-called, is not prescribed, the twelve years' rule in effect lays down "the period of limitation applicable to an application for execution." Those are the words used in clause (3) of paragraph 11 of the 3rd Schedule to the Code of Civil Procedure. We think, therefore, that the case relied on by the learned Vakil for the appellants is not in conflict with the view which we have expressed above and with the decision of the Oudh Court to which we have referred. For these reasons we hold that the decision of the Court below is right and these appeals must fail. We accordingly dismiss them with costs including fees on the higher, scale.

Appeal dismissed.

(1) 8 Ind. Cas. 377; 13 O. C. 303.

(2) 44 Ind. Cas. 24; 40 A. 198; 16 A. L. J. 71.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 481 OF 1918.

April 7, 1919.

Present:—Sir Henry Drake Brockman, KT. J.C.

DEORAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RUKHMINI BAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), s. 46 (5)—Registration, deed presented for, recitals in—Registrar, whether can go behind recitals—Legislature, intention of.

The language of sub-section 5 of section 46 of the C. P. Tenancy Act indicates that the Registration Officer is not expected by the Legislature to decide as to the soundness of the recitals in a deed presented for registration. If the document contains a recital of any of the kinds mentioned, he is not precluded from effecting registration. [p. 745, col. 1.]

Appeal from the decree of the District Judge, Nainar, in Appeal No. 67 of 1918, dated the 22nd July 1918.

Mr. *M. R. Bobde*, for the Appellants.

Messrs. *Gupta* and *W. R. Puranik*, for the Respondents.

JUDGMENT.—The facts of the case out of which this second appeal arises are fully stated in the judgments of the lower Courts. The plaintiff in the suit purchased on the 26th February 1917 a certain house, the value of which is Rs. 100, from Raoji. This Raoji had become the owner of the house by virtue of a gift from his wife Maina Bai, who died on the 14th February 1917. Maina Bai was the daughter of one Motiram, who owned besides the house a *malik makbuza* plot in Mouza Chulkhan, an occupancy field in Mouza Jhiri and an occupancy field in Mouza Nimbola. Motiram, who died in 1912 or 1913, left all three fields and the house to Maina Bai and his sister's grandson Deoram. It is common ground that Maina Bai and Deoram represented by his father Totaram held the property covered by the Will jointly until the 1st February 1916. According to the plaintiff a partition was effected on the 1st February 1916, by virtue of which the house and the *malik makbuza* plot fell to the share of Maina Bai, the two occupancy fields going to Deoram.

The plaintiff came into the Court claiming possession of the house on the strength of the partition which is evidenced by the registered deed (Exhibit P-1), on the allegation that after he obtained possession Totaram on behalf of Deoram ejected him. The defence set up is contained in a written statement, which denied the partition and contended *inter alia* that the division was not binding on the defendant as it was illegal, invalid, unequal, inequitable and unjust. The trial Judge found that the partition took place and that Maina Bai and Deoram held possession in accordance with it. The defendant's evidence attacked the partition solely on the ground of unfairness and the trial Judge held on consideration of all the evidence that it was fair. The plaintiff accordingly obtained a decree for possession.

The defendant, who is represented not by his father but by a paternal uncle as guardian *ad litem*, appealed to the District Court, contending that the partition was unfair and praying that the trial Judge's decree might be modified so as to entitle the plaintiff to joint possession to the extent of a half share only. The District Judge held the partition to be fair and dismissed the appeal.

In second appeal several new points are taken on behalf of the defendant-appellant. The first is that inasmuch as occupancy fields cannot legally be devised by Will under the decision in *Laxmi Bai* v. *Alyar Khan* (1), Maina Bai must be deemed to have become the sole tenant on Motiram's death and the partition of 1916, therefore, amounted to a transfer which is prohibited by sub-section (3), section 46, C. P. Tenancy Act, 1898. On being pressed to state whether Deoram has any title to the occupancy land and, if so on what that title is based, his Pleader accepted the position taken up for the plaintiff-respondent which is supported by entries in the village papers, namely, that the *malguzar* recognised Maina Bai and Deoram as joint tenants on Motiram's death. Had the present contention of the appellant been raised in the first Court, further evidence would doubtless have been adduced to establish this recognition of Deoram as a tenant by

(1) 2 C. P. L. R. 167.

the landlord. It might also have been shown that a new tenancy was created, the landlord not being content to treat Maina Bai the rightful heir as merely taking herself a co sharer. If there was a new tenancy, then Deoram may have been a person in favour of whom the right of occupancy originally arose and to such a case the proviso to sub section (3) of section 46 would apply, if a partition be regarded as a form of transfer which is ordinarily prohibited. I think then that this new contention of the appellant cannot be regarded as raising a mere question of law. It should have been advanced in the Court of first instance and is hereby overruled as not entertainable at this stage.

The next contention pressed for the appellant is also a new one, being to the effect that sub-section (5) of section 46 precluded the Registering Officer from registering Exhibit P-1. This contention appears to me to be entirely without substance. The partition deed expressly represents Maina Bai and Deoram as having jointly succeeded under Motiram's Will and so might reasonably have been regarded by the Registration Officer as putting Deoram in the position of a co-sharer by succession. Sub-section (5) is worded in a way which to my mind indicates that the Registering Officer was not expected by the Legislature to decide as to the soundness of the recitals in the document presented for registration. If the document contains a recital of any of the kinds mentioned he is not precluded from effecting registration. I hold that the partition deed was not unjustifiably registered so as to be void within the principle recognized in *Nilkant* v. *Ghulya* (2).

Thirdly it is said that the partition is on the face of it unfair, inasmuch as an occupancy holding is not transferable and is consequently much less valuable than a *malik makbuza* plot or a house and that the lower Appellate Court has altogether overlooked this feature of the case. That the District Judge was fully aware of the difference in respect of alienability between a *malik makbuza* plot and an occupancy holding appears plainly from the sixth paragraph of his judgment. Both the lower Courts were indeed impressed with the fact that Totaram being indebted Deoram's position would be safer if he took the occupancy land. Moreover, it appears from the evidence of the defendant's own witness Sampat Lala (D. W. No. 4) that this consideration was put forward while the negotiations for the partition were going on. All the fields were inspected by the plaintiff's witness Sakharam (P. W. No. 7), whose evidence both the trial Judge and the lower Appellate Court have accepted and who, having had long experience in the Land Record and Settlement Departments, was not without substantial qualifications for reporting on their market-value. It must also be remembered that the occupancy rights may be surrendered for value to the landlord or sold to the heir-apparent, so that they cannot be regarded as altogether inalienable.

It remains to notice the contention that the lower Appellate Court wrongly threw upon the appellant the burden of showing that the partition was unequal and unjust. This contention is based upon the first sentence in the seventh paragraph of the lower Appellate Court's judgment, which runs thus:—

"The burden of proving that the partition was unequal and unjust and brought about by undue influence and fraud lay heavily upon the defendant and he failed to discharge it."

It is admitted for the respondents, who are the widows of the original plaintiff, that the plaintiff had the burden of showing that the partition was fair and so binding on the minor. The statement above quoted is certainly worded with some looseness, but no question of burden really arises at this stage, inasmuch as the Courts below have both accepted the evidence adduced by the plaintiff as to the values of the respective shares allotted at the partition. Moreover, the fact that Totaram signed the partition deed on behalf of his son was rightly regarded as some guarantee for the fairness of the transaction, and it is significant that Totaram was not into the witness-box to explain how he came to assent to the division evidenced by Exhibit P-1.

The appeal could in no view succeed with regard to the entire house in dispute,

(2) 42 Ind. Cas. 384; 13 N. L. R. 165.

inasmuch as the appeal to the District Court did not seek the entire reversal of the trial Judge's decree. For the reasons above given I consider that the partition is binding on the appellant and that it is not open to him to contend at this stage that the Will conferred on him no right in respect of the occupancy holding. The appeal accordingly fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 41 OF 1915.

February 9, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

HIRA LAL SINGH AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

RAMJIRAM - JUDGMENT DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 18—Execution of decree—Cross-decrees—Set-off, direction as to, in one decree—Application for execution, whether necessary before set-off can be allowed.

Where a landlord holds a decree against his tenant for rent, and the latter holds a decree against his landlord for mesne profits, but there is a direction in the decree for rent that execution is not to issue until the amount due under the decree for mesne profits is ascertained, the intention is that the decrees should be set off against each other. It is not necessary, in such a case, that the decrees on both sides should be before the Court for execution as required by Order XXI, rule 18 of the Civil Procedure Code, in order that a set-off might be claimed.

Miscellaneous appeal from an order of the Subordinate Judge, Patna, dated the 9th January 1915.

Mr. *Kulwant Sahai*, for the Appellants.

Mr. *Lachmi Narain Sinha*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—The respondent held decrees for rent amounting to Rs. 2,000 against his tenant Tipan Prasad Singh. The latter, who held a decree against the respondent for Rs. 11,123 on account of mesne profits, sold it to the appellants who applied for execution by sale of some property of the respondent. The Court below has held that the amount due on the decree held by the respondent should be set off against the amount due on the decree held by the appellants and that the latter should be allowed to execute their decree for the balance only. Hence this appeal.

The appellants are, *prima facie*, bound to allow the set-off, but they contend that the set-off should not be allowed inasmuch as the respondent has not applied for execution of his decrees. Order XXI, rule 18, no doubt contemplates that the decrees on both sides are before the Court for execution, *i.e.*, that both sides shall have taken out execution. But the circumstances of the present case are peculiar. The High Court, when affirming one of the decrees for rent, said that execution should not issue until the amount of mesne profits due under the decree in favour of the appellants had been ascertained. Evidently the intention was that the decrees should be set off against each other. If the Court below had ruled that a set off could not be allowed inasmuch as the respondent had not taken out execution, the respondent would have taken out execution at once. In consequence of the decision of the Court below the respondent has not taken out execution. It is quite clear that the decrees held by the parties should be set off against each other as far as possible and all parties understood that this would be done. In these circumstances we dismiss this appeal but we make no order as to costs.

SHARFUDDIN, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 751 OF 1918.

January 27, 1919.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

BOGISETTI AKKA NAGAMMA—PLAINTIFF—APPELLANT

versus

PANGANAMA KRISHNA RAO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara Law prevailing in Madras

RAKHAL CHANDRA PURKAIT v. SUDHINDRA NATH BOSE.

Presidency—Joint family—Mortgage by co-parcener of his share, validity of.

A mortgage of his undivided share by a member of a joint Hindu family is valid according to the Hindu Law prevailing in the Madras Presidency.

Lachhman Prasad v. *Sarnam Singh*, 40 Ind. Cas. 284; 39 A. 500; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97 (1917) M. W. N. 516; 6 L. W. 334; 44 I. A. 163 (P. C.), distinguished.

Anant Ram v. *Collector of Etah*, 44 Ind. Cas. 290; 34 M. L. J. 291 at p. 293; 7 L. W. 323; 4 P. L. W. 226; 16 A. L. J. 245; 23 M. L. T. 228; 22 C. W. N. 484; 27 C. L. J. 363; 20 Bom. L. R. 524; 40 A. 171; (1918) M. W. N. 446 (P. C.), followed.

Second appeal against the decree of the Court of the District Judge of Cuddapah, in Appeal Suit No. 38 of 1917, preferred against the decree of the Court of the District Munsif, Gooty, in Original Suit No. 1069 of 1915.

FACTS.—Plaintiff took a mortgage from 3rd defendant of his $\frac{1}{3}$rd share in the family property. The other defendants were his co-parceners. In a suit to enforce the mortgage it was pleaded that a mortgage by one co-parcener of his undivided share is invalid according to the Mitakshara School. The District Judge, following *Lachhman Prasad* v. *Sarnam Singh* (1), dismissed the suit in appeal. Plaintiff preferred a second appeal to the High Court.

Mr. *T. Prakasam*, for the Appellant.

Mr. *S. Gopalaswamy Aiyangar*, for the Respondents.

JUDGMENT.—The second of the cases relied on by the District Judge, *Lachhman Prasad* v *Sarnam Singh* (1), was decided with reference to the law in Allahabad, and in *Anant Ram* v. *Collector of Etah* (2), the Judicial Committee in referring to the same case quote it as being authority for that province.

The fact that the law on this point is different in Madras and Bombay from the law in Allahabad and Calcutta was recognised by the Privy Council so long ago as *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (3) and *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4). This being so, we are not prepared to apply *Lachhman Prasad* v. *Sarnam Singh* (1) as it is opposed to the ruling of the Full Bench of this Court in *Chinnu Pillai* v. *Kalimuthu Chetti* (5), which confirms the current of previous decisions in this Presidency. Under this ruling, plaintiff is entitled to a decree against his mortgagor's 1/3rd share of the property mortgaged and there will be a decree accordingly. Parties will pay and receive proportionate costs throughout, 1/3rd and 2/3rds.

Time for payment extended to three months from this date.

M. C. P.

Appeal allowed.

(1) 40 Ind. Cas. 284; 39 A. 500; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 44 I. A. 163 (P. C.).

(2) 44 Ind. Cas. 290; 34 M. L. J. 291 at p. 293; 7 L. W. 323; 4 P. L. W. 226; 16 A. L. J. 245; 23 M. L. T. 228; 22 C. W. N. 484; 27 C. L. J. 363; 20 Bom. L. R. 524; 40 A. 171; (1918) M. W. N. 446 (P. C.).

(3) 5 B. 48; 7 I. A. 181; 4 Sar. P. C. J. 173; 3 Suth. P. C. J. 778; 3 Shome L. R. 217; 4 Ind. Jur. 472; 7 C. L. R. 320; 3 Ind. Dec. (N. S.) 34 (P. C.).

(4) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(5) 9 Ind. Cas. 596; 35 M. 47; (1911) 1 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 246.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 234 OF 1917.

April 11, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Panton.

RAKHAL CHANDRA PURKAIT—APPELLANT

versus

SUDHINDRA NATH BOSE, RECEIVER TO THE ESTATE OF BROJO NATH DAS, INSOLVENT—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 16 (6), 36—Order of adjudication, date of operation of—Property transferred by insolvent within two years before presentation of petition of insolvency, whether liable to claims of creditors—Transfer, validity of.

Section 36 of the Provincial Insolvency Act should be read along with section 16 (6) of the Act. Therefore, for the purpose of making the properties of the insolvent liable to the claims of his creditors, an order of adjudication relates back to, and takes effect from, the date of the presentation of the petition for insolvency. [p. 749, col 1.]

Under the provisions of section 36 of the Provincial Insolvency Act, read with section 16 (6) of the Act, a transfer made by an insolvent more than two years before the date of the adjudication order

out within two years before the date of the presentation of the petition for insolvency, may be void against the Receiver and annulled by the Court. [p. 749, col. 1.]

Appeal against the order of the District Judge, 24 Pergannahs, dated the 12th June 1917.

FACTS appear from the judgment.

Dr. *Dwarka Nath Mitter* (with him Babu *Banku Behari Mullik Choudhury*), for the Appellant.—In this case the order of adjudication was made on the 25th July 1915, and the property in question was transferred on the 9th July 1913. In other words, the property was transferred more than two years before the order of adjudication. Hence the transfer cannot be said to be void as against the Receiver. Moreover, section 16 (6) of the Provincial Insolvency Act, which lays down that an order of adjudication shall relate back to and take effect from the date of the presentation of the petition, does not apply to a case like this. That section refers to other cases of relation back. Here the transfer, being made more than two years before the order of adjudication, is not within the purview of section 16 (6), Provincial Insolvency Act. Therefore the validity of the transfer cannot be questioned.

Babu *Bepin Bihari Ghosh* (with him Messrs. *Narendra Nath Mukerjee* and *Ashutosh Ghose*), for the Respondents.—It appears from the judgment of the Court below that transfer is a sham transaction. There is no actual transfer by the insolvent to the appellant, no change of possession, and no change of title. There is no evidence to shew that the appellant paid the consideration money. By virtue of the adjudication order the Receiver is entitled to get possession of the property which belongs to the insolvent.

As regards the question of relation back, we find that under the English rule, the order of adjudication relates back to the date when the insolvent commits an act of bankruptcy. Again under the Presidency Towns Insolvency Act the relation back refers to the date when an act of bankruptcy is committed. But the Provincial Insolvency Act has fixed the time to which the order of adjudication should relate back, namely, the time of the presentation of the petition of bankruptcy. Here the relation back is restricted to the date of the presentation of the petition of bankruptcy. Here the period is made certain, so that perjury may be prevented, which sometimes takes place to prove that an act of bankruptcy was committed on a certain day. Refers to sections 36, 16 (6), Provincial Insolvency Act, *Pollitt, In re, Minor, Ex parte* (1) and Halsbury's Laws of England, Volume II, page 61.

Dr. *Dwarka Nath Mitter* replied.

JUDGMENT.—This appeal is against an order of the District Judge of the 24-Pergannahs under section 36 of the Provincial Insolvency Act, by which he held that the alleged transfer of certain property made by an insolvent in favour of the appellant was void as against the Receiver.

The insolvent Brojo Nath executed a deed of sale in favour of the appellant Rakhal on the 9th July 1913. Brojo Nath applied to be declared insolvent on the 7th May 1915 and the order of adjudication was made on the 25th July 1915. The Receiver in insolvency applied to the District Judge on the 11th April 1916 for avoiding the transfer. The learned District Judge held that the transfer was void having been made within two years before the date of the presentation of the petition for insolvency, and upon the evidence he found that the transfer was without consideration and did not pass any title to the appellant.

Now, section 36 of the Provincial Insolvency Act lays down that any transfer of property, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void a against the Receiver and may be annulled by the Court.

It is contended on behalf of the appellant that the transfer in the present case, having been made more than two years before the date of the adjudication order, is not void against the Receiver.

Section 16 (6) of the Provincial Insolvency Act, however, lays down that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.

It is contended that section 16 (6) of the Act does not affect any transfer made two

(1) (1893) 1 Q. B. 455; 62 L. J. Q. B. 236; 4 R. 253; 68 L. T. 366; 41 W. R. 276; 10 Morrell 35.

years before the order of adjudication, but that the relation back has reference to other matters. We are of opinion, however, that an order of adjudication relates back to, and takes effect from, the date of the presentation of the petition for the purpose of making the properties of the insolvent liable to the claims of the creditors. Under the English Law, an order of adjudication relates back to, and takes effect from, the date of an act of insolvency but under the Indian law (section 16 (6) of the Provincial Insolvency Act), an order of adjudication operates only from the day when the petition of insolvency is presented to the Court. It follows that from that time the property of the debtor is made available for payment of the debts. If the contention of the appellant were accepted, the provisions of the Act might be defeated in some cases. After the petition for insolvency is made, the order of adjudication may be delayed in some cases for more than two years, for instance, where the matter goes up to the Privy Council on appeal, and in such a case any transfer made by the insolvent within two years before the date of presentation of the petition of insolvency, but more than two years before the order of adjudication, would become valid. We do not think that such a result was contemplated and we are of opinion that the provisions of section 36 are to be read with section 16 (6) of the Act.

The next question is whether the learned Judge was right in his finding upon the evidence in the case.

It appears that the transfer was made by the insolvent in favour of his sister's son and it is found that notwithstanding the transfer the insolvent was in possession of the property, and although it appears that the rent receipts stand in the name of his sister's son Rakhal, the insolvent mortgaged the property to a third person after the date of the transfer, and Rakhal himself was an attesting witness to the bond. Having regard to these facts and others mentioned in the judgment of the learned Judge, we think that his finding is correct.

The appeal must accordingly be dismissed with costs, one gold *mohur*.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 373, 421, 422, 384 AND 420 OF 1915.

January 15, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

APPEAL NO. 373 OF 1915

VADLAMUDI GOPALAKRISHNAYYA AND ANOTHER—DEFENDANTS NOS. 1 AND 3—APPELLANTS

versus

VADLAMUDI GANGAYYA AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2, 5 TO 9, 21, 69, 70, 74 TO 81, 84 86, 87, 90, 91, 93 TO 99—RESPONDENTS.

APPEAL NO. 421 OF 1915

VADLAMUDI SUBBA RAO MINOR, BY NATURAL FATHER AND GUARDIAN VADLAMUDI SEETHARAMASWAMY—DEFENDANT NO. 93—APPELLANT

versus

VADLAMUDI GANGAYYA AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 84, 94 TO 96, 85, 87, 97 TO 99, 90, 91, 1 AND 92—RESPONDENTS.

APPEAL NO. 422 OF 1915

VADLAMUDI GANGAYYA—PLAINTIFF—APPELLANT

versus

BOBBA PADMANABHYYA AND OTHERS—DEFENDANTS NOS. 2, 3, 5 TO 9, 11, 12, 14, 16 TO 19, 21 TO 23, 29, 39, 42, 73 AND 51—RESPONDENTS.

APPEAL NO. 384 OF 1915

VADLAMUDI MANIKYAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

VADLAMUDI LINGAYYA—PLAINTIFF NO. 1—RESPONDENT.

APPEAL NO. 420 OF 1915

VADLAMUDI VENKATASUBBA ROW MINOR, BY NATURAL FATHER AND GUARDIAN VADLAMUDI SEETHARAMASWAMY—DEFENDANT NO. 2—APPELLANT

versus

VADLAMUDI LINGAYYA AND ANOTHER—PLAINTIFF NO. 1 AND DEFENDANT NO. 1—RESPONDENTS.

Hindu Law—Surrender by widow of her interest in favour of reversioners, validity of—Agreement to reconvey in favour of third parties—Consideration, effect of.

A surrender by a Hindu widow to her reversioners of practically the whole of her husband's estate is valid, though the actual consideration paid is small

and very much below the value of the estate and though a part of the consideration is an agreement to reconvey the property to third parties. [p. 754, col. 1.]

Keretti Brahmanaikudu v. *Kareti Mahalakshmi*, 17 Ind. Cas. 487; (1913) M. W. N. 433; 24 M. L. J. 533; 13 M. L. T. 468 and *Challa Subbiah Sastri* v. *Palury Pattabhiramayya*, 31 M. 446, followed

The fact that a small and inappreciable portion of the estate is not included in the deed of surrender will not invalidate it. [p. 753, col. 2.]

Appeals against the decrees of the Court of the Temporary Subordinate Judge, Masulipatam, in Original Suits Nos. 44 and 70 of 1913.

Messrs. *T. R. Ramachandra Aiyar* and *P. Narayanamurthi*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.

APPEAL No. 373 OF 1915.

The object of the suit in which these appeals arise was to obtain a declaration that the 1st defendant was not the adopted son of one Gopalakrishnayya and that the plaintiff was entitled to 1/15th share of the property in Schedule A to the plaint, to recover the same from the defendants, to obtain an apportionment of the property with reference to bad and good soil and for other reliefs. The 84th and 85th defendants, unless the 93rd defendant was validly adopted by Manikyam, the 92nd defendant, would be the nearest reversioners of Gopalakrishnayya and the plaintiff, who is the remoter reversioner, claims 1/15th share of the estate under a deed of arrangement entered into between the 84th and 85th defendants, who had obtained a surrender of the properties from Gopalakrishnayya's mother Rangammah on 23rd November 1911, and the rest of the presumptive reversioners living at the time. Gopalakrishnayya had died on 30th July 1895 leaving a widow Ammama, who died subsequently on 3rd November 1911 whereupon the properties devolved on Gopalakrishnayya's mother, Rangamma, who would be about 90 years old and is still alive. The main contest was between the whole body of reversioners on one side basing their title on the surrender by Rangamma and on the other the 1st defendant claiming to have been validly adopted by the widow Ammama and the 93rd defendant claiming to have been adopted by Manikyam, the 92nd defendant, the widow of one Koniah, a deceased first cousin of Gopalakrishnayya and who would, therefore, have a better right to the reversion than the 84th and 85th defendants. The defendants in the suit are, besides the reversioners other than the plaintiff, various other persons who are in possession of different items of property under some claim or other, either by transfer from the reversioners or from the widow or otherwise. The 91st defendant, it may be mentioned, is the National College of Masulipatam to which a gift was made of 1/15th share by the reversioners. A large number of issues were tried and in the result the learned Subordinate Judge decreed the plaintiff's claim. We shall deal with the different questions argued before us in the several appeals and memoranda of objections in their order.

On the question relating to the authority alleged to have been given by Gopalakrishnayya to his widow Ammama to make an adoption, we have no hesitation in agreeing with the conclusion of the learned Subordinate Judge. The burden of proving that the adoption was made under proper authority lay upon the 1st defendant, but having considered the evidence of the defendant's witness on this point, we are not at all satisfied that Gopalakrishnayya gave authority as is alleged. Gopalakrishnayya died on the 30th July 1895 and the case of the defendant is that the authority was given to the widow on the same day. It is not clear upon the evidence what he actually died of. The evidence adduced in support of the authority to adopt is that he died suddenly, and that the illness, whatever it was, only occurred on the very date of his death. The man who is alleged to have treated him, the defendants' 14th witness Amba Narasayya, says that he hardly knew what the matter was with this man, but however that may be, the most important evidence on which Mr. Ramachandra Aiyar naturally relies in support of his case is that of the 13th witness for the defendants, a second grade Pleader. He says that he came to know Gopalakrishnayya as both of them were fond of music and used to meet at music parties and theatres. The learned Subordinate Judge has discussed this evidence at great length and his conclusion is that the testimony of this witness cannot be acted upon. He points

out that this witness's name did not appear in any of the lists of witnesses but that he was summoned only a few days before the defendants let in their evidence, and was not served with summons until the day before he was examined. The explanation as to why his name did not appear in any of the previous lists of witnesses is that it did not transpire that he was present at the time of Gopalakrishnayya's death or knew anything about the alleged authority to adopt, until the defendants' 14th witness Amba Narasayya happened to be questioned by the Pleader for the defence when he disclosed this man's name. We find it impossible to believe that if this witness was actually present at the death-bed of Gopalakrishnayya, his name would not have been known to everybody else present there and that the defendants would not have known from the very beginning that this man knew about the authority to adopt. The other men who were present at Gopalakrishnayya's bedside were ordinary villagers and if the defendants' 13th witness was also there and heard the deceased give authority to his wife to adopt a child on his death, it is fairly certain he would have been one of the first to be summoned to give evidence in the case. As regards the other witnesses the Subordinate Judge has dealt with their evidence in paragraph 128 of his judgment and we are unable to say that his estimate of their evidence is incorrect. Further the circumstances of the case strongly support the conclusion of the trial Judge. The authority is stated to have been given in 1865, but it is not mentioned in any sort of document or writing until the very date of adoption, that is till 1911. If any such authority had been received by Ammama, it can be assumed with certainty that there would have been more than one occasion to mention ths fact during all these years. Ammama was seriously ill in 1898 and the Subordinate Judge is right in pointing out that if she had any authority to adopt, she would have made some attempt to carry out her husband's wishes at that time. The absence of all reference in Exhibit FF to any such authority also negatives the supposition that the authority was actually given. It is pointed out by the learned Subordinate Judge that the story of the defence is that from the very birth of the 1st defendant Ammama wanted to adopt him. If there was the least truth in the suggestion we cannot understand why, if she had received authority from her husband, she would have refrained from making the adoption till the very last day of her death. We, therefore, agree with the Subordinate Judge that the adoption of the 1st defendant is not valid.

The adoption of the 93rd defendant by Manikyam, the widow of Koniah, is said to have taken place on the 29th October 1911, that is to say, previous to Exhibit S, the deed of surrender executed by Rangamma on the 23rd November 1911. Manikyam at that date was 30 years of age and it is not disputed that though the authority to adopt had been given to her by her deceased husband 14 years ago, she made no attempt to adopt all this time, and there can be little doubt upon the evidence that if she did make the adoption as alleged, it must have been brought about more or less hurriedly and with the object of defeating the reversioners of Gopalakrishnayya who, it is said, were anxious to get hold of the estate by means of a surrender from Gopalakrishnayya's mother, Rangamma. Manikyam had also inherited from her husband somewhat valuable properties of the value of Rs. 15,000 and we have no hesitation in saying that if she was at all anxious to adopt in accordance with the authority given by her husband, she would have made the adoption long before 1911. The suggestion made on behalf of the appellant is that it was at the time that Ammama was taken ill that the idea occurred to her advisers, especially the 1st defendant who was the *gomasta* of both Ammama and Manikyam, to have an adoption made by Manikyam in order to make sure that the property of Gopalakrishnayya did not go to the reversioners. There can be no doubt that the relations both of Ammama and Manikyam on the one hand and of the reversioners on the other were anxious to secure to themselves the property which was in the possession of Ammama and which on Ammama's death would devolve on Rangamma, the mother of Gopalakrishnayya.

The learned Subordinate Judge, having

considered the evidence on both sides, has come to the conclusion that the story of the adoption of 93rd defendant is not true. He has found himself unable to accept the testimony of the witnesses of the defendants who speak to the adoption taking place on the 29th October 1911, and is inclined to accept the evidence of the witnesses of the plaintiff residing in the village of Guraza where the adoption is said to have taken place. They all state that they never heard of any such adoption and that if there had been one, they would have known of it. Most of the witnesses in support of the adoption are relations of Manikyam or Ammama, but that in itself would not, in a case of this nature, throw discredit on their testimony if we were in a position to say on a view of the undoubted facts and probabilities of the case that the story set up is true. The 93rd defendant at the time of the alleged adoption was 7 or 8 years old; he belonged to a very poor family in Kavutharam. He used to go to a school at Kavutharam and the case is that he was brought to Guraza on the 29th October, which happened to be a Sunday, and after the adoption was hastily performed on the same day, he went back with his parents to his village. From the school register it appears that he attended school as usual on the 30th. It is observed by the learned Judge that it is hardly likely that if the boy had been adopted, the adoptive mother would have allowed him to return to Kavutharam on the same day. The Subordinate Judge also comments on the fact that though his original name was said to have been changed and under the law, being affiliated to the family of his adoptive father, he would henceforth be known as the son of his adoptive father, no alteration was made either in his name or in that of his father in the school register. As regards the actual ceremony, the Subordinate Judge is impressed by the fact that no sufficient publicity was given to the adoption and the adoption was not celebrated as one would expect it to be, having regard to the fact that Manikyam was in fairly well-to-do circumstances. The absence of any music at the time of the ceremony, as specially pointed out, was a circumstance against the truth of the story of the defence. There is one very important circumstance noted by the Subordinate Judge which militates against the theory of adoption, that is, the fact that the boy did not perform the *shradh* ceremony of the adoptive father which took place about 20 days from the date of the alleged adoption. Then the evidence is that he performed the two succeeding ceremonies at the village of Kavutharam while Manikyam herself was living at Guraza. It is also to be noted that the boy did not live with Manikyam at all for a long time after the alleged adoption.

There are also other very significant circumstances which support the decision of the Subordinate Judge. On the 24th November 1911, when the deed of surrender was presented for registration, it appears that a representation was made to the Sub-Registrar that, as a matter of fact, Manikyam had adopted a son and, therefore, Rangamma was not entitled to make a valid surrender. Exhibit LLLL is one of those petitions and it was sent by post and received by the Sub-Registrar on the 24th. Exhibit LLLL (1), the other petition, was presented to the Sub Registrar personally by the brother of the 81st defendant. It is curious that in none of these petitions, the name of the adopted son is mentioned, and we do not think that any proper explanation has been given for this omission. The Sub Registrar who was examined in the case says that the 81st defendant himself was present at the time of registration of Exhibit S and when asked for the name of the adopted son, he replied that the boy would come before the public in the course of a short time. We are asked to say that the evidence of the Sub-Registrar on the point is false. The Subordinate Judge, who saw the witness, did not find sufficient reason for disbelieving him; but apart from that, when we remember that there was so much anxiety displayed by the appellant's party to object to the registration of the deed of surrender and to set up an adoption, it is difficult to see why the name of the adopted son, if the adoption had actually taken place, should not have been put forward.

Then we find that the Will alleged to have been executed by Manikyam, Exhibit

XXX, and the deed of sale purporting to have been executed by her, Exhibit UUUU, both bear the date of 29th October 1911, the date of the alleged adoption. The adoption is mentioned in Exhibit XXX, and there can be very little doubt that the main purpose for which Exhibit XXX was executed, whenever it might have been executed, was to supply evidence of this adoption. The Subordinate Judge has found that both these documents have been antedated, and it seems to us that there is force in the reasons given in support of this conclusion. If, as a matter of fact, the Will was executed on the 29th October, it is not at all clear why, having regard to the anxiety which Manikyam and her advisers had to defeat the contemplated surrender on the part of Rangamma, no steps should have been taken at once to register this document. Then in Exhibit LLLL it is mentioned that certain documents "executed between the said Manikyam and the adopted son were about to be registered," and this could not possibly refer to the Will or to the deed of sale, Exhibit UUUU, and it is not explained why if the Will had been in existence it was not mentioned in Exhibit LLLL. One would have thought that if Exhibit XXX was in existence at that time, it would have been presented before the Sub-Registrar in support of the story of the alleged adoption. The truth seems to be, as suggested by the trial Judge, that Manikyam had no idea of adopting, but when her own relations and advisers found that the reversioners were going to obtain a surrender from Rangamma, they thought it necessary to give out that Manikyam had actually made an adoption. It may be assumed that Manikyam could not be persuaded to yield to the wishes of her advisers and make an adoption, but apparently it was not found easy to secure within the short time at their disposal a suitable boy whose parents or guardians would agree to such terms as would suit the purposes of Manikyam's relations and advisers. For instance, the brother of Manikyam is claiming a valuable portion of the properties belonging to the estate of her husband, under a conveyance said to have been executed on the date of the alleged adoption. In these circumstances we must confirm the finding of the Subordinate Judge that the alleged adoption of the 93rd defendant has not been proved.

The surrender of Rangamma is attacked mainly on the ground that it is not a *bona fide* transaction, inasmuch as she received Rs. 6,000 as consideration for making the surrender in favour of defendants Nos. 84 and 85 who were the nearest reversioners. The property is of the value of about 1½ lakhs yielding an annual income of something like Rs. 10 000 At the time of the surrender, Rangamma was about 80 years old. It also appears that defendants Nos 84 and 85 came to an arrangement with all the remoter reversioners as regards this property, and it may reasonably be that one of these persons will succeed on her death. The plaintiff, who seeks to recover his share under an arrangement of purchase from the surrenderees, is one of the remote reversioners. The question of law is undoubtedly one of difficulty, but so far as this Court is concerned, we must take it as settled by recent decisions reported as *Keretti Brahmanaikudu* v. *Kereti Mahalakshmi* (1) and *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (2). In the previous case it was arranged at the time of the surrender that part of the property would be reconveyed to the brother of the widow, and there was also a stipulation that she was to receive Rs. 400 though the amount apparently was not actually paid. Even in the face of these facts it was ruled, following the earlier case of *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (2), that the surrender was a valid one. We think that the present case is covered by those decisions. Mr. Ramachandra Aiyar tried to distinguish the present case from that in *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (2), on the ground that there is an observation by Mr. Justice Sankaran Nair that if part of the property be reconveyed to the widow in pursuance of an understanding at the time of the surrender, that might make a difference. But this observation is only by way of *obiter*, the main principle of the decision being that the fact that the consideration for the surrender was a reconveyance of a portion of the property, though to a third person, does not *ipso facto* invalidate the surrender. In this the consideration for the surrender,

(1) 17 Ind. Cas. 487; (1913) M. W. N. 433; 24 M. L. J. 543; 13 M. L. T. 468.

(2) 31 M. 446.

which would not amount to more than Rs. 6,000 at the most, was but a very small fraction of the entire property.

It is also argued that inasmuch as a house site worth about Rs. 600 is not included in the deed of surrender, the surrender cannot be said to be the entire estate as the law requires and is, therefore, bad. We do not think that there is any force in this contention. It is a very insignificant fraction that is not included in the surrender, very likely through inadvertence, and this cannot be held to affect the substance of the transaction. It was further sought to be argued by Mr. Ramachandra Aiyar that the so-called surrender was in fact an alienation of the properties by the widow to a number of persons, some at least among them being strangers not concerned in the reversion. He suggested that the surrender was a mere cloak in order to support alienations in favour of strangers. But this case was never sought to be made in the lower Court. No doubt in paragraph 6 of the 1st defendant's written statement there is a vague averment of conspiracy, but it cannot be said to have been intended to put forward a case that what purported to be a surrender in favour of the nearest reversioners, *viz.*, defendants Nos. 84 and 85, was really meant by Rangamma to be a cloak for supporting alienations in favour of strangers. No such issue was raised and the learned Subordinate Judge, who dealt with every matter raised during the trial at great length, has not alluded to any such question in his judgment. The surrender then was of practically the whole estate without reserving any portion of it to the widow, though a small sum of money was paid to the widow. In these circumstances the validity of the surrender is concluded so far as this Court is concerned by the decisions in *Keretti Brahmanaikudu* v. *Kareti Mahalakshmi* (1) and *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (2).

Then another point was raised by Mr. Ramachandra Aiyar that so far as the gift to the National College of 1/15th share of the property is concerned, it was not shown to have been accepted by the trustee of the College, as neither he nor the Secretary produced the deed at the time of the trial. The gift was not of an onerous nature and there is no reason for saying that it has not been accepted by the trustee. As a matter of fact both in the lower Court and before us in the arguments on behalf of the 1st defendant it was persistently and earnestly urged that it was the trustee and other persons interested in the National College that brought about the surrender. We do not think that there is any substance in this objection.

The next point urged before us is that this suit is not framed as a suit for partition and the Subordinate Judge was not right in declaring the shares of the different parties and in giving a decree for partition. As we read the plaint, it is a suit for partition and it has been so treated by the lower Court. The whole case has been tried on that basis.

The first point taken in the appeal on behalf of the 3rd defendant is that he should not have been made liable for mesne profits of item No. 9 in the schedule. It is suggested that he was in possession of that item on behalf of his minor natural son, the 1st defendant. It has been pointed out that the 1st defendant is not entitled to the property, and as the 3rd defendant himself was in actual possession of the property, we think he has rightly been made liable for mesne profits. As regards costs, it is suggested that some issues were decided in favour of the 1st defendant and the 3rd defendant and, therefore, the Sub Judge was not right in awarding the whole costs against them. But they failed on the substantial questions raised in the trial and we do not think that the Subordinate Judge was wrong in his order as to costs.

This disposes of the appeal by the 1st and 3rd defendants. Appeal No. 373 of 1915 is dismissed with costs.

APPEALS NOS. 420 AND 421 OF 1915.

These appeals must be dismissed with costs, on our finding that the adoption of the 93rd defendant did not, in fact, take place.

APPEAL NO. 384 OF 1915.

This appeal relates to certain properties which belonged to the estate of Konayya and were inherited by his widow Manikyam. She sold these properties to her own brothers by Exhibit UUUU for Rs. 5,000, which has been found and rightly so found to be a wholly inadequate consideration, assuming that it was paid. Mr. Narayanamurthi wishes to support the sale on the strength of Exhibit II, a Will executed by Konayya. His contention is that under this Will Manikyam became sole owner of the property inasmuch as no

child was born to her. But it has been found in fact that there was no miscarriage and that a female child was born to Konayya after his death and died shortly after its birth. The last clause in the Will to which reference is made says, "if no such (child) should be born, the adopted son which my wife according to her pleasure may take, or my wife Manikyam should enjoy the * * * * property." The gift to Manikyam is contingent on the child she was carrying not being born alive; this contingency did not happen as the child was in fact born alive and, therefore, the contemplated gift did not take effect in favour of Manikyam. This was the only question raised before us in the appeal which was argued only on behalf of defendants Nos. 3 and 4.

The appeal fails and is dismissed with costs.

APPEAL NO. 422 OF 1915.

This appeal raises the question of the validity of the lease of item No. 1 in the schedule granted by Ammama on the 4th December 1893 for 20 years to her father for a rent of Rs. 1,500 a year. The lease will expire in 2 years' time and the question argued before us is whether such a lease is competent for the widow to grant. The Subordinate Judge has found that in the circumstances it could not be said to be an improvident lease and has upheld it. It appears that the tenants, who were in possession of the lands, were creating difficulties and it was probable that without considerable litigation no rent would have been realised from them. We find that as a matter of fact Ammama's father had to bring a number of suits in order to eject the tenants who were denying his title and to recover the lands. It is stated that rent reserved in the original lease granted to Gopalakrishnayya was Rs. 1,900. But having regard to the difficulty of realising the rent, the Subordinate Judge is right in saying that the reduction of rent was justified. No doubt the lease was executed by Ammama in favour of her father, but it is difficult to say that it was done with a view to favour him as Ammama in fact prosecuted her father in a Criminal Court on some charges in connection with the accounts of her property. We are not, therefore, prepared to differ from the conclusion of the learned Subordinate Judge that the lease, under the circumstances, was a fair and *bona fide* transaction. That being so, it is undoubtedly valid in law. Mr. Ramadoss on behalf of the appellant also claims interest on the rents decreed to him. But having regard to the frame of the suit and the fact that the rents decreed were mostly for periods subsequent to the institution of the suit, we do not think we would be justified in giving him interest.

Item No. 2 in the schedule was bought by Ammama's father at a Court auction. The property was under mortgage to Ammama's husband Gopalakrishnayya and in order to enforce it, a mortgage suit was brought and in pursuance of the decree in that suit it was brought to sale. It was sold for Rs 600 and odd, although the decretal amount was about Rs. 2,000. Ammama's father was apparently a fairly well to do man and had sufficient means to buy this property. It is found that after him his son, the 2nd defendant, has been in possession, paying *kist* or Government revenue. It also appears that in a suit instituted by Ranganna against Ammama for maintenance, Ammama disclaimed all interest in this property; and in the proceeding before the arbitrators in the dispute between Ammama and her father, she did not claim the property as her own. These facts go to show that the property really was bought by Ammama's father *bona fide* and not as *benamidar* for Ammama. Much reliance is placed on an entry in the account-books of the Pleader who acted in the proceedings in the mortgage suit. These accounts show that a ledger was opened in Ammama's father's name and this property was purchased on his behalf. There is, however, a transfer of a small sum of Rs. 2 12 0 to Ammama's ledger, she being debited with this amount as it was incurred in respect of cost for taking delivery of the property. We do not think that this is sufficient to outweigh the other evidence which goes to show that the property was bought by Ammama's father on his own account. The burden lay upon the plaintiff to prove that the transaction was of a *benami* character, but far from that burden being discharged the evidence shows that the purchase was not *benami*.

Item No. 10 in the schedule, which consists of 25 cents of land, appears to have been made a gift of by Ammama to her Purohit,

the 73rd defendant, on the occasion of the Kistna Pushkaram. It is alleged that there is no registered instrument to evidence the gift and, therefore, it must be disallowed. No such plea, however, was taken and the question was not raised before the lower Court. We cannot, therefore, allow it to be raised now. This objection as regards item No. 10 is, therefore, disallowed.

Appeal No. 422 of 1915 fails and is dismissed with costs. So also the memorandum of objections in Appeal No. 373 of 1915 argued by Mr. Ramadoss.

The memorandum of objections in Appeal Nos. 422 of 1915 filed on behalf of defendants Nos. 5, 6, 7, 8, 9 and 21 relates to items Nos. 11, 15, 12, 16, in the schedule. As regards item No. 11, the Subordinate Judge has awarded mesne profits at the rate of Rs. 20 for all the shares and as regards item No. 15 he has awarded at the rate of 15 *tooms* an acre and at Rs. 50 a *patti*. It is contended that, as a matter of fact, these items are not in the possession of the 7th defendant. No doubt in his evidence he denies that he is in possession. But it is expressly alleged in the plaint that these items are in the possession of the 7th defendant and in his written statement there is no clear or positive denial of the allegation in the plaint. As regards item No. 12, the Subordinate Judge has given mesne profits at Rs 50 per *patti* and we are not in a position to say why he ought to have awarded, as is now contended, Rs. 44 and not Rs. 50. As regards item No. 16, the Subordinate Judge has awarded Rs. 480-6-0 while, as a matter of fact, the amount claimed is Rs. 413. The decree will, therefore, be modified by reducing the amount to Rs. 413, otherwise the memorandum of objections fails and is dismissed with costs.

The memorandum of objections in Appeal No. 373 of 19 5.

(For the memorandum of objections argued by Mr. Ramadoss *vide* under Appeal No. 422 of 1915 *supra*.)

As regards the memorandum of objections of the 76th defendant (13th respondent) the mesne profits awarded will be reduced to what is claimed against him in the plaint.

The 2nd defendant's (2nd respondent's) memorandum of objections:—The Subordinate Judge has found that the 14 cents, which is part of item No. 2, belongs to Ammama and we do not see special reason for interfering with that finding. Nor is there any ground for interfering with the conclusion of the Subordinate Judge as regards the liability of the 2nd defendant for the mesne profits of item No. 9. The technical objection, however, to the form of the decree with reference to item No. (1) is well founded, inasmuch as this item of property is under a lease and will not expire till sometime in 1918. The Subordinate Judge was not, therefore, right in so framing the decree as to give the plaintiff a present right to partition of this property. We think that there ought to be a paragraph in the decree after paragraph 2 to this effect that the right of the plaintiff to item No (1) of schedule be declared subject to the leasehold interest of the 2nd defendant under Exhibit HHH. As a consequence of that in the third paragraph of the decree, after the words "other than items" add "1 and 2." The paragraphs will be re-numbered. Subject to the above modifications of the decree the memorandum of objections is dismissed with costs.

The 18th respondent's memorandum of objections:—This relates to a part of item No. 20 amounting to about 7 acres and odd. This property was sold in auction in execution of the decree obtained by Rangamma against Ammama. The Subordinate Judge has found that the purchase by the 1st respondent, who was the *gomasta* of Ammama, was made on behalf of Ammama herself. There is considerable evidence in support of this finding which is also in accordance with the probabilities of the case. The memorandum of objections is dismissed with costs.

M. C. P.

Appeals dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 103 OF 1918.

August 6, 1919.

Present:—Mr. Justice Stuart and Mr. Justice Walsh.

GAJ KUMAR CHANDER—PLAINTIFF—PETITIONER

versus

Syed SALAMAT ALI AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), s. 167—Order of

GAJ KUMAR CHANDER v. SALAMAT ALI.

Assistant Collector – Revision, whether lies—High Court, power of interference of.

The High Court has no power to entertain an application for revision against an order passed in appeal against the decision of an Assistant Collector in a matter covered by the provisions of section 167 of the Agra Tenancy Act.

Civil revision against the order of the District Judge, Allahabad, dated the 8th February 1918.

Mr. *Gulzari Lal*, for the Petitioner.

Mr. *G. L. Agarwala*, for the Opposite Parties.

JUDGMENT.—The decision of this revision has been referred to a Bench of two Judges in view of the difference of opinion between the Judges who decided *Parbhu Narain Singh* v. *Harbans Lal* (1). The point is this. Does a revision under section 115, Civil Procedure Code, lie against the order of a District Judge in an appeal against the decision of an Assistant Collector in a matter under the provisions of section 167, Local Act II of 1901? We have heard the arguments. The arguments to the effect that no such revision lies can briefly be stated as follows: Under the provisions of section 167, Local Act II of 1901, all suits and applications of the nature specified in the 4th Schedule shall be heard and determined by the Revenue Courts and, except in the way of appeal, as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made. The authority of Courts for dealing with the matters provided for by that Act is to be found in the provisions of the Act itself. Revenue Courts only have authority to deal with original matters. Revenue Courts in some instances and Civil Courts in other instances have authority to deal with matters in appeal. The Act confers powers in revision under the provisions of section 185 on the Board of Revenue alone. What authority then, we are asked, has the High Court "except in the way of appeal as hereinafter provided." According to this argument the High Court has necessarily no revisional authority. The arguments on the other side are to the effect that section 115, Civil Procedure Code, confers upon the High Court revisional jurisdiction over all Civil Courts subordinate to itself. As a District Judge's Court is subordinate to the High Court, it follows according to this argument that the High Court must have powers to revise any orders passed by a District Judge. Great stress is laid in this connection upon the provisions of section 193, Local Act II of 1901, and we have been asked to note that the provisions of old section 622, Civil Procedure Code, are not excluded under the provisions of section 193. After considering the point we are of opinion that the argument against the existence of revisional powers of the High Court in these matters must prevail; the fact that there is no exclusion of section 622 in section 193 does not affect the question, for the provisions of the Code of Civil Procedure apply to the procedure in suits and other proceedings under the Rent Act so far as they are not inconsistent therewith. Thus the only power that the High Court has to dispose of matters covered by Local Act II of 1901 is given by the Act itself, and the power of revision is not a power which is so given to it. In other words we accept the view of Mr. Justice Piggott in *Parbhu Narain Singh* v. *Harbans Lal* (1): "I am, as at present advised, of opinion that it would be doing violence to the words of the last clause of section 167 of the Tenancy Act for this Court to entertain the present application at all." The same view was taken by Tudball, J., in *Mohammad Ehtisham Ali* v. *Lalji Singh* (2). We, therefore, find that the High Court has no power to entertain an application for revision against an order passed in appeal by a District Judge against the decision of an Assistant Collector. We accept the preliminary objection and dismiss this revision with costs.

Revision dismissed.

(1) 35 Ind. Cas. 279; 14 A. L. J. 281.

(2) 49 Ind. Cas. 362; 17 A. L. J. 123; 41 A. 226.

KAMAKSHI AMMAL v. SUBBARAYA CHETTY.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1065 OF 1918.

March 6, 1919.

Present:—Mr. Justice Phillips.

KAMAKSHI AMMAL—PLAINTIFF No. 1—PETITIONER

versus

SUBBARAYA CHETTY AND ANOTHER—DEFENDANT AND PLAINTIFF No. 2—RESPONDENTS.

Stamp Act (II of 1899), s. 37—Certificate by Collector under s. 37, grant of legality of—Endorsement on pro-note that penalty has been levied, effect of—Pro-note, invalid, suit on—Trial without objection by parties—Original cause of action, suit on—Amendment of plaint—Oral application, whether sufficient—Civil Procedure Code (Act V of 1908), s. 153, O. VI, r. 17.

An endorsement on a pro-note by a Sub-Collector that penalty has been levied, is not a certificate within the meaning of section 37 of the Stamp Act that the pro-note is duly stamped. [p. 758, col. 2.]

Reference under section 57 of Act II of 1899, 23 A. 213 A. W. N. (1901) 54 and *Venkatraman Ganap Hegde* v. *Shankarnarayan Sitaram Bhat*, 42 Ind. Cas. 947: 19 Bom. L. R. 862, considered.

Where a suit is based on a pro-note which is invalid under the Stamp Act but which both parties think is valid, the Court should allow the plaintiff to amend his plaint and fall back on his original cause of action. [p. 759, col. 1.]

A written application is not necessary to move the Court for an order allowing an amendment of the pleadings. An oral application is sufficient. [p. 758, col. 2.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court, Chingleput, in Appeal Suit No. 388 of 1917, preferred against the decree of the Court of the District Munsif, Conjeevaram, in Original Suit No. 497 of 1916.

Mr. *T. Narasimha Iyengar*, for the Petitioner.—The Sub Collector having granted a certificate, the same is binding on the Civil Courts. The mention of a wrong section is immaterial. In any event the defendant did not object to the maintainability of the suit. The parties went to trial on the assumption that the pro-note was valid. The lower Court should have allowed the plaintiff to fall back on the original cause of action. The District Judge erred in holding that the application for amendment should be in writing. There is no statutory provision barring oral applications.

Dr. *K. Pandalai*, for the Respondents.—The certificate purports to have been given under sections 33 and 35 of the Stamp Act, under which certificates could not be granted. It cannot be taken to have been granted under section 32, as the document was produced more than 3 years after its execution.

Under section 37 no certificate could be granted. See *Reference under section 57 of Act II of* 1899 (1) and *Venkatraman Ganap Hegde* v. *Shankarnarayan Sitaram Bhat* (2).

As for amendment, the plaintiff could not be permitted to alter the nature of the suit.

JUDGMENT.—It is contended that the certificate of the Sub Collector being one under sections 32 and 37 of the Stamp Act, is binding on a Civil Court. The certificate purports to be under sections 33 and 35, which do not provide for certificates, but it is certainly not one under section 32, for the document was only produced before the Sub Collector 3 years after execution.

It is contended that no certificate could be granted under section 37 and reliance is placed on *Reference under section 57 of Act II of* 1899 (1) and *Venkatraman Ganap Hegde* v. *Shankarnarayan Sitaram Bhat* (2), which follows it. It is somewhat doubtful whether *Reference under section 57 of Act II of* 1899 (1) is now correct law, for certain kinds of postage stamps are now recognised under the Stamp Act, a point which was not considered by the Bombay High Court in *Venkatraman Ganap Hegde* v. *Shankarnarayan Sitaram Bhat* (2). I think it is unnecessary to decide this point, for I do not think the certificate was made under section 37, for there is no endorsement or certificate on the document that it is duly stamped, the only endorsement being that a penalty of Re. 1 had been levied, and for this reason the Sub Collector appears to have referred to section 35 in his order. It is then contended for petitioner that the plaint should have been allowed to be amended. The District Judge rejected the application on the ground that no written application had been filed, for his other reason, *i. e.*, that the plaint did not contain distinct causes of action, is hardly of much value in deciding whether a plaint should be amended. However, an oral application would be quite sufficient.

(1) 23 A. 213; A. W. N. (1901) 54.
(2) 42 Ind. Cas. 947; 19 Bom. L. R. 862.

The plaintiff and apparently defendant also thought the pro-note to be valid and I, therefore, think that this is pre-eminently a case where plaintiff should be allowed to fall back on his original cause of action.

The decrees of the lower Courts are set aside and the suit remanded to the District Munsif for fresh disposal after allowing the plaint to be amended. Costs will abide the result.

M. C. P.

Decrees set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 562 OF 1916.

April 5, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Newbould.

GIRISH CHANDRA MONDAL AND OTHERS —APPELLANTS

versus

NARENDRA NATH HALDAR AND OTHERS —RESPONDENTS.

Landlord and tenant—Occupancy holding, non-transferable, transfer of—Transferee, recognition of, by landlord—Rent, arrears of, liability for—Sale of holding in execution of decree against old tenant, legality of.

D purchased a non-transferable occupancy holding from the tenant; the landlord, however, brought a suit for arrears of rent against the tenant and obtained a decree in 1901. In 1902 *D* paid the *salami* for mutation and was recognised as tenant by the landlord. In 1904 the landlord sued out execution of the decree he had obtained in 1901 against the old tenant, and brought the holding to sale and it was purchased by *E*, who transferred the holding by conditional sale to *F*. The plaintiff obtained a lease from *F* and brought the present suit for possession on establishment of his title:

Held, that the landlord having recognised *D* unconditionally as the tenant, the latter was not liable for the arrears of rent, and the old tenancy having come to an end, the landlord was not entitled to bring to sale the holding as the holding of the old tenant, and that, consequently, the suit must fail. [p. 761, col. 1.]

Appeal against the decree of the District Judge, 24 Pergannahs, dated the 27th September 1915, confirming that of the Munsif, Diamond Harbour, dated the 30th June 1914.

FACTS appear from the following preliminary judgment of Mr. Justice Chatterjea and Mr. Justice Newbould dated 26th November 1918:—

In this case the defendant No. 1 or rather his father was the transferee of a non-transferable holding. The defendant No 1 was recognised as a tenant by the landlord in the year 1902. Previous to that, however, the landlord had brought a suit for arrears of rent against the heir of the original tenant and obtained a decree in the year 1901. That decree was executed sometime in the year 1904 and the holding was purchased by some person through whom the plaintiff claims the holding in suit.

The lower Appellate Court has found that the defendant had been recognised by the landlord. The Courts below have, however, concurred in giving a decree to the plaintiff.

On appeal it is contended that the landlord having recognised the defendant No. 1, the transferee of the holding, as a tenant in the year 1902, the relationship between the landlord and the old tenant came to an end, that the decree for rent could not be executed against the holding, and that the sale could not affect the right of the defendant No. 1 who had been recognised as a tenant.

Before we proceed to consider the arguments addressed to us on this question by the learned Pleaders on both sides, it is desirable to have a finding upon the question whether the recognition of the defendant No. 1 by the landlord was conditional or not, as it is suggested on behalf of the respondent that the recognition might have been conditional on the defendant No. 1's paying up the decree for rent, and that the understanding might have been that the decree would be executed against the holding if it was not paid up by the transferee.

We do not find the question discussed in either of the Courts below, and we accordingly send the case back to the lower Appellate Court for a finding upon the question as to what was the understanding, if any, at the time of the recognition of the defendant No. 1 by the landlord. The finding should be returned to this Court within two months from this date.

The appeal will be retained on the file of this Court.

Babu *Surendra Chandra Sen* (with him Babu *Hemendra Chandra Sen*), for the Appellant.—The main question for decision in this case is whether the Bengal Tenancy Act applies in a case between a landlord and an outgoing *raiyat* who has sold his right to another *raiyat*. The landlord recognises the transferer. Can the landlord eject the purchaser under section 66? The holding is a non-transferable occupancy holding.

According to section 65 he cannot be ejected but his tenure may be sold.

Here there is no question as to the fact that the tenant ceased to be a tenant before execution.

Section 169, clause (*c*), referred to.

If the landlord, having recognised me in 1902, sells the property in 1904, he cannot take the proceeds of sale between 1902 and 1904

Under Chapter XIV it is no longer a holding of tenure holder or landlord, as can be gathered from the proper interpretations of the sections.

According to *Dayamoy's case* the landlord is entitled to *khas* possession.

We purchased the holding in 1886 and 18 years after our purchase the landlord recognised us as tenants.

My contention is that it is not a rent decree and section 60 and Chapter XIV of the Bengal Tenancy Act do not apply.

It is not necessary to have the sale set aside.

The whole case is that it was wrongly treated as a rent decree against an outgoing tenant.

Babu *Hiralal Chakravarty*, for the Respondent.—The question for decision is whether recognition after decree and before execution is valid or not. When the rent sale took place against a genuine decree the sale was valid. I am entirely unconcerned with the execution proceedings. At best I got a constructive notice. I am an innocent purchaser.

Because I am a *bona fide* purchaser, I cannot, of course, have some right.

Section 66 is only complementary to section 65 and *vice versa*, and this is the view taken by the Judicial Committee.

He cannot take advantage of his own wrong. In section 66 no third person is concerned.

He brought a suit to set aside the sale, etc., and decision was that it could not be set aside.

Recognition in the present case cannot have the effect of changing a non-transferable occupancy holding into a transferable one.

This recognition was made after sale and this was urged by us in the first Court.

After the sale was confirmed, a suit was brought by defendants against auction-purchaser and landlord to set aside the sale and confirm the possession. It was dismissed. Therefore the present case is *res judicata*.

[NEWBOULD, J.—Was this point taken in the first Court?]

Yes.

[Babu *Surendra Chandra Sen*.—It was not necessary to decide this point. The only question is whether he had any title]

A copy of the decree is in the record.

[Babu *Surendra Chandra Sen*.—No issue as to *res judicata* was made in the first Court. Application was treated as one under section 244, Civil Procedure Code (section 47, new Code). The copy of judgment is not here. The judgment is that it was treated as an application under section 244, Civil Procedure Code. Hence the point that the copy of the decree shows that the present suit will be *res judicata* cannot be allowed.]

From I. L. R. 14 Calcutta downwards all the decisions show that if the purchaser is a *bona fide* one he cannot be disturbed.

Babu *Surendra Chandra Sen* briefly replied.

JUDGMENT.—The defendant No. 1 purchased a non-transferable occupancy holding from the tenant in the year 1283. The landlord, however, sued the tenant for arrears of rent and obtained a decree in the year 1901. In 1902 the defendant No. 1, who had purchased the holding from the tenant as stated above, paid *salami* for mutation of names and he was recognised as tenant by the landlord in 1902. Subsequently in the year 1904 the landlord put the decree which he had obtained in the year 1901 against the tenant into execution and in the sale which followed, the holding was purchased by defendant No. 2. The defendant No. 3 got the holding by conditional sale from the defendant

No. 2. The plaintiff obtained a lease from the defendant No. 3 and brought a suit for recovery of possession on establishment of his title.

It was contended before us on behalf of the appellant that after the defendant No. 1's purchase had been recognised by the landlord, the relationship of landlord and tenant between the landlord and the old tenant ceased and that, therefore, the provisions of section 65 or the provisions of Chapter XIV of the Bengal Tenancy Act could not apply to the case.

It was suggested before us, on behalf of the respondent, that the landlord might have recognised the purchase on condition that the purchaser should pay up the arrears of rent (the rent decree), and we accordingly remanded the case for a finding upon the question as to what was the understanding, if any, at the time of the recognition of the defendant No. 1 by the landlord.

The learned District Judge has come to a finding that the recognition was subject to no condition, and the finding amounts to this, that the purchaser could not be held liable for the arrears of rent.

That being so, and the old tenancy having come to an end, the landlord could not put up to sale the holding (which had passed to the defendant No. (1) as the holding of the old tenant. Apart from the question whether the plaintiff's lessor who was the purchaser of a non transferable occupancy holding had acquired any right to the holding, we think that upon the finding arrived at the suit must fail.

The appeal is accordingly allowed and the suit must be dismissed with costs in all Courts

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 159 OF 1918.

January 20, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

JAGANNATHA AYYANGAR—

APPELLANT

versus

NARAYANA AYYANGAR AND ANOTHER—

RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 25, 36, 37—Transfer by debtor's transferee, avoidance of—Official Receiver, right of—Applicability of s. 36 where first transferee is only benamidar *for his transferee—Colourable transaction—Enquiry by Court—Joinder of subsequent transferee as party—Appeal against Court's order by creditor, legality of—Remand, order of—Right of creditor appellant to be represented in further proceedings—Enquiry on report of Official Receiver, validity of—Madras High Court Rules under Provincial Insolvency Act, r. 2 (7)—Procedure.*

It is not competent to a Court to institute an enquiry under section 36 or 37 of the Provincial Insolvency Act on a report by the Official Receiver, but where such proceedings are taken without objection they are not invalid *in toto*, and may be validated by the Official Receiver converting his report into a properly stamped petition [p 762, col. 2]

The Court has jurisdiction under section 36 of the Provincial Insolvency Act to enquire into a petition by the Official Receiver for the avoidance of a transfer by the debtor's transferee, where the second transfer is only a colourable transaction and the debtor's transferee is only a *benamidar* for his subsequent transferee. In such an enquiry the second transferee is a necessary party. [p 762, col. 2; p 763, col.]

Quære.—Whether the word 'insolvent' in sections 36 and 37 of the Provincial Insolvency Act would not include persons who have derived title from him and whether the sections do not contemplate action being taken against the transferees from the first transferee

An appeal against an order passed under sections 36 and 37 of the Provincial Insolvency Act need not necessarily be presented by the Official Receiver but may be presented by a creditor of the insolvent. But the creditor will not be entitled to conduct proceedings had in pursuance of an order of remand by the Appellate Court. [p. 763, col. 2.]

Per *Seshagiri Aiyar, J.*—Having regard to the provisions of section 53 of the Transfer of Property Act, there must, ordinarily, be a suit against the subsequent transferee to recover possession [p. 764, col. 1.]

Appeal against the order of the District Court, Tanjore, in Insolvency Petition No. 9 of 913

FACTS appear from the judgment.

Mr. *K. R Rangoswamy Ayyangar*, for the Respondent, took the preliminary objections that the whole proceedings were *ultra vires*, because they were had on the Official Re-

ceiver's report. The District Judge was not moved by a petition from the Official Receiver, as he was required to do by the rules of the High Court, and the appeal was not presented by the Official Receiver.

Mr. *M S. Ramanuja Ayyangar*, for the Appellant.—The objection comes at a late stage. It was not raised in the lower Court nor even in the earlier stages of the appeal in this Court. In any event the want of form in the initiation of proceedings does not vitiate them altogether. The Official Receiver may now be directed to put in a petition.

As to the presentation of the appeal any creditor may file it; see *Kumarappa Chettiar* v. *Murugappa Chettiar* (1).

A transferee from the insolvent's transferee is within the terms of sections 36 and 37 of the Provincial Insolvency Act. Transfers by the debtor's transferee may be avoided under the sections. The law in England is to that effect under section 47 of the Bankruptcy Act of 1883. See *Brown, Ex parte*; *Vansittart, In re* (2), *Norton Ex parte*; *Brall, In re* (3) and *Carter and Kenderdine's Contract Act, In re* (4). In any event first transfer was merely a cloak for the second transfer. It virtually amounts to a transfer by the insolvent *benami* through the first transferor. As such it comes within the mischief of section 36.

Mr. *Rangaswamy Ayyangar*, for the Respondent.—There is no express provision in the Act for the avoidance of transfers by the debtor's transferee. The only remedy is by a suit for possession. He may plead *bona fide* purchase without notice. The definition of the word 'insolvent' cannot be made to include persons deriving title from him. The special procedure prescribed in the sections cannot be applied to cases not expressly covered by them.

JUDGMENT.

OLDFIELD, J.—An attempt has been made to support the lower Court's order without reference to its merits, on the ground that it should not have been passed and the proceedings should not have been regarded as validly instituted on the Official Receiver's report without any regular petition. This objection is justified by rule 2 (7) of the rules passed by this Court for Official Receivers. But, it has, so far as appears, never been relied on either in the lower Court or when the case was heard here at an earlier stage. We are not prepared in these circumstances to treat the proceedings as invalid *in toto*. They will be allowed to go on conditionally on the Official Receiver converting his report into a properly stamped petition in proper form.

On the merits we read the report as embodying a request to the Court to avoid the transfers evidenced by two documents, referred to by the Official Receiver as Exhibits III and IV. Exhibit III is a transfer by the debtor to one Thiruvengadatha Ayyangar and Exhibit IV by the latter to the present respondent. The lower Court has refused relief on the ground that section 35, Provincial Insolvency Act, under which the application was made, authorises only the avoidance of transfers by the debtor, not by his transferees.

The first answer to this is that the Official Receiver's case in his report was that there was no real transfer by Exhibit III, but only a concealment of the insolvent's property in the name of another person and that, therefore, Exhibits III and IV should have been regarded altogether as a device for a transfer by the debtor to the respondent. The lower Court should have dealt with the case on this basis and must now do so. If this is established and there was no real transfer to any intermediate transferee, the respondent's objection to the evidence of Exhibit IV will be met.

Next I am prepared to agree with the lower Court that section 36 does not cover transfers by transferees from the insolvent, since its wording excludes them. The contrary is contended for because in England, as for instance in *Brown, Ex parte*; *Vansittart, In re* (2) and *Norton, Ex parte*; *Brall, In re* (3), such transfers were set aside with reference to the similarly worded section 47 of the Bankruptcy Act, 1883. That, however, is not conclusive, because the trustee concerned in those cases was able under the English rule 6 (*e*) to move the Court by application in respect of any

(1) 36 Ind Cas. 771.
(2) (1893) 2 Q. B. 377; 62 L. J. Q. B. 279; 5 R. 280; 68 L. T. 233; 41 W. R. 286; 10 Morrell 44.
(3) 1893) 2 Q. B. 381; 62 L. J. Q. B. 457; 5 R. 440; 69 L T 323; 41 W. R. 623; 10 Morrell 166
(4) (1897) 1 Ch 776; 76 L. T. 476; 66 L. J. Ch. 408; 45 W. R. 484; 4 Manson 34.

settlement and there was no question on his proceeding by suit, as, in the absence of such a rule, the Official Receiver must proceed against third parties in India and as he will be able, if necessary, to proceed in this case.

But even if section 36 does not authorise the Official Receiver's employment of the special procedure provided by the Act in respect of Exhibit IV, we have been shown no reason why he was not entitled to employ it to obtain the avoidance of Exhibit III, and thus to lay the foundation for legal proceedings in respect of the former document. If then the lower Court rejects the contention already referred to as to the colourable character of Exhibit III, it must still deal with the Official Receiver's substantive contention as regards it.

In dealing with the case the lower Court will be well advised to have the transferee under Exhibit III, Thiruvengadatha Ayyangar, made a party in order to avoid or reduce litigation in future.

A preliminary objection to the hearing of the appeal was taken on the ground that it was not presented by the Official Receiver, but by the creditor. The objection was unsustainable in view of the decision in *Kumarappa Chettiar* v. *Murugappa Chettiar* (1). This, however, we may observe, will not entitle appellant to the conduct of the petition in the lower Court, when it is dealt with there in pursuance of this order.

We set aside the lower Court's decision and remand the Official Receiver's application for re-admission and re disposal in the light of the foregoing. Costs to date will abide the result and be provided for in the order to be passed.

SESHAGIRI AIYAR, J.—I agree but only wish to add a few words upon two of the legal questions argued before us. The learned Vakil for the respondent took the preliminary objection that the whole proceeding was *ultra vires*, because the District Judge was not moved by the Official Receiver by a petition. I am inclined to the view that the learned Judge should have called on the Official Receiver to embody the points on which he wanted a decision in a petition. Clause 7, rule 12 of this Court's rules contemplates a direction by the District Judge to the Official Receiver to present such a petition, when a report is submitted. In the Bankruptcy Act in England a motion in open Court is the procedure prescribed. See Robson's Law of Bankruptcy, page 946. But the District Judge has been allowed to pass orders without demur on the report. Although on the last occasion an objection was taken in this Court against that procedure, either the point was not argued or the learned Judges did not uphold this purely technical objection. At the same time in order that the proceedings may be made regular, I agree with my learned brother that the District Judge should now call upon the Official Receiver to present a formal petition. I am also of opinion that notice should go to Thiruvengadatha Ayyangar.

As regards the contention that sections 36 and 37 of the Provincial Insolvency Act do not contemplate action being taken against transferees from the first transferee, I am not clear that the word *insolvent* would not include persons who have derived title from him. In England, it seems to have been taken for granted that subsequent transferees are equally within the mischief intended to be guarded against Under section 47 of the Bankruptcy Act of 1883, corresponding to section 36 of our Act, applications against subsequent transferees were entertained without objection. See *Brown, Ex parte*; *Vansittart, In re* (2) and *Norton, Ex parte*; *Brall, In re* (3) and *Carter and Kenderdine's Contract Act, In re* (4). May in Fraudulent Conveyances summarises the law thus:—"A voluntary settlement within section 47 is void against the trustee in the bankruptcy not from the date of the settlement, but from the date at which the title of the trustee has accrued, that is, the date of the act of bankruptcy, to which the title of the trustee relates back. Hence, a purchaser in good faith from the donee under the settlement of property comprised therein, who has purchased before the date at which the trustee's title accrued, has a good title to the property as against the trustee even though he purchased with notice that his vendor had acquired the property by means of a voluntary conveyance."

It must, however, be mentioned that a rule was passed in England under the Act

in these terms:—"Applications to set aside or avoid any settlement, conveyance, transfer, security or payment or to declare for or against the title of the trustee to any property *adversely* claimed may be made, &c." This rule is wide enough to cover application against a subsequent transferee, as he can be said to claim adversely against the trustee. It may be advisable to enact a similar rule under the Provincial Insolvency Act. In the absence of such a rule and having regard to the words of sections 36 and 37, it is open to doubt whether the Official Receiver can ask that the subsequent transfer be annulled as against him.

In any event, I think that with reference to section 53 of the Transfer of Property Act, there must ordinarily be a suit against the subsequent transferee to recover possession, because contentions as to his being a *bona fide* transferee for value without notice from an ostensible owner can be raised by the transferee. With these remarks I agree with my learned brother that the case should be remitted to the lower Court for further consideration. I also agree that the District Judge should have considered whether Thiruvengadatha Ayyangar was only a *benamidar*. If he came to that conclusion, the second transfer should be regarded as made by the insolvent. The fact that it was not made directly by him but through the agency of his nominee should not affect the enquiry under sections 36 and 37 of the Act.

M. C. P.

Appeal allowed;
Case remanded.

PATNA HIGH COURT.
APPEAL FROM APPELLATE ORDER No. 138 OF 1919.
July 22, 1919.
Present:—Mr. Justice Das.
RAM PROSAD ROY—OPPOSITE PARTY—APPELLANT
versus
KIRIT ROY—APPLICANT—RESPONDENT.

Civil Procedure Code (Act V of 1908, O. XXI, r. 2—Execution of decree—Satisfaction of decree—Evidence of satisfaction, admissibility of—Payment certified but not recorded, whether can be recognised.

A Court executing a decree is entitled to go into evidence for the purpose of considering whether the decree-holder has certified satisfaction of the decree. Order XXI, rule 2, clause (3), of the Civil Procedure Code enables a Court to recognise a payment or adjustment which has been certified but not recorded. [p. 765, col. 1.]

Appeal from a decision of the Subordinate Judge, Saran.

Mr. *Jalgobind Prasad Sinha*, for the Appellant.

Mr. *Harnarayan Prasad*, for the Respondent.

JUDGMENT.—The only question argued before me is whether under section 47 of the Code of Civil Procedure the Court can investigate the question whether the fact of satisfaction of a decree was certified to the Court by the decree holder.

In this case the appellant obtained a decree against the respondent. He put that decree in execution, when he was met with the plea by the respondent that the decree was satisfied and the fact of the satisfaction of the decree was certified to the Court by the decree holder. The petition put in by the decree holder is not forthcoming and the explanation is that it was either misplaced by the Court Amlas or that the decree-holder may have had something to do with it. The lower Appellate Court has on evidence come to the conclusion that the decree holder did certify the fact of the satisfaction of the decree to the Court and that, therefore, execution cannot proceed.

The learned Vakil on behalf of the decree-holder urges that the Court should not have gone into that question at all and that sub section 3 of Order XXI, rule 2, prevents the Court executing a decree from recognizing any payment or adjustment which has not been certified or recorded.

The scheme of Order XXI, rule 2, is not very complicated. First of all there is an obligation on the decree-holder to certify the payment or adjustment to the Court, whose duty it is to execute the decree, and there is also an obligation on the Court to record the same accordingly. Next, if the decree-holder does not certify to the Court, then the section gives power to a judgment-debtor

to bring that fact to the notice of the Court, and it gives power to the Court to investigate that matter and if the Court finds that there were such payments as alleged by the judgment-debtor, the Court has power to record the same accordingly. Lastly, it imposes a bar upon a Court executing the decree from recognizing a payment or adjustment which has not been certified or recorded as aforesaid. In my opinion the Court may recognize a payment or adjustment which has been certified but not recorded. It seems to me that sub section 3 is perfectly clear on this point. Therefore, the position is that the Court finds on an investigation of facts that the decree-holder did certify the fact of such payment to the Court, although it was not recorded by the Court. In my opinion the Court was entitled to go into evidence for the purpose of considering whether the decree-holder did certify the fact of such payment to the Court. The finding of fact that the decree-holder did certify such payment to the Court is binding on me in second appeal, and I hold that the Court may recognize such payment although it has not been recorded by the Court.

I would, therefore, dismiss this appeal with costs, which I assess at one gold *mohur*.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 89 OF 1918.

February 17, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

A. T. S VALASUBRAMANIA PILLAI—PLAINTIFF—PETITIONER APPELLANT

versus

T. A. B. CHIT COMPANY YELA NIDHI, LIMITED MARUDUR, AND OTHERS—DEFENDANTS—COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 17 (2)—Execution of decree—Application for execution, return of—Presentation after amendment—Limitation, commencement of—Time, grant of, for making amendment, application for, whether 'step-in-aid' of execution—Limitation Act (IX of 1908), Sch. I, Art. 182 (5).

Where an application for execution of a decree or order is re-presented after the required amendments have been made the amended application should, for purposes of limitation, be deemed to have been presented on the date on which it was first presented, and not on the date of re-presentation. [p. 766, cols. 1 & 2]

An application for time to amend an execution application and to put it in the form prescribed is not a 'step-in-aid' of execution within the meaning of Article 8 (5) of the Limitation Act, nor is an adjournment granted to convert an irregular application not placed on the file into a regular one a 'step-in-aid' of execution. [p. 766, cols. 1 & 2; p. 767, col. 1.]

In order that a particular act may amount to a 'step-in-aid' of execution, execution must be pending before the Court which it can aid. [p. 766, col. 1.]

Abdul Kadir Rowther v. *Krishna Malamal Nair*, 23 Ind. Cas. 533; 38 M. 695; 26 M. L. J. 433; 15 M. L. T. 305; (1914) M. W. N. 563; 1 L. W. 271, explained and distinguished.

Appeal against the order of the District Court, Tinnevelly, dated the 22nd March 1918, in Appeal Suit No. 84 of 1918, preferred against the order of the Court of the District Munsif, Tinnevelly, dated the 13th December 1917, in Execution Petition No. 414 of 1917, in Original Suit No. 107 of 1910.

FACTS appear from the judgment.

Mr. *S. Subramanya Aiyar*, for the Appellant.—Order XXI, rule 17 (2), Civil Procedure Code, is only an enabling provision. It does not abrogate the law as it stood before the enactment of the new Code. The decree-holder has alternative rights under the new Code. He can fall back on the date of re-presentation for purposes of limitation. Under the old Code there was no provision corresponding to Order XXI, rule 17 (2), Civil Procedure Code. Under the old Code, the decisions laid down that the date of re-presentation should be regarded as the date of applying in accordance with law.

Then, the grant of time by Court for amendment gives a fresh starting point. It is a "step in aid of execution" *Abdul Kadir Routher* v. *Krishna Malamal Nair* (1).

Mr. *M. D. Devadoss*, for the Respondents.—Order XXI, rule 17 (2), of the new Civil Procedure Code makes a deliberate departure from the old Code. The decisions under the old Code are no longer law. The rule neither expressly nor impliedly provides

(1) 23 Ind. Cas. 533; 38 M. 695; 26 M. L. J. 433; 15 M. L. T. 305; (1914) M. W. N. 563; 1 L. W. 271.

for alternative rights as suggested for the aprellants.

The grant of time is no step-in aid of execution. *Abdul Kadar Rowther* v. *Krishna Malam l Nair* (1) is clearly distinguishable. There the execution application was admitted and the petitioner was asked to furnish further particulars. Here the application has not been registered and numbered and time was given to present it in proper form.

JUDGMENT.

OLDFIELD, J.—The execution application before us was so far from being in the proper form when it was presented, that after eight months the petitioner appellant here crossed it out and amended it by re-writing it as a whole. The interval had been spent almost entirely in appellant's Vakil asking for and the lower Court mechanically granting extension of time in instalments of two weeks. The case is not creditable either to the Vakil or the Court.

The first point taken is that for purposes of limitation the date on which the application was finally admitted, not that on which it was first presented, is the starting point, because appellant's interest is to put that starting point as late as possible. Order XXI, rule 17 (2), of Schedule I of the Code of Civil Procedure, however, lays down that an amended application shall be deemed to have been presented on the date on which it was first presented. It is suggested that this provision does not abrogate the law, as it stood before its enactment, that the presentation should be treated as effected when the application was finally accepted, the decree-holder thus having his choice between two dates. It is sufficient that, even if the law before 1908 stood as is alleged, the wording of Order XXI, rule 17, is clear and general and does not countenance this suggestion.

Next it is said that time should run from some one of the various applications for time inscribed on the application, which have been referred to above, as a step in-aid of execution. But when the alleged step was taken there was no execution pending before the Court, which it could aid. This, therefore, also fails.

Lastly, it is urged that the appellant should be regarded as having really presented two applications, one of which must be deemed to have been withdrawn when he made a fundamental and comprehensive amendment above mentioned. In fact he then put in the original petition with an endorsement "filed amended" and paid for no second stamp; and it is impossible to identify any withdrawal of the old petition or presentation of a new petition with what he did.

The appeal against appellate order is dismissed with costs.

SESHAGIRI AIYAR, J.—I agree.

Mr. S. Subramania Ayyar for the appellant has raised some ingenious contentions. The first is that the application for execution must be taken to have been presented on the date of its re presentation and not on the date of its original presentation. Order XXI, rule 17, clause 2, Schedule I of the Code of Civil Procedure, is against this argument. Then it was suggested that this rule is only an enabling provision and that the Legislature intended to provide alternative rights to the decree-holder and not to deprive him of the existing rights. This contention was based on the facts that before the Procedure Code of 1908 was passed, there was no provision corresponding to Order XXI, rule 17 (2) and that it was held by some Courts that for purposes of computing the period of limitation under Article 179 of the Limitation Act, it is the date of the re-presentation that should be regarded as the date of applying in accordance with law. The learned Vakil from these facts advanced a bold argument that the Legislature notwithstanding Order XXI, rule 17 (2), intended to perpetuate the old view of the law and provided an additional right to the decree-holder to enable him to count the original presentation date as also enuring for his benefit. I am unable to accept this contention. With knowledge of the old decisions the Legislature has deliberately enacted that it is the date of the original presentation that starts limitation.

The next contention was that inasmuch as the Court granted a dozen times time to enable the applicant to comply with the requirements of the Code, each of those endorsements granting time was a step in-aid of execution. Reliance was placed on *Abdul Kadur Rowther* v. *Krishna Malamal Nair* (1) for this argument. In that case an execution application was on the file of the Court and the applicant was given time

to furnish particulars to enable the Court to deal effectually with that application. The grant of time was held by the learned Judges as a step in aid of execution. Even in that view, the present contention cannot be sustained. Here there was no application on the file and consequently there can be no step-in-aid of execution; what the applicant was asked to do was to make the application a valid one on which the Court's order can be passed; an adjournment granted to make an irregular application not placed on the file a regular one is not a step-in-aid of execution.

I agree that the appeal should be dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL APPEAL No. 69 OF 1918.

January 14, 1919.

Present :—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir John Woodroffe, Kt.

HARAN CHANDRA CHATTERJEE

—PLAINTIFF—APPELLANT

versus

THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision—'Illegality' or irregularity, what is—Trial of wrong issue or misplacement of onus, whether justifies interference—Failure of justice for want of sufficient evidence.

In interfering with a decision of a lower Court under section 115, Civil Procedure Code, the High Court is not concerned with any error in the decision on matters of law or fact. It must be shown that there is a question of jurisdiction within the meaning of clauses (*a*) and (*b*) of section 115 or that there has been an act of actual illegality or irregularity in procedure affecting the merits. [p. 768, col. 1; p. 769, cols. 1 & 2.]

The words "illegality" or "irregularity" in section 115, clause (*c*), of the Civil Procedure Code refer to matters of procedure only. [p. 768, col. 1]

The plaintiff instituted a suit in the Court of Small Causes at Calcutta and obtained a decree. Against that decree an application under section 115, Civil Procedure Code, was made to the Original Side of the High Court. The grounds for making the application were (1) that a wrong issue was tried, (2) that the onus was wrongly placed upon the defendants, and 3) that there was no evidence to support the judgment of the Small Cause Court:

Held, (1) that the trial of a wrong issue amounted only to an error in law and did not amount to any illegality or irregularity in procedure; [p. 768, col. 2; p. 769, col. 2.]

(2) that the fact that the onus was wrongly placed did not entitle the High Court to interfere under section 115, Civil Procedure Code; [p. 768, col. 2.]

(3) (Per *Woodroffe, J.*) that to justify interference for want of evidence it must be shown that there was absolutely no evidence at all. [p. 770, col. 1.]

Appeal from the order of Mr. Justice Greaves, dated the 30th July 1918.

Messrs. *S. N. Sircar* and *N. Banerjee*, for the Appellant

Messrs. *Langford James* and *S. M. Bose*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of Greaves, J., whereby he set aside a decree made in the suit in favour of the plaintiff by the Calcutta Court of Small Causes and directed a retrial.

The order was made in pursuance of section 115 of the Civil Procedure Code, and on appeal it was argued that the Court of Small Causes had jurisdiction to try the case, that it did exercise such jurisdiction and that it had not acted in the exercise of its jurisdiction illegally or with material irregularity.

The suit was upon a policy of insurance issued by the defendants in favour of Messrs Gangjee Nangsee & Co., Rangoon, in respect of rice consigned by them to the plaintiff and shipped upon the SS. "Anthia": the claim was in respect of 483 bags of rice alleged to have been damaged by water.

The defendant Corporation admitted that 483 bags were damaged, but denied that the damage was caused by any of the adventures or perils insured against under the said policy.

The judgment of the Small Cause Court Judge, who tried the case, is as follows :—

"I don't think the defendant Company has discharged their onus of showing that the damage was from causes other than those included in policy. The evidence of the Surveyor does not appear satisfactory. He does not say that under no circumstances could the damage have been caused by the sea: percolation might have taken place removing traces of salt. He was the person best able to know whether the Company was liable or not. His first report would go to show that he thought the Company was liable."

There was an application for a new trial and the judgment is as follows:—

"I do not think the onus was misplaced on the defendants. They have failed to discharge the onus by proving that the goods were damaged by anything other than the perils of sea. So the application for new trial is dismissed."

The grounds upon which the application under section 115 was supported, were:—

1. That the wrong issue was tried.

2. That the Small Cause Court was wrong in holding that the onus was upon the defendants to show that the damage was from causes other than those included in the policy.

3. That there was no evidence to support the Small Cause Court's judgment.

The learned Judge, Greaves, J., held that the mere fact that the onus was wrongly laid, would not justify the Court in interfering under section 115 of the Civil Procedure Code, but he came to the conclusion that there was no evidence before the Court which would support the decree, nor any finding upon the construction of the policy which would support it, and on that ground he set aside the decree and directed a re-trial.

The question is not whether this Court would have come to the same conclusion as the Small Cause Court, for a mistake in law is not in itself a ground for interfering under section 115, Civil Procedure Code. In this case, in my judgment, there is no ground for interference under clauses (*a*) and (*b*) of the section, and if interference by this Court can be justified, it must be under clause (*c*), *i. e.*, it must be shown that that Court acted in the exercise of its jurisdiction illegally or with material irregularity. In the case of *Shew Prosad Bung-hidhur* v. *Ram Chunder Haribux* (1) Jenkins, C. J., said: "it appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the faults of procedure indicated in that section," and Woodroffe, J., in the same case at page 339* said "then as regards the alleged irregularity, this according to the general trend of the cases applies to the commission of an error of procedure."

As regards the first ground, it was urged that the real issue was whether the goods were damaged by a period insured against, but that the Small Cause Court had framed the issue in a wrong form, *viz.*, was the damage due to causes other than those included in the policy. This seems to me to be an error in law and does not amount to an illegality or material irregularity in the procedure.

As regards the second ground, *viz.*, that the onus was put upon the defendants to shew that the damage was from causes other than those included in the policy.

This really amounts to a contention that the Court placed a wrong construction upon the policy and made an error in law in holding that the onus was on the defendants. The case was fully heard, no evidence was excluded, and as a matter of fact the plaintiff did in the first instance give some evidence, *viz*, on the 4th March, and on the further hearing the Solicitor for the defendants said he had no evidence beyond the documents and the commission, and in my judgment the mere fact that the Small Cause Court wrongly placed the onus on the defendants under the circumstances of this case is not sufficient to entitle this Court to interfere under section 115.

As regards the third ground that there was no evidence to support the judgment. It is not necessary to express any opinion as to whether it would be a sufficient ground to interfere under section 115, if I were to come to the conclusion in this case that there was no evidence to support the decision of the Small Cause Court, for in this case, in my judgment, there was some evidence. We have not to decide whether we should have come to the same conclusion upon such evidence as the Small Cause Court: it is sufficient to say that there was some evidence which had to be considered by the Small Cause Court. As for instance there was the report of the Surveyor that the bags were damaged by water: that the Surveyor assessed the damage as stated in his report, and that the consignee had agreed to take over the bags at the allowances therein referred to.

There was the Surveyor's evidence that a Surveyor cannot grant any allowance in

(1) 23 Ind Cas 977; 41 C. 323 at p. 338,
*Page of 41 C.—*Ed.*

such cases unless specially asked for, which, it was argued, meant asked for by the Insurance Company.

This, it was argued, amounted to an arrangement by the Surveyor on behalf of the Company with the consignee as to the amount payable by the defendants. The Court may have arrived at the conclusion that this was evidence of the liability of the defendants.

There was further evidence given on behalf of the plaintiffs by the *gomashta* that the Company never received damaged goods, and it was, therefore, argued that the goods must have been in good order and condition when loaded on board the ship; there was evidence that the rice was not new crop, and consequently "sweating" was not to be expected; further that only portions of the bags were damaged.

The question is not whether this Court would have been satisfied with this evidence; the question is, whether it can truly be said that there was no evidence, and I am unable to say that there was no evidence upon which the Small Cause Court could come to the conclusion at which it arrived.

It may be that if the matter had been open to us, we should have come to a different conclusion on the construction of the policy, and as to the law and we might not have been satisfied with the evidence, but that is not the question. The question is, whether the Small Cause Court acted in the exercise of its jurisdiction illegally or with material irregularity, and in my judgment this has not been made out.

Consequently the appeal must be allowed and the decision of the learned Judge set aside. The appellants are entitled to their costs of the appeal and of the proceedings before Greaves, J.

WOODROFFE, J.—The question on this appeal is whether Greaves, J., did right in interfering with a decision of the Small Cause Court under section 115 of the Code. We are not concerned here with the merits of the case, whether in law or fact. The Judges of the Small Cause Court may have passed an erroneous decision, but the law does not allow us to interfere with their judgments on this ground. This is not an appeal. It must be shown either (*a*) that there is a question of jurisdiction, a term the meaning of which I have explained in my judgment in *Shew Prosad* v. *Ram Chunder* (1), or (*b*) that there has been an illegality or irregularity affecting the merits. These two words refer to matters of procedure. This must be so, for jurisdiction is dealt with under clauses (*a*) and (*b*) of section 115 and mere error in decision on matters of law and fact are not within the scope of the section. We are left then with acts, that is, illegal or irregular processual acts. Has there been such an illegality or irregularity here? It is to be noted that there was the ordinary trial, that evidence was given by the plaintiff in the first instance, that this evidence was all that the parties wished to give and the decree (whether it be right or wrong) was based thereon. The illegality and irregularity alleged is (*a*) that the wrong issue was tried, (*b*) that the onus was misplaced, (*c*) that there was absolutely no evidence to support the decision.

The issue tried between the parties raised the question of the liability of the defendants on the policy. But though the substantial question of liability on the policy was tried, it is said to have been tried in a wrong form, namely, were the goods damaged by a peril other than that insured against instead of, were the goods damaged by one of the perils insured against. Whether the one issue or the other was right, the matter is not in this case shown to be other than a question of law, seeing that if there was error, there was no irregularity or illegality other than that (if in particular cases there may be any which I need not decide) involved in the mere settlement of the form of the issue. There was in this case no evidence shut out nor call to start the evidence nor were the defendants prevented in any other respect from doing what they wished to do. The objection really is that the Court took a wrong view of the general law and put a wrong construction on the policy. Similar remarks apply to the argument as to the alleged misplacing of the onus. As a matter of fact the plaintiffs first gave evidence as if the onus were on them, and both parties gave all the evidence that they wished to give. There may be cases though, it is not necessary to finally decide the matter,

where these grounds might be successfully taken, as for instance where a party was wrongly called upon to begin, or where he was not permitted to give, nor had an opportunity of giving, evidence on any particular point. But this is not the case here. It is to be observed that the learned Judge did not decide to grant revision on either of these grounds. On the contrary he has held that the question of onus is not a ground under section 115. The basis of his judgment is that there was absolutely no evidence, to support the decree. This, however, is not made out. There is some evidence though whether the evidence given made out a case is not a matter which we are here entitled to consider. Before we can interfere it must be shown that there was absolutely no evidence at all. There was evidence of the statements and conduct of the Surveyor. His report shows that a certain number of bags were damaged by water and that he and the claimants together agreed that certain allowances for damage should be allowed. Mr. Stewart says that the Surveyor cannot grant any allowance in such cases unless specially asked for, that is (as I read it) by the Insurance Company. The plaintiff's case is that the Surveyor fixed a sum as being payable by the defendant Company. The Judges may have thought that this evidence established liability.

Again evidence was given that the Shipping Company never received goods in bad order, evidence excluding the possibility of sweating, some evidence as to the weather and that the goods might have been damaged by sea water. All this may be insufficient to establish the conclusion of the Judges, for the Surveyor denies authority to make any admission, and what the Shipping Company do is not evidence against the Insurance Company. Nextly the mere general statement about salt water is met by evidence of the actual tests applied. Had the case been tried by us, it may well be that we would have taken a different view of the construction of the document and the law applicable and that we would have considered the evidence given as insufficient to establish the defendants' liability. But as I have said, we cannot go in revision into the question whether the judgment is right or wrong in law. It may be wrong in law, but it must be shown that there was an act of actual illegality or irregularity within the meaning of section 115, Civil Procedure Code, which entitles us to interfere. This the respondent has, under the circumstances of this case, failed to establish and it has been shown that the grounds on which Greaves, J., interfered cannot be supported in fact. The appeal must, therefore, be allowed, and the decision of the learned Judge set aside. The appellants are entitled to the costs of this appeal and of the proceedings before Greaves, J.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 46 OF 1915.

February 12, 1918.

Present:—Sir Stanley Batchelor, Kt., Acting Chief Justice, and Mr. Justice Kemp.

YAMUNABAI NARAYAN CHITNIS—APPELLANT

versus

LAGMANNA BASANNA KURANI—RESPONDENT.

Inam, *grant of, for services rendered and to be rendered—Wilful default—Resumption—Landlord and tenant—Adverse possession during currency of lease—Ouster of tenant by stranger, effect of.*

Where lands are granted on account partly of services already rendered and partly of services to be rendered in the future, the grantor is entitled to resume the lands by reason of the wilful default of the grantee in the service which was a condition precedent to his enjoyment of the lands. [p. 773, col. 2: p. 778, col 1.]

Ordinarily, during the currency of a lease no adverse possession can be obtained by a third party against the landlord, but it is otherwise where, to the knowledge of the landlord, his tenants are ejected by a stranger after open conflict with him, and the new tenants pay their rents to the stranger. In such a case the landlord's rights are openly invaded and his rights openly challenged and jeopardised and adverse possession begins to run against him. [p. 776, col. 1; p. 777, col. 1.]

Appeal against the decision of the First Class Subordinate Judge, Belgaum, in Suit No. 101 of 1913.

Mr. *Setalvad* (with him Mr. *S. R. Bakhle*), for the Appellant.

Mr. *Ooyaji* (with him Mr. *S. S. Patkar*), for Respondent No. 22.

JUDGMENT.

BATCHELOR, ACTING C. J.—This is an appeal from a judgment and decree of the first class Subordinate Judge of Belgaum, Mr. Koppikar. The suit was brought for possession of certain lands with mesne profits. The original defendants Nos. 1 to 24 were tenants in occupation of the lands in suit, but the real combatant defendant was defendant No. 25, who is the Sar Desai of Vantmuri. The history of the litigation is set out in the learned Subordinate Judge's judgment, but it will be convenient to refer to a few of the more important facts now, in order to bring them into early prominence. It is admitted that the original owner of the lands in suit was the Desai, the predecessor of the present defendant No. 25, to whom I shall in future allude as the defendant. So early as 1774 A. D. his ancestors made a grant of these lands to the plaintiff's ancestors by the Sanad, Exhibit 201. A pedigree of the plaintiff's family, so far as we are concerned with it, will be found in the Subordinate Judge's judgment. The plaintiff's ancestors acted as Chitnis and storekeeper for the Desai, but in 1843 the right of service as storekeeper was discriminated from the service as Chitnis, and went to another branch of the family. We are not further concerned with any rights connected with the service as storekeeper. The office of Chitnis remained with the plaintiff's family together with the lands in suit. In the genealogy appearing in the lower Court's judgment, it may be observed that Nilkanth, Gopal and Balkrishna were adopted sons, and their adoptions were in each case duly recognised by the Desai. Balkrishna left no son, and his widow Sundrabai was unable to serve as Chitnis. The Desai, therefore, allocated the lands and the appurtenant cash remuneration to other persons whom he temporarily employed to discharge the duties of the office. In November 1879 Sundrabai mortgaged the lands to the Desai for a sum of Rs. 2,500 and the Desai was put in possession. In 1881 Sundrabai adopted Narayan, who attained majority in 1889, and died either in 1902 or 1903, according to the plaintiff's version. In August 1889 Narayan after reaching his majority redeemed the mortgage, and the instrument, Exhibit 56, bears upon it an endorsement of satisfaction. In October 1889 Narayan purported to let out the lands under Kabuliyats to six tenants. These Kabuliyats, which are Exhibits 179 to 184, are for a term of twelve years, and would, therefore, expire in 1901. The six tenants, however, proved recalcitrant, and Narayan was unable to obtain from them any payment of their rents. He, therefore, filed suits against them, and in those suits obtained decrees for the rents of the years 1890 and 1891. The rents of those years were actually recovered from those tenants by Narayan. In 1894 Narayan brought other suits for the rents of 1892-1893 against the six original tenants, and certain other persons who had been put in occupation as tenants by the Desai. In 1896 Narayan obtained from the Court a decree in the suits of 1894, but admittedly he never succeeded in getting that decree executed, and admittedly he nevermore recovered any rents in respect of these lands. In other words, after this struggle with the Desai in 1889 he abandoned the matter and acquiesced in the Desai's position.

The facts which I have above set out are, I believe, not in dispute between the parties. The learned Judge below raised two principal issues, one of them dealing with the true construction of the Sanad, Exhibit 201, and the other raising the question whether the Desai had a defence to the plaintiff's suit on the ground of his adverse possession. As to the construction of the Sanad the learned Judge found in favour of the plaintiff, but finding that the Desai had proved adverse possession for a period exceeding twelve years, he on this ground dismissed the suit. The judgment, as is invariably the case with Mr. Koppikar's judgments, is a careful document, and for my own part, I agree with the learned Judge below in all that he says as to the questions of fact in this suit, and those questions of fact are, in my opinion, all important. I differ from Mr. Koppikar as to the construction of the Sanad, but nonetheless I desire to say that my judgment is largely based upon my own view as to the facts of the case

and if I am right as to those facts, it seems to me that there can be no doubt either of the justice or of the propriety of the decree under appeal. No doubt at first it seems a plausible thing to say that a Court should be loath to defeat the grant of 1774 by reason of adverse possession on the part of the grantor's successor, but if broad propositions of this kind are to go for anything, the case may be put even more favourably for the defendant. For, whereas as I read this Sanad, the lands were granted in consideration of service, the plaintiff in this suit seeks to dispossess the defendant and claims the lands absolutely, repudiating any obligation to serve, and denying that the defendant Desai has any interest in the property. Upon this point it may be well to notice at once that the Desai's position is in my view neither extravagant nor oppressive, and he says in his deposition, which appears to me to be a candid and truthful statement, "If service is rendered, then only the lands in suit are to be held by the plaintiff's family from generation to generation. If they refuse to render the service I have the right of resuming the lands. I have also that right if they deny my title as owner." Now it is an admitted fact that at least for ten years the defendant Desai has been in exclusive occupation and enjoyment of these lands, and throughout that time the plaintiff's family have acquiesced in that position. Now after the lapse of this prolonged period this Hindu lady, acting through her agent, her brother, sues to oust the defendant.

With these preliminary observations, I go now to the first question to be answered. What is the true meaning of the Sanad, Exhibit 20? That document runs as follows:—

'To

Rajeshri Narayan Jivaji Chitnis and Kotnis belonging to Gotra Kashyapa Sutra Ashvalayan.

Salutations and request of friend Basavaprabhu *walad* Lakhamgowda Desai, Nadgowda, Pargane Hukkeri, Sar Desai of several Mahals and Nadgowda Mamle Murtujabad. The Sooryear Khamas, Sabain, Maya Alaf 1175 (*i. e.*, 1774 A. D.) Vritti Patra given in writing by me is as follows:— Your father and you have been serving us faithfully since the time of my father. You have been very useful in serving us. You are serving in many ways as Chitnis and as Koti clerk. Thinking that you are a useful person and that you are competent to perform both these services and that it is necessary to grant to you only (that is, exclusively) the Vritti appertaining to these services and to continue it with you from generation to generation, I have granted to you the Vritti appertaining to the services of Chitnis and Kotnis and the Vritti appertaining to service in respect of the management of the Koti. The emoluments granted in your favour in respect of these two services are as particulars mentioned below."

Then after setting out the particulars, the document concludes:

"I have granted you in Inam as above, Rs. four hundred as emoluments in cash and the said Kamat lands in respect of both services. And I have settled and granted you the Kaulavani of the aforesaid Pargane and Kanu (rights) in respect of Sanads, etc. You, your sons, grandsons and other descendants from generation to generation are to go on enjoying the above property, and you and your descendants from generation to generation are to perform both the services and live happily. There is no reason for any one to cause obstruction. May this be known."

Mr. Setalvad for the plaintiff has urged that upon a true reading of this document there is a sharp distinction between the cash which is to be the remuneration for future services, and the lands which, according to the learned Counsel, are granted in exchange for services already rendered. But upon carefully attending to the language of the document, I feel sure that the vernacular words cannot bear the weight of any such distinction. It is quite true that the word 'Vetan' remuneration, occurs after the word 'cash', but that after all is the place where one would expect to find it, and if the document be read as a whole, it seems to me impossible to deny the force of the constant occurrence together of the cash and the lands, and the constant bracketing and coupling of the services already rendered with the services to be rendered in future as constituting jointly the integral consideration for the

grant. The thing itself is more than once called a Vritti, and that word is defined in Molesworth's Dictionary as meaning any office, situation or business, senses which are familiar to the Courts in connection with this particular word. If reference be made to Exhibits 202, 242, 203 and 45[illegible], it will, I think, be seen that the sense which I am attributing to the instrument is the sense which the parties to it have always accepted. In Exhibit 202, for instance, which is a letter from the Desai to Nilkanth, we have the following passages:—

"The deceased Rudropant had no issue. He, therefore, took you in adoption. As to that, you requested that the adoption should be confirmed by (us) the Sarkar. On a consideration thereof, it appears to us that the fact of your having been adopted by Rudropant is true. Your adoption is, therefore, confirmed and you are made owner to his Vritti. Therefore, the land, Haks and Kanubabs and the Kaulavni, etc., in the several villages appertaining to the said Chitnishi Vritti acquired by and continued from your ancestors...are granted. The whole land including the above and Haks, Kanubabs and emoluments in respect of writing as continued from ancient times, you should enjoy and you should do your own writing work in respect of Chitnishi and by enjoying the lands, etc., as mentioned above you should faithfully perform the service of the Sarkar."

In Exhibit 242, which is a letter to the Desai from Nilkanth, we find the following language:—

"You the Sarkar have now made me the owner of the Vritti of Rudropant and granted a Sanad in my favour to the effect that I should manage the work of writing in respect of Chitnishi and in respect of the Jamabandi of the several villages and go on enjoying the property... I shall accordingly enjoy the said Vritti and perform the two duties of writing and live honestly and loyally in the service of the Sarkar."

These documents, if their assistance is needed, seem to me to confirm the meaning which I am attributing to Exhibit 202, that is to say, they seem to support the construction that the lands in question and the cash allowances are granted, to use the language of the Privy Council, *pro servitis impensis et impendendis*, that is, on account partly of services already rendered and partly of services to be rendered in the future. In other words, as I read the Sanad, the continued performance of the services, is upon the true construction of the grant, the condition on which the lands are to be held, and if that is so, then according to the Privy Council's decision in *Forbes* v. *Meer Mahomed Tuquee* (1), the lands may unquestionably be resumed for wilful default. The decision which I have just cited was considered by Sir Lawrence Jenkins in *Lakhamgavda* v. *Keshav Annaji* (2), but I cannot concede that the judgment of the Chief Justice affords any support to the plaintiff's case in our present circumstances. All that was laid down there was that, where the grant is a grant in consideration of past and future services, as here, and where, as here, there is no express provision in the grant that the interest in the lands should cease when the services are no longer required, the lands held under the grant are not resumable at will. But then that is not the defendant's case. He claims to be able to resume the lands, not at will, but by reason of the wilful default in the service which was a condition precedent to the enjoyment of the lands.

That there was a wilful default cannot, I think, be questioned. The mortgage of 1879 was made by Sundrabai to the Desai when the latter was an infant, and at that time the managers of the Sansthan were the Desai's mother assisted, if one should say assisted, by a person named Bhau Ramchandra. This Bhau Ramchandra is found upon the evidence to have been related to the family of Sundrabai, and it is enough to say that ultimately he had to be removed for mismanagement of the estate. In 1885 the Desai attained majority, and in 1889 the mortgage money was paid to him. It is important, however, to observe that the endorsement on Exhibit 56 recites that the deed is given back. It does

(1) 13 M. I. A. 438; 14 W. R. (P. C. 23; 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R. 614.

(2) 28 B. 305; 6 Bom. L. R. 364.

not recite that possession of the lands was delivered to Narayan, and the Desai, whom I believe, has sworn that possession of the lands was not delivered. It is true that on the day before the redemption Narayan made the statement, Exhibit 462, upon which Mr. Setalvad has placed reliance. But it cannot, I think, be effectively argued from this statement that Narayan genuinely professed an honest willingness to continue the service as Chitnis. The statement is very much in the form of a self-serving petition, the object being that his name should be entered in the accounts of the Sansthan, and he says that "Nazrana in respect of adoption and the heirship inquiry has already been given by Sundrabai according to the custom of the Sansthan." The statement appears to have been made in the Kutcheri of the Sansthan in the presence of some representative of the Desai, and it would seem that Narayan's attention was called to the fact that no record was discoverable showing that Nazrana had been paid in respect of the adoption. "We were asked", therefore, he says, "to state whether or not we are now willing to pay Nazrana in respect of the sanctioning of the adoption. As to this, I beg to state that at present my family is in straitened circumstances as debts etc., have been incurred. I am, therefore, willing to act up to any order that may graciously be passed and to pay now only whatever amount, etc., that may be found due this day to the Sansthan and to render service etc." That, no doubt, so far as words go, is a profession of willingness to serve, but as it seems to me, a profession of willingness to serve on terms which were Narayan's and were not the Desai's. Admittedly, however, Narayan never served, and though the Desai's books were put in evidence in the Court below, it is not suggested that any Nazrana was ever paid by Narayan, nor is it alleged that the adoption of Narayan was ever recognised by the Desai. The Desai himself in his statement made on the 21st January 1894, Exhibit 200, explains what happened in these words: "The opponent (*i. e.*, Narayan) had been told to perform service. He did not perform it. He absconded. The order to perform service had been made orally. The remuneration for service had been settled previously, that is, before the Vahivat came into my hands. After the administration came into my hands, he was told to join service. He absconded." It is indeed clear upon this record not only that Narayan failed to offer himself for service on the terms that the Desai could approve, but that he lost no time in putting himself in a position of irreconcilable hostility against the Desai whose tenants he sought to estrange. In his deposition in the present suit the defendant speaks as follows on the present point: "On the satisfaction of the mortgage, I told the plaintiff's husband that if he was not able to render the service, that he might appoint somebody to do it and learn the work under him and promised to deliver the lands if he did so. He did not appear to render the service and did not depute any one for the purpose."

So much as to the position occupied by Narayan. But what concerns us more intimately is the position of the plaintiff herself, and that is disclosed in no uncertain terms in the early paragraphs of the plaint. In the first paragraph, after setting out the lands in suit, she goes on: "The said lands have been continuing as Pot Inam from ancient times with the plaintiff's family from the ancestors of the defendant No. 25, the Khatedar, and are of the full ownership of the plaintiff." And in paragraph 3 she says: "that the plaintiff's husband Narayan Balkrishna recently died, and that she herself, the plaintiff, is his only heir." I conclude, therefore, that in this case there has been not only a wilful default to render the services which were the condition precedent to the enjoyment of the lands, but the present suit is based upon an open disavowal and repudiation of the defendant's interest in the property. It appears to me, therefore, that on the terms of the Sanad the defendant was, and is, entitled to resume the lands.

Next it remains to deal with the question of possession. In the first place, it is essential for the plaintiff not only to prove her title, but to show that within twelve years next preceding the suit she had possession of the land: see the Privy Council's decision in *Dharani Kantal Lahiri* v. *Gabar*

Ali Khan (3). Well, if that is the burden lying upon the plaintiff, it appears to me that a complete answer to the suit is the fact that certainly during the twelve years preceding the suit the possession of this property was with the defendant and not with the plaintiff. This fact is clearly proved, and so far as I have understood the arguments, is not contested by the appellant. I need not, therefore, labour the point, but will say that to me it is plain upon the record that at least ever since 1893, the defendant has sole possession in his own right, that his tenants have been in occupation, and that through them he has received all the rents and profits of the lands and has received them to the knowledge of the plaintiff and her predecessor.

Upon the question whether the defendant's possession can be regarded throughout as adverse or not the appellant relies upon the twelve year rent notes obtained by Narayan in 1889, and the argument has been that the possession of the Desai could not be adverse as against Narayan until those leases had expired in 1901. Unfortunately for that argument, the learned Judge below has found that Kabuliyats and rent notes in question are not honest documents, but were obtained by Narayan in collusion with the tenants and in fraud of the Desai. That finding is fully explained in the last paragraph of the Subordinate Judge's judgment, and I need not say more than that I agree with the reasoning there employed. It is notorious that Indian peasants are ready enough to pass such rent notes to any one, the peasant's sole desire being to be allowed to stay on the land which he occupies. As to Mr. Setalvad's contention that this young man would not have been able to collude with the tenants to the detriment of the powerful Desai, the answer appears to me to be extremely simple, for, I think, that any misrepresentation made by Narayan would have produced the desired effect, as for instance, if Narayan had told the tenants that his adoption had been sanctioned by the Desai. We are, however, without any evidence as to what precisely happened, so that all this is a matter of speculation. I wish only to say that the theory that Narayan colluded with the tenants is not, in my opinion, exposed to the slightest difficulty on the ground of actual practice. I should add that I myself feel quite sure that in October 1889 and in the events that had by then happened, Narayan certainly did not suppose that he was honestly entitled to take these rent notes from the tenants, or to obtrude himself into the position of the landlord. I think his object was, as is not infrequent in such cases, merely to create documentary evidence to assist him in the future.

But then it was said that the Desai's own accounts from 1891 to 1911 indicate that in his opinion these lands were still held by the plaintiff as remuneration for the Chitnis service. We have been carefully taken through all these entries by the learned Counsel, and though at first sight they seem to raise a difficulty in the defendant's way, that difficulty is, I think, dispelled by a little consideration. In the first place, ever since 1889 it is indisputable that the Desai has been in open hostility to the plaintiff, openly claiming that the lands had been resumed because there had been default in the service. It is unlikely, therefore, that he would make himself, or ever authorize any agent to make, account entries which are flagrantly in contradiction with his own sustained action. The explanation, however, is not far to seek. In the first place, it is noteworthy that this point is not referred to in the long and elaborate judgment of Mr. Koppikar, so that I must infer that at the trial the plaintiff felt that no importance could attach to it. It was reserved for the Court of Appeal. That is the more unfortunate, because both the Desai himself and his Karbhari were examined at the trial, and if any point were to be made by the plaintiff of the Desai's account books, it was, in my opinion, manifestly essential that that point should be put either to the Desai or to his Karbhari or both in order to afford them an opportunity of giving a reply. As I say, no such opportunity was afforded, and the point was reserved for the Court of Appeal after all

(3) 18 Ind Cas. 17; 15 Bom L. R. 445; 25 M. L. J. 95; 13 M. L. T. 185; (1913) M. W. N. 157; 17 C. W. N. 389; 17 C. L. J. 277 (P. C.).

the evidence had been finally closed. Even here, however, it so happens that the matter is not difficult. I fully accept Mr. Coyaji's explanation, which is that as a matter of accounts these lands were in the Desai's office earmarked or allocated to the Chitnisi office, and have never yet been formally dissociated from that office. The entries, therefore, would be continued to be made by the clerks in the ordinary routine, and Mr. Coyaji has stated without contradiction that even after the Desai's written statement was filed in this suit, the entries continued to be made as before. It seems to me, therefore, that no use can be made of these entries in contradiction of the clear attitude which the Desai has preserved since 1889. If, then, the learned Judge below is right, as I think he is right, in finding that the rent notes were collusive, there also is an end of the plaintiff's case, for it cannot be that the plaintiff's position is improved by reason of the collusion of her predecessor-in-title.

Lastly, I will shortly state my opinion upon the assumption that Mr. Koppikar and I are wrong in regarding the Kabuliyats as collusive. Even so, I do not think that the result would be different. There is no need to cast any doubt upon the general proposition that ordinarily during the currency of a lease no adverse possession can be obtained by a third party against the landlord seeing, that the landlord is not usually entitled to resume possession until the expiry of the lease. But as Mr. Justice Batty's elaborate judgment in *Tarubai* v. *Venkatrao* (4) shows, this broad proposition is subject to qualification and reserve. At page 57 of the Report the learned Judge observes: "In the case of landlord and tenant, the mere ouster of the tenant was shown to be insufficient so to affect the landlord as to put him to the necessity of vindicating his position. But when the landlord was entitled to rent and the rent was not merely left unpaid (a fact which would give the real owner no unmistakeable notice of his rights being infringed), but was actually refused and paid to another person, then there would be such virtual dispossession of the rightful owner as to put him to his remedy."

(4) 27 B. 43; 4 Bom. L. R. 721.

Now here the facts are exceptionally strong against Narayan and the plaintiff. To their knowledge, their tenants are ejected by the Desai after open conflict with him, and ever since 1893, these new tenants of their enemy pay their rents to the Desai. It is, I think, upon these facts not possible to resist the conclusion that Narayan's alleged rights were openly invaded, and his alleged title was openly challenged and jeopardised by the Desai. It follows, therefore, in the words of Mr. Justice Batty, that he was put to his remedy against the Desai, whose acts manifestly assailed his own position and not merely the position of the tenants.

I have already observed that after the payment of the mortgage money, though the mortgage bond was handed back, the lands were not delivered. I may now add that Narayan's successful suits of 1892 and 1894 were brought against the tenants only, and that the Desai was no party to them. The judgments in Narayan's favour proceed merely on the execution of the Kabuliyats by the tenants, and not on any finding that Narayan had made over actual possession of the lands to the tenants. Moreover, the Desai not being a party, the Courts neither did nor could consider the question of actual possession, as that question arose between Narayan and the Desai. But upon this question we have in the present suit very notable admissions. The plaintiff's own brother and agent who is conducting this suit on her behalf Keshav Shesbgiri, Exhibit 194, says in cross-examination: 'I am not prepared to swear that the lands were not granted as remuneration for service. I do not know if plaintiff's ancestors did or did not render service to the family of defendant No. 25. Defendant No. 25 has been in possession of the plaint lands for the last 10 or 15 years, and enjoying the profits wrongfully. Plaintiff's husband last recovered the rent of the plaint lands in 1891-92, but not afterwards. Defendant No. 25 recovered rents subsequent to 1891-92. In 1892-93 defendant set up title as owner and claimed to be in possession and refused to part with it." Then Balvant Daso, Exhibit 206, a witness for the plaintiff and a person who bears no good-will towards the Desai, says in cross-examina-

tion: "I cannot say from what tenants defendant No. 25 has been taking Kabuliyats in respect of Subraya's portion since the miscellaneous proceedings of 1892 93. Since 1895 defendant No. 25 has been recovering the rent of Subraya's portion of the plaint lands." And the plaintiff's witness Nilappa Ningappa, Exhibit 219, speaks to much the same effect. "I do not remember," he says, "how long the tenants of defendant No. 25 have been occupying the plaint lands. It may be 20 or 22 years. They have been paying the rent to defendant No. 25 and they told me so 7 or 8 years ago. They commenced paying rent to defendant No. 25 about 20 years ago." In the face of reluctant admissions of this sort, it seems to me that the Court is bound to believe the otherwise credible and respectable testimony of the Desai, Exhibit 199, when he says: "I did not deliver possession of the lands after satisfaction of the mortgage. I have remained in possession all the time since satisfaction of that mortgage in my capacity as owner." On this evidence I come to the conclusion that ever since 1893 on any computation the Desai has excluded the plaintiff and her predecessor from possession and enjoyment to their knowledge and in open assertion of his adverse claim. The facts seem to me to be so strong that if Mr. Justice Batty and I are right in thinking that in special circumstances adverse possession can run against a landlord during the currency of a lease, I cannot doubt that such possession will run against Narayan in the circumstances of this case even upon the violent assumption that the Kabuliyats taken by him from the tenants were not taken collusively and in fraud of the defendant.

Upon all these grounds, I am of opinion that the decree of the Court below is right and ought to be affirmed with costs, this appeal being dismissed.

KEMP, J.—Plaintiff sues to recover possession as owner of the plaint lands together with mesne profits. Defendant No. 25 is the Sar Desai of Vantmuri and the plaintiff's claim is based on a Sanad granted by the then Desai to one Narayan Jivaji, plaintiff's ancestor, on 24th September 1774 (Exhibit 201). Plaintiff's case is that the lands comprised in the Sanad were given to her family as a sub-Inam without any condition or power of resumption and that the service of Chitnis or secretary rendered by the members of the plaintiff's family was in consideration of a money payment which used to be made to the family and that the grant was not in consideration of past and future services in that office. Defendant No. 25 alleges that the subject of the grant was the office and not the lands, that the office used to be remunerated by the income of the lands, that he has the right of dispensing with the service and resuming the lands and that he did both about 1890-91. The other defendants are tenants on the lands in question.

In my opinion, it is of little avail to look at the Sanads in decided cases to construe the Sanad in suit. The construction of a Sanad in each case depends on its terms.

The present Sanad acknowledges the services of the grantee and his father in the capacities of secretary and storekeeper and records that the right of both these services shall be allotted to this grantee and continued to him from generation to generation. The remuneration for these services is detailed as property consisting of lands at Kamatnur and other places and Rs. 200 in cash payable every year with some perquisites for the office of secretary and an equal amount and lands in different villages for the office of storekeeper. The Sanad then goes on to say: "I have granted you in Inam as above Rs. 200 as emoluments in cash and the said Kamat lands in respect of both services. And I have settled and granted you the Kaulavani of the aforesaid Pargane and Kanu rights in respect of Sanads, etc. You, your sons, grandsons and other descendants from generation to generation are to go on enjoying the above property, and you and your descendants from generation to generation are to perform both the services and live happily."

The proper construction of this document seems to me to be grant of an office to be remunerated from cash and lands. I do not agree with the plaintiff's contention that the lands were granted apart from the services, nor with the defendant's contention that he has the right of dispensing with the services and resuming the lands. So long as the grantee and his descendants performed the services, they were entitled to the remuneration of the cash and the lands.

In 1843 a dispute arose between the two branches of the plaintiff's family, which was settled by the Desai allotting to one branch this right of service as storekeeper with the cash and lands pertaining thereto and to the other branch (represented in this case by the plaintiff) the office of Chitnis with the cash and lands relating to that office.

Subsequently, the holder in 1843 of the office of Chitnis died without issue and his adopted son Nilkanth, on paying the customary Nazrana was recognised by the Desai, who invested him with the office and the lands and perqui-ites of his adoptive father and enjoined him to the writing work connected with the office of secretary, enjoy the lands, etc., as aforesaid and render the service with devotion. After Nilkanth's death Gopal was recognised as his adopted son, invested with all the rights and powers of his ancestors and directed to discharge his duties with devotion.

After Gopal, his adopted son Balkrishna was recognized on agreeing to pay the customary Nazrana and perform the service (Exhibit 459).

On Balkrishna's death, as his widow Sundrabai was unable to perform the service or depute a fit person to do so, the Desai withheld some of the perquisites and applied the proceeds towards the remuneration for the service, which apparently he took from others. In 1881, Sundrabai adopted Narayan, the plaintiff's deceased husband. Narayan made an application on 13th August 1889 to have the perquisites restored as he was willing to serve the Desai. He also prayed that he might be excused the payment of the customary Nazrana (Exhibit 492). It does not appear that the Desai ever recognized his adoption or accepted his offer of service. Indeed he says that Narayan refused to perform the services which would be a sufficient ground to defeat this suit for the performance of services was a condition precedent to the enjoyment of the lands.

On 25th November 1879, Sundrabai mortgaged the lands with the Desai with possession for Rs. 2,500 (Exhibit 56). The Desai was then a minor and did not attain his majority until 1895.

On 14th October 1889, Narayan redeemed the mortgage and received back the deed with satisfaction endorsed upon it, but the Desai remained in possession of the lands.

The plaintiff contends that Narayan was in possession by virtue of Kabuliyats passed by the tenants on 8th October 1889, but these Kabuliyats (Exhibits 179—184) were obtained from tenants who had come in through the Desai during the currency of the mortgage.

Now it may be that in a grant of this kind when the last holder of the office dies without issue, the services may be performed by somebody deputed by his widow. In the present case, as Sundrabai was unable to perform the service and did not depute any one to do it for her, the Desai withheld some of the perquisites and applied the proceeds towards the remuneration for the service from others. Narayan, Sundrabai's adopted son, did not perform the service nor was his adoption recognised by the Desai.

What, however, we are concerned with in the present case is that the plaintiff, who is Narayan's only heir, claims the lands as owner, and I am of opinion that having regard to my construction of the terms of the Sanad her claim as owner must fail. Where the office is alive and involves the continuous performance of the duties, I think she can only claim the remuneration from, as distinct from the ownership of, the lands if she depute somebody acceptable to the Desai to perform the services. But her suit claiming the property absolutely must fail.

Then it is shown the Desai was in possession in 1902. The plaint was filed on 21st December 1912. In order to succeed the plaintiff here must show not only title against the defendant but that she was dispossessed within twelve years of suit [*Dharani Kanta Lahiri* v. *Gabar Ali Khan* (3)]: this she cannot do. Narayan died in 1902-1903. Even if the Kabuliyats passed to Narayan in October 1889 by the six tenants who were put in by the Desai during the mortgage be considered as *bona fide*, it is proved that all these six tenants had been ejected by the Desai, who was in possession through his tenants for more than twelve years before the suit.

But I question whether Narayan really ever secured possession after the mortgage. The six tenants had passed Kabuliyats to the Desai during the mortgage: when it was paid off the then existing Kabuliyats had not expired and before their expiry Narayan purported to secure these tenants as his tenants. The period of those Kabuliyats was twelve years and it is improbable that the Desai, who all along contested Narayan's right, would give over possession as alleged. It is a matter of common knowledge that it is an easy matter to secure a Kabuliyat from a tenant of this class. Such a Kabuliyat is not therefore of high probative value. It is true Narayan obtained decrees for rent up to 1891 but to those suits the Desai was not a party and they cannot, therefore, be taken as evidence of possession against him.

Then it is contended that the entries in the Desai's account books show that he admitted the land belonged to Narayan and that he did not really set up an adverse title as against him. I do not think much value can be attached to the contents of these entries because it is shown that the entries, continue in this form right up to the filing of the accounts and, even if the Desai knew of the form of these entries and that they would be used as evidence against him, they cannot affect the legal rights of the parties as established by the clear words of the Sanad. If the plaintiff says that the Desai waived the right of service, the answer to that is that is not the plaintiff's suit.

I, therefore, think the suit fails and the appeal should be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 64 OF 1918.

August 12, 1919

Present:—Justice Sir P. C. Banerji, KT.,
Mr. Justice Rafique and
Mr. Justice Piggott.

GOKARAN SINGH—DEFENDANT—APPELLANT

versus

GANGA SINGH—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 177 (f)—Jurisdiction, plea of, decision of—Appeal—Court, proper.

Where a defendant raises the plea that the suit is not cognizable by a Revenue Court and that Court overrules the objection and gives a decision upon the merits, an appeal lies, under section 177 (*f*) of the Agra Tenancy Act, to the District Judge. [p. 780, col. 2.]

Appeal, under section 10 of the Letters Patent, against the judgment of Justice Sir George Knox, KT, dated the 17th March 1918.

Mr. *Lakhshmi Narain*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.

BANERJI, J.—The principal question which arises in this appeal is whether the Court below had jurisdiction to entertain the appeal as preferred to it from the decision of the Court of first instance. The facts of the case are these:—The plaintiff Ganga Singh alleged that under a perfect partition which took place between him and the defendant, the disputed plots of land were allotted to his share inasmuch as the defendant held more *sir* and *khudkasht* lands than he was entitled to, that after the partition the defendant forcibly took possession of the disputed lands and that in view of the provisions of section 34 of the Agra Tenancy Act the plaintiff was entitled to treat the defendant as his tenant. Treating the defendant as such, the plaintiff brought the present suit in the Revenue Court to eject the defendant from the disputed plots of land, the defendant being, according to him, a non-occupancy tenant. The defendant, on the other hand, contended that he had a right of occupancy. He also raised the plea, which was the first of the additional pleas put forward by him, that "having regard to the plaintiff's own allegations, the suit was not cognizable by the Revenue Court, and on such a ground his suit should be dis-

missed." An issue was framed by the Court of first instance on the question of jurisdiction and further issues were raised on the merits. The Court of first instance tried the other points in the case, and being of opinion that the defendant was a tenant with rights of occupancy held that the plaintiff was not entitled to eject him. The Court proceeded to observe that in this view the suit was cognizable by the Revenue Court. The plaintiff preferred an appeal from the decision of the Court of first instance to the Commissioner. The Commissioner was of opinion that the appeal lay to the District Judge in view of the provisions of section 177 (*f*) of the Tenancy Act and returned the memorandum of appeal to the plaintiff for presentation to the proper Court. The memorandum of appeal was then presented by him in the Court of the District Judge. The District Judge entertained the appeal and on the merits held that having regard to the partition proceedings it was no longer open to the defendant to set up his alleged right of occupancy. The Court decreed the claim. The decree of that Court has been affirmed by a learned Judge of this Court in second appeal and the present appeal has been preferred by the defendant under the Letters Patent.

It is contended before us on his behalf that no appeal lay to the District Judge. Although he himself raised the plea that the Revenue Court had no jurisdiction, he urges that this was a futile plea, that in reality there was no question of jurisdiction which could be decided by the Court of first instance and that consequently no appeal lay to the District Judge. Three cases have been cited to us. The first in point of time is the case of *Deo Narain Singh* v. *Sitla Baksh Singh* (1). In that case it was observed by the learned Judges that "it would be reducing matters to an absolute absurdity to hold that the defendants in a revenue suit could, by formally raising an absolutely untenable plea of jurisdiction, take every case from the Revenue Court to the Civil Court." And the learned Judges held that where a plea of jurisdiction was raised which could not properly be raised, an appeal did not lie to the District Judge. This view was not followed in the case of *Damodar Das* v. *Jhaoo Singh* (2). The third case which we have been referred is the case of *Umrai Singh* v. *Ewaz Singh* (3). No doubt section 177 (*f*) of the Agra Tenancy Act provides that an appeal lies to the District Judge where a question of jurisdiction has been decided by the Court of first instance. If this provision were strictly followed an absurdity would arise in some cases, as observed in the case of *Deo Narain Singh* v. *Sitla Baksh Singh* (1) to which I have already referred. A party may select his own forum of appeal by raising a plea which could never have been raised, but, in my opinion, the view which was adopted by my brother Piggott in the case of *Umrai Singh* v. *Ewaz Singh* (3) seems to me to be the right criterion in a case of this kind. He observed in his judgment which was affirmed in Letters Patent, that where there was a plea "that the suit as brought was not cognizable by a Revenue Court, that is to say, that assuming the allegations made in the plaint to be true, the Assistant Collector had no jurisdiction to entertain that plaint," that would not be a plea of jurisdiction which was a mere futile and nominal plea but a proper plea to raise. Where such a plea has been raised and decided, an appeal lies from the decision of the Revenue Court to the District Judge under section 177 (*f*). In the present case the defendant raised the plea as stated above, that upon the allegations contained in the plaint the suit was not one of the nature cognizable by a Revenue Court. The question whether under section 34 of the Tenancy Act the defendant could be deemed to be a tenant and could be sued for ejectment in the Revenue Court was a debatable question and, therefore, when the defendant raised the plea that upon the allegations made in the plaint the case was not cognizable by the Revenue Court, he raised a substantive plea of jurisdiction and not a plea which could never be advanced seriously. If the case had been finally

(1) 47 Ind. Cas. 891; 40 A. 177; 16 A. L. J. 590.
(2) 39 Ind. Cas. 87; 15 A. L. J. 319.
(3) 49 Ind. Cas. 732; 41 A. 270; 17 A. L. J. 189.

decided in favour of the plaintiff, the defendant's appeal would have lain in the Court of the District Judge. As the plea was overruled and in the end the suit was dismissed by the Court of first instance, the plaintiff was entitled to prefer his appeal to the Court of the District Judge. I think the learned Judge of this Court has rightly held that the appeal lay to the lower Appellate Court. The plea to the contrary now put forward does not come with good grace from the defendant, who himself raised the plea of jurisdiction.

There have been some arguments addressed to us upon the merits of the case. On the merits I see no reason to differ from the view taken by the learned Judge of this Court. The defendant was a party to the partition proceedings in his character as a co-sharer. If he claimed the lands now in suit as lands in respect of which he had the rights of an occupancy tenant, he ought to have put forward that claim at a proper stage of the partition proceedings. Not having done so and the partition proceedings having been completed, it is too late for him now to contend that he has rights of occupancy as a tenant in respect of these lands and that he still possesses those rights The lands were treated in the partition proceedings as his *khudkasht* lands It may be that they were so treated through a mistake, but the fact remains that the partition took place on the basis that the lands were his *khudkasht* lands. If they are burdened by his alleged rights of occupancy, the effect will be to diminish the value of the share which has been allotted to the plaintiff and to that extent to annul the effect of the partition. This cannot be done after the partition proceedings have been completed and confirmed. The learned Judge of the lower Appellate Court was, in my opinion, wrong in saying that the defendant was "equitably estopped" from raising the plea. The defendant, in my opinion, is concluded by the partition proceedings and is not entitled to go behind those proceedings in this suit. I would dismiss the appeal with costs.

RAFIQUE, J.—I am also of opinion for the reasons given by my learned brother Mr. Justice Banerji that this appeal should fail. I would, therefore, dismiss it with costs.

PIGGOTT, J.—I am of the same opinion. I only take it upon myself to add a few words because I was principally concerned in the decision in *Umrai Singh* v. *Ewaz Singh* (3), which has been relied upon as if it were an authority in favour of the appellant. At the time when I pronounced that decision, neither of the other two cases to which we have been referred, namely, *Deo Narain Singh* v. *Sitla Baksh Singh* (1) and *Damodar Das* v. *Jhaoo Singh* (2), had yet been reported. I referred to the former of the two as an unreported case, and my principal reason for adding these remarks at this stage in the present case is, I think, that I made a mistake in doing so. My *ratio decidendi* in *Umrai Singh* v. *Ewaz Singh* (3), which was apparently accepted by the learned Judges before whom the case came in appeal, was really different from that in *Deo Narain Singh* v. *Sitla Baksh Singh* (1). The question, as I look at it, and as I still regard it, is one of interpreting the words "a question of jurisdiction" in section 177 (*f*) of the Agra Tenancy Act. I take those words to mean a plea by the defendant to the effect that, on the facts alleged by the plaintiff himself, the suit is not one which a Revenue Court has jurisdiction to entertain. Obviously it is open to a defendant to deny the facts alleged in the plaint, to set up a different state of facts and to plead that upon facts alleged by himself, the Revenue Court could not lawfully eject him or grant the plaintiff whatever other relief the plaintiff was seeking from that Court This, however, is not, in my opinion, a plea of jurisdiction within the meaning of the sub-section above referred to. It is merely an assertion of the legal consequences which would follow upon the Court's affirming certain pleas of fact set up by the defendant It is so far from being a plea of jurisdiction that it presupposes the jurisdiction of the Court before which the said plea is raised to determine which set of facts is correct, that alleged by the plaintiff or that alleged by the defendant. A plea of jurisdiction, properly so

called, is a plea that the facts as stated by the plaintiff himself are such that the Court before which the plaint is brought has no jurisdiction to entertain it, or to grant the relief therein sought. The other two cases of this Court, namely, *Damodar Das* v. *Jhaoo Singh* (2) and *Deo Narain Singh* v. *Sitla Baksh Singh* (1) are to a large extent in conflict, and I think sufficient to say that I should prefer, if the case were one which required the point to be determined, to follow the decision in *Damodar Das* v. *Jhaoo Singh* (2). It is suggested that, unless the view taken in *Deo Narain Singh* v. *Sitla Baksh Singh* (1) be affirmed, it will always be open to any defendant in a suit brought in a Revenue Court, and exclusively cognizable by such Court, to invoke the appellate jurisdiction of the District Judge by entering a purely formal, and on the face of it unsustainable, plea, to the effect that the plaint as filed is not cognizable by the Revenue Court. With regard to this I think it sufficient to remark that, on the one hand, we are bound to enforce the law as we find it and to interpret the words of section 177 *(f)* to the best of our ability, according to their plain meaning. On the other hand, I think the danger suggested will be found to have very little existence in actual practice. It is not as a rule the defendant in a suit before the Revenue Courts who wishes to go out of his way to get that suit brought before a Civil Court in appeal. On the other matters which have been argued before us I have nothing to add to the judgment of Mr. Justice Banerji. I also would dismiss the appeal with costs.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 832 OF 1918.

April 2, 1919.

Present:—Justice Sir William Alying, KT., and Mr. Justice Napier.

PERIYA GOUNDAN—PLAINTIFF—APPELLANT

versus

KUPPA GOUNDAN—DEFENDANT—RESPONDENT.

Malicious prosecution—Prosecution by Police on information supplied by defendant—Informant, liability of—Damages, suit for.

Where, upon a report to a Village Munsif, the Police, after investigation, launch a prosecution against certain persons, and it turns out that the communication to the Munsif was false and the persons are acquitted, the person who made the report is liable, at the instance of the persons prosecuted, in an action for damages for malicious prosecution. It is no answer to such a suit, and would make no difference to the defendant's liability for damages, that the prosecution was instituted and conducted by the Police, as the person primarily responsible for the prosecution is the person who furnished the false information. [p. 783, col. 2.]

Second appeal against the decree of the District Court, Salem, in Appeal Suit No. 3 of 1919, preferred against the decree of the Court of the District Munsif, Salem, in Original Suit No. 887 of 1915.

FACTS appear from the judgment.

Mr. *S. S. Ramachandra Aiyar*, for the Appellant.—The lower Appellate Court erred in holding that the defendant was not liable because the prosecution was conducted by the Police. He gave the first information to the Village Munsif, who submitted a report. The Police acted on the report and prosecuted the accused. It is the false information that formed the basis of the whole thing, and the fact that the prosecution was launched through the medium of the Village Headman does not affect the defendant's liability. There are several modes of launching a complaint and if malice could be imputed to the informant and also absence of reasonable and probable cause, there is no reason why he should escape liability in damages. See the Privy Council ruling in *Gaya Prasad* v. *Bhagat Singh* (1). In *Sessions Judge of Tinnevelly*

(1) 30 A. 525; 10 Bom. L. R. 1080; 4 M. L. T. 204; 18 M. L. J. 394; 5 A. L. J. 665; 14 Bur. L. R. 318; 11 O. C. 371; 8 C. L. J. 337; 35 I. A. 189; 12 C. W. N. 1017 (P. C.).

Division v. *Sivan Chetty* (2) the Full Bench held that a false information to the Village Headman rendered the informant amenable to a prosecution under section 211, Indian Penal Code. It would be anomalous if an action for damages could not be sustained on the same facts.

Mr. *C. Sreenivasa Aiyangar*, for the Respondent.—The prosecution was launched and conducted by the Police actively. The Police made a sifting enquiry and launched the prosecution because they were satisfied that there was a *prima facie* case. The information, whatever it was, was acted on by the Police. The Police and not the defendant was the prosecutor. See *Narasinga Row* v. *Muthaya Pillai* (3).

JUDGMENT.—Appellant sued respondent for damages for malicious prosecution. He got a decree for Rs. 100 in the Munsif's Court. The District Judge set it aside, on the ground that respondent could not be said to have prosecuted appellant, because he only made a report to the Village Munsif as a result of which the Police, after investigation, launched and conducted a prosecution for theft against appellant and his father. The authority relied on is the ruling of this Court in *Narasinga Row* v. *Muthaya Pillai* (3).

Any person desirous of setting the criminal law in motion against another in respect of an act amounting to a cognizable offence can do so in three ways :—

1. He can present a complaint to a Magistrate having jurisdiction, who will thereupon take action under Chapter XVII, Criminal Procedure Code.

2. He may give information to an officer in charge of a Police station, who will take action under Chapter XIV, Criminal Procedure Code.

3. He may (in the case of all non-bailable and certain other offences) give information to the Headman of his village, who is bound under section 45, Criminal Procedure Code, to forthwith communicate the information to the nearest Magistrate, and to the officer in charge of the nearest Police station. It then becomes the duty of the Police Officer to investigate the case as laid down in Chapter XIV.

(2) 1 Ind. Cas. 187; 32 M. 258; 5 M. L. T. 269 (F. B.); 9 Cr. L. J. 170.

(3) 26 M. 362; 12 M. L. J. 389.

Method (3) in fact only differs from method (2) in that the Village Headman, being the officer presumably most accessible to the person giving information, is made the channel of communication to the Police Officer. It was the method adopted in the present case, and, as the District Judge himself recognizes, the fact that this indirect method of communication with the Police was resorted to makes no difference in the defendant's liability for damages. The contention is that whenever the prosecution in Court is instituted on a Police report under section 173, Criminal Procedure Code, the person who furnished the original information to the Police, whether directly or through the Village Headman, is not responsible for the act of the Police and cannot be sued for damages for malicious prosecution.

This certainly seems to me to be the meaning of the learned Judges in *Narasinga Row* v. *Muthaya Pillai* (3), but with all respect, I am unable to agree. If it be conceded that a person is liable for damages in respect of a prosecution on the ground that it was instituted on maliciously false information communicated by him to the Court in the shape of a complaint under section 200, Criminal Procedure Code, why should he not be equally liable where he induces the Police by maliciously false information to send the case to the Magistrate under section 107, Criminal Procedure Code? No doubt it is the duty of the Police to hold an investigation, as laid down in Chapter XIV, before sending the case to the Magistrate with a view to verifying as far as possible the truth of the information furnished to them. But a similar duty is cast on the Magistrate receiving a complaint; he must examine the complainant on oath (section 200) and if not satisfied of the truth of the complaint, he may hold or direct a preliminary enquiry (section 202), and he only takes action against the accused person by the issue of process under section 204, Criminal Procedure Code, if he is of opinion that there is sufficient ground for proceeding. The fact that some officer, whether Policeman or Magistrate, has to form an opinion on the apparent truth of the informant's information before the prosecution proceeds is no more reason in the one case than in the other for exonerating

the informant from liability for what follows. It is in each case his false information, out of which the prosecution arises; and it makes no difference whether the person led astray in the first instance is the Police Officer or the Magistrate. The Police or, as the form usually runs, the King-Emperor may be the nominal prosecutor: but the person primarily responsible for the prosecution is the person who furnished the false information on which the Police act. "*Qui facit per alium facit per se.*" The true principles on which responsibility for the prosecution should be fixed are laid down by their Lordships of the Privy Council in *Gaya Prasad* v. *Bhagat Singh* (1). They are at pains to make it clear that it is not enough to say (as the learned District Judge has in effect said here) that the prosecution was instituted and conducted by the Police. The whole circumstances of the case must be looked to.

It is true that their Lordships in their judgment referred to the judgment of this Court in *Narasinga Row* v. *Muthaya Pillai* (3), and add:

"The principle here laid down is sound enough, if properly understood, and its application to the particular case was no doubt justified; but in the opinion of their Lordships it is not of universal application."

I cannot understand this as meaning that their Lordships considered the facts of that case and endorsed this Court's decision on them as correct. To do so would, as it seems to me and if I understand this Court's decision aright, run counter to all the rest of their Lordships' judgment. The language suggests to me that they deemed it unnecessary to consider the correctness of the decision in that particular case: Rather they wished to point out that, while it might be correct, it was based on a principle which was not to be universally applied. If, as I presume, they had only the report in the Indian Law Reports series before them, they may well have been misled. The latter is very incomplete, and contains nothing to suggest that any of the Courts which dealt with the case found the prosecution to be, as a fact, malicious. It recites that the District Munsif found that it was not: but it fails to state (what we have ascertained from the original record) that the Sub-Judge, who was the final Judge of fact, found "that the prosecution of the plaintiff by the 1st defendant was malicious and without reasonable and probable cause." With all respect I do not think their Lordships realised that the Bench of this Court had in effect held that even if the information to the Police was maliciously false, the plaintiff's suit for damages could not succeed, simply because the case having been taken up on a Police report (section 190 (1) (*b*), Criminal Procedure Code) the Police, and not defendant, must be regarded as the prosecutor.

From such a proposition which is clearly contrary to the views expressed in the rest of their Lordships' judgment, I must respectfully dissent.

It is not inappropriate in this connection to draw attention to the view taken by this Court as to the applicability of section 211, Indian Penal Code, to cases such as the present one. The matter is fully discussed by a Full Bench in *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty* (2) and according to the opinion of the majority the action of the defendant in this case, provided the information given by him to the Village Headman was maliciously false, would render him liable to prosecution for an offence under section 211, Indian Penal Code. It would be a curious anomaly if an action for damages against him could not be sustained on the same facts.

I would set aside the decree of the District Judge, and direct him to restore the appeal to file and dispose of it in the light of the above remarks. Costs in this Court to be costs in the cause.

M. C. P.

Appeal allowed.
Case remanded.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 262 OF 1919.

June 23, 1919.

Present:—Mr. Justice Piggott.

MANNUA AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), ss. 298 (G), 318, 321—Bye-laws relating to dangerous and offensive trades—License, whether can be refused arbitrarily—Remedy of person aggrieved—Injunction, suit for, whether maintainable—Jurisdiction of Civil Courts.

A Municipal Board would not be justified in refusing to grant a license properly applied for, under the bye-laws relating to dangerous and offensive trades, not on any grounds of public safety, health or public convenience, but merely in order to secure an advantage to itself in a dispute about a question of title with another person. [p. 787, col. 1.]

Under the U. P. Municipalities Act of 1916 the jurisdiction of the Civil Courts is limited by the provisions of sections 318 and 321 of the Act. Under these sections the only remedy of a person who considers himself aggrieved by a bye-law made under section 298 (G) of the Act is by way of appeal to the higher authority referred to in section 318 of the Act, but it is by no means equally clear that a suit would not lie for an injunction to compel a Municipal Board to grant the plaintiff a license for carrying on a particular trade upon a particular spot, provided always that the plaintiff was prepared to take out the license subject to all the conditions prescribed by the bye-laws and could satisfy the Court that the Municipal Board had refused him the license for reasons wholly unconnected with the public health, safety or convenience. [p. 787, col. 2.]

Criminal revision from an order of the Joint Magistrate, Cawnpore, dated the 1st March 1919.

Messrs. *G. W. Dillon* and *Kailash Nath Katju*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicants in this case are *Musammat* Batasu, also called *Musammat* Diptian, and her son Mannua, Ganga Putras by caste, residents of Cawnpur. They were prosecuted under the provisions of the United Provinces Municipal Act for keeping a certain plot of ground as a place for the storing of wood, without having obtained a license for so doing from the Municipal Board. Now it is not denied that the Municipal Board of Cawnpur has made bye-laws under section 298 of the aforesaid Act, which bye-laws contain amongst other prohibitions a prohibition against any land within Municipal limits being used for the storage of wood, except under a license granted by the Board and subject to the provisions of such license. The record before me shows that Mannua on behalf of himself and his mother admitted that they held no license for storing wood at the spot in question. He even admitted that they had not, up to the date on which he made his statement in Court, presented to the Municipal Board any formal application for a license. He said he had asked an Inspector in the service of the Municipal Board verbally for a license and had been told by the Inspector that he could not get one. At his trial he presented a petition to the Joint Magistrate before whom he was being tried, addressing the said Magistrate in his capacity of a member of the Municipal Board of Cawnpur, asking that he might be granted a license. On this state of facts, and apart from all other considerations, it is sufficiently obvious that *Musammat* Batasu and Mannua have committed at least a technical breach of a bye-law lawfully made by the Municipal Board of Cawnpur and are liable to punishment This, however, does not quite conclude the matter. The sentence imposed by the trying Magistrate has been a fine of Rs. 50 on each of the two accused persons. This is practically the maximum penalty prescribed by the Municipal bye law for a first conviction in respect of an offence of this sort, the fine imposed being nontheless the maximum fine of Rs. 100 because it has been apportioned in equal shares between the two keepers of the timberyard. Now it has been represented to me on behalf of *Musammat* Batasu and Mannua that the sentence imposed is in any case excessive and that, in view of the circumstances of the case as a whole, the Joint Magistrate should, even if he felt himself compelled to convict of a technical offence, have marked his sense of the equities of the case by imposing a merely nominal penalty. Now that the case has come before me in revision, I consider it incumbent on me to look into the matter from this point of view. The dispute between the applicants and the Municipal Board of Cawnpur goes back to the year 1914. It appears that in that year the Municipal Board came to the conclusion that the land on which the applicants were then and are now keeping a timberyard was

Nazul land which could only be occupied on a lease or license granted by the Municipal Board. They took proceedings against these applicants for keeping a timberyard on Nazul land without the permission of the Board. The applicants replied that the land in question was not Nazul land, and that in any case it had been in the exclusive occupation for the purpose of a timberyard of the applicants and their predecessors-in-title for a period of more than fifty years. As a matter of fact the dispute in that case does not seem to have been directed specially to the question of any stock of timber on the land in question, but rather to the question of a hut alleged to exist upon the said site. The Court trying the case came to the conclusion that the Municipal Board was not entitled to maintain such a prosecution without first instituting a suit in the Civil Court and obtaining an adjudication on the question of disputed title to the land itself. Towards the end of the year 1918 the question of the use of the land in suit by these applicants seems to have come up once more before the Municipal Board, and a resolution was passed the terms of which have been laid before me. The Board resolved that the lease of Nazul land granted to *Musammat* Batasu and Mannua should be cancelled and that no license should be given them for storing wood on the land in question. The present prosecution has followed naturally on the passing of this resolution. The applicants contend that the Municipal Board is not within its legal rights in refusing to grant them a license. Their case is that the bye-law under which they have been prosecuted forms part of a series of bye laws dealing with dangerous and offensive trades, the object of which is the safety of the public and the prevention of nuisances. It is contended on their behalf that these bye-laws must be interpreted as a whole, and that, being so interpreted, they warrant the conclusion that the Municipal Board is under an obligation to grant a license under the said bye-laws upon any properly framed application, provided only they are satisfied that the trade in question can be carried on in the land for which license is sought without danger or injury to the public and that the person applying for a license is prepared to abide by all the prescribed conditions. I am asked to hold that if the present case be judged by these tests, the decision ought to be in favour of the applicants that the Municipal Board had no right to pass a resolution refusing to give them a license and that it is within the power of this Court to set aside a conviction, if it is satisfied that there has been a misuse of the powers conferred upon the Municipal Board by the Act which regulates and defines its powers. In this connection I have been referred to the case of *Emperor* v. *Balkishan* (1) in which a learned Judge of this Court, in dealing with a conviction under the former Municipalities Act of 1900, went into the question of the reasonableness of a particular bye-law and set aside the conviction upon a finding that the bye law in question was not reasonable and that its passing amounted to an abuse of power on the part of the Municipal Board. This decision cannot govern the case now before me in its entirety. The bye-law which the applicants have contravened is in itself a very reasonable and proper one, and the applicants were technically in the wrong when they came before the Joint Magistrate's Court, because they had made no formal application to the Municipal Board for the grant of a license. I am still of opinion that, inspite of the Board's resolution of the 20th of November 1918, it is incumbent upon these applicants, unless they elect to submit to the orders of the Board and to remove their stock of wood from the site in question, to present through the proper channel a formal application for a license to the Municipal Board. Whatever resolution may have been passed by the said Board at a previous meeting upon an *ex parte* statement of the facts, it does no follow that a license would necessarily be refused after the applicants had laid their case fully before the Board. I am bound to observe, however, that the position of the Board in this matter is a peculiar one. They are claiming the site itself as against *Musammat* Batasu and Mannua. On the materials at present available to me I do not profess to understand the reference in the Board's resolution of November 20th, 1918, to the cancellation of a lease said to be held by Mannua and his mother for

(1) 24 A. 439; A. W. N. (1902) 117.

the use of this land. For ought I know the Municipal Board may have been in possession of indisputable evidence that these applicants hold the land in suit as their lessees. In any case the papers before me show that the land in suit is claimed as Nazul land on behalf of the Municipal Board and that this claim is being resisted by *Musammat* Batasu and Mannua. The question is whether the Municipal Board is acting within its lawful rights in using its power of withholding a license so as to put pressure upon these applicants and compel them to vacate the disputed site, without the question of title being brought for determination before a competent Court. On the facts now before me I hesitate about pronouncing a final opinion on this point. The Municipal Board may have adequate reasons for taking up the position that they would only be stultifying themselves, and making an admission which would be used against them in any subsequent civil litigation, if they were to grant these persons a license for storing wood on this particular site. I will not go further than to say that in my opinion the question would be one for careful consideration by the Municipal Board in the event of the matter coming before them upon a regular and formal application for a license made by *Musammat* Batasu or Mannua or both. I so far agree with the main argument which has been pressed upon me in support of this application that I think it is correct to say that the bye-laws on the subject of dangerous and offensive trades must be considered as a whole, and that a Municipal Board will be straining its authority if it refuses a license, properly applied for under any of these bye-laws, not on any grounds of public safety, health or convenience, but merely in order to secure an advantage to itself in a dispute about a question of title with another person. The jurisdiction of this Court to interfere on the criminal side has been sufficiently illustrated by the ruling which I have already referred to. It is beyond question also that, under the former Municipal Act, a suit would be maintainable for an injunction restraining a Municipal Board from interfering with the plaintiff's lawful exercise of his right to carry on a certain trade or employment upon a particular site, to the possession of which the said plaintiff had a clear title. Under the United Provinces Municipalities Act No. II of 1916 the jurisdiction of the Civil Courts is limited by the provisions of sections 318 and 321 of the said Act. I have no doubt that under these sections the only remedy of a person who considered himself aggrieved by a bye-law made under section 295 of the Act, heading G (which is the heading dealing with offensive and dangerous trades), would be by way of appeal to the higher authority referred to in section 318. But it is by no means equally clear that a suit would not lie for an injunction to compel a Municipal Board to grant the plaintiff a license for carrying on a particular trade upon a particular spot, provided always that the plaintiff was prepared to take out the license subject to all the conditions prescribed by the bye laws and could satisfy the Court that the Municipal Board had refused him the license for reasons wholly unconnected with the public health, safety or convenience. I do not think I can profitably say anything further about this case as it stands. I reduce the sentence imposed upon *Musammat* Batasu and Mannua to one of a fine of Rs. 10 against the two of them or Rs. 5 each. The balance of the fine, if paid, will be refunded to the applicants. I leave it to the parties concerned to reconsider their position in the light of such remarks as I have thought it expedient to make. If the matter should unhappily come before this Court again, the point for consideration will undoubtedly be, which of the two parties has honestly and in good faith endeavoured to put itself in the right. I must not be understood for a moment to have laid down that these applicants are entitled to persist in their present attitude of contumacious resistance to the Municipal bye-laws. They are bound either to submit to those bye-laws or to take proper steps to bring the matter in dispute between themselves and the Municipal Board to the adjudication of a competent authority; and the first step which they must take, I have no doubt, is the presentation, through the proper channel, of a regular and formal application for a license for the storage of wood in the site in question.

Sentence reduced.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 264 OF 1918.

March 27, 1919.

Present:—Sir Henry Drake-Brockman, KT., J. C.

Rani SUNDERABAI—APPLICANT

versus

KISHORE SINGH AND OTHERS—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 439—Revision—High Court, power of interference of—Acquittal, whether can be set aside at instance of private prosecutor—Offence, personal—Defamation.

Although, as a general rule, it is inexpedient to interfere in revision at the instance of a private person with an acquittal after trial by a competent tribunal, yet, section 439 of the Criminal Procedure Code undoubtedly confers power on the High Court to set aside an order of acquittal at the instance of a private prosecutor, especially in a case of defamation where the offence is of so essentially personal a character that the Local Government would seldom be willing to appeal from an acquittal. [p. 789, col. 1.]

Application for revision of the order of the District Magistrate, Saugor.

Mr. *S. Y. Deshmukh*, for the Applicant.

Messrs. *Gupta* and *G. L. Subhedar*, for the Non-Applicants.

The Hon'ble Mr. *G. P. Dick*, for the Crown.

ORDER.—Rani Sundara, the applicant in this case, is the wife of Raja Kishore Singh of Hatri. On the 18th April 1918 she complained to a First Class Magistrate that she had been defamed by the Raja, his Karinda Anup Singh and another person with whom we are not now concerned, in a petition presented to the District Court at Saugor on the 30th November 1916. One Fundilal, a medical practitioner, was included in the complaint on the ground that he had sworn an affidavit in support of the aforesaid petition. The petition, of which a copy forms Exhibit P-1 in the Magistrate's record, was signed by Anup Singh as the Raja's Karinda. It alleged that the Rani was leading an unchaste life, had been pregnant for over 5 months and was believed to be attempting abortion. Fundilal's affidavit stated that having seen the Rani thrice in one month he found her over 5 months advanced in pregnancy, that she admitted being pregnant and that she had been trying to bring about a miscarriage. The District Court had on the 14th March 1916 passed a decree awarding the Rani an allowance of Rs. 30 per month and directing the Raja to put her in possession of residential quarters at Patna in the Damoh District. The object of the petition was to obtain an order depriving the Rani of this allowance. The District Judge after full enquiry held that the Rani had not been unchaste or pregnant as alleged and dismissed the application with costs on the 17th April 1917.

Immediately on receipt of summons in the present case the Raja applied for and obtained permission to appear by Pleader. The only ground stated in his application was that he was a very respectable man against whom his wife had laid a frivolous complaint with the object of dishonouring him. In his order the Magistrate dispensed with the personal attendance of the Raja "for the time being," but his attendance was not enforced at any stage of the trial.

The Rani in her evidence denied that Fundilal had ever attended her and called one witness to speak to her character. The Raja himself was not examined, but his Pleader made a statement on his behalf in the course of which he alleged that Anup Singh had filed the petition in the District Court without his knowledge: this statement was corroborated by Anup Singh on the latter's examination. Anup Singh alleged that he had made enquiries and satisfied himself that the Rani was pregnant in November 1916. Fundilal in reply to the Magistrate's questions declared that he had felt the Rani's pulse and caused her to be examined by a woman who reported her to be five or six months advanced in pregnancy. The Magistrate then charged the Raja and Anup Singh with defamation in respect of the allegations in the petition of November 1916 that the Rani was leading an unchaste life and was said to be over five months pregnant. Fundilal was charged with making similar allegations in his affidavit and also with stating therein that the Rani was attempting to bring about a miscarriage.

All the accused pleaded not guilty. Six witnesses were examined for the defence, the object being to show that Fundilal did attend the complainant and cause her to be examined by one *Musammat* Gora, with the result that she was *bona fide* believed to be pregnant. How Fundilal's discovery came

to the knowledge of Anup Singh was not explained.

The Magistrate acquitted all the accused, holding that the Raja and Anup Singh had acted in good faith on information supplied by Fundilal and were protected by the ninth exception to section 499, Indian Penal Code. Fundilal also was held to have acted in good faith as the result of his visits to the Rani and her examination by *Musammat* Gora: no exception to section 499 was cited as applicable to his conduct.

The application for revision of the order of acquittal attacks the order on its merits and without reference to the practice of this Court in such matters as laid down in *Binda Prashad* v. *Ripusudan* (1). The District Magistrate, however, has not opposed the application and on behalf of the Crown the standing Counsel has submitted that there has been a serious miscarriage of justice. For the non-applicants on the other hand it is urged that there has been no such defect or irregularity in the trial as to justify interference in revision.

It may be taken as a well-settled view of all the High Courts that as a general rule it is not expedient to interfere in revision at the instance of a private person with an acquittal after trial by a competent tribunal and that applications for such interference should be discouraged on public grounds. The practice of this Court is in accordance with this view. On the other hand section 439, Criminal Procedure Code, undoubtedly confers power to set aside an order of acquittal at the instance of a private prosecutor. And defamation is an offence of so essentially a personal character that the Local Government would seldom be willing to appeal from an acquittal under section 477, Criminal Procedure Code. It is true that in *Binda Prashad* v. *Ripusudan* (1) (above cited) the offence in question was defamation, but the character of that offence does not appear to have been considered and interference was recognised as proper if by reason of any irregularity there has been a failure of justice.

In the present case the basis of the allegations against the Rani is the existence of what is described as a ball in the lower part of the abdomen. *Musammat* Gora (D. W. No 3) deposed to feeling this ball and basing her conclusion as to the Rani's condition thereon. The Magistrate appears to have accepted this woman's story on the assumption that without the knowledge obtained from *Musammat* Gora the existence of the ball could not have been known to the Raja. The Rani herself alleged that this lump has existed since she was 10 or 15 years old and if this is true, the Raja may perfectly well have known of it by reason of his position as the Rani's husband. The probability of this knowledge having been used as a foundation for the petition of November 1916 has been wholly lost sight of. The Magistrate has also failed to justify the entire omission from the charges against the Raja and Anup Singh of any reference to the accusation of attempted abortion, which figures in the charge against Fundilal alone. No attempt was made by any of the witnesses for the defence to make out that the Rani was endeavouring to bring about a miscarriage; even Gora said nothing on this point. The Magistrate, moreover, made no reference in his judgment to circumstances admitted by Gora, which indicated that she might have been influenced by Fundilal, and it is certainly difficult to understand why a woman of her position and character has been believed in preference to the Rani in a matter closely affecting the Rani's own person.

The complainant waited a whole year after the failure of the Raja's application to the District Court before preferring her complaint, but she was not cross-examined in respect of this delay at the trial, nor did the Magistrate make any reference to the fact in his judgment. This point will doubtless receive attention at the re-trial which I am about to order.

The trying Magistrate seems to me to have failed altogether to appreciate the probabilities of the case and to weigh the evidence for the defence with the care which the situation demanded. He also omitted to include in the charge against the Raja and Anup Singh an essential part of the accusation laid by the complainant, which is *prima facie* justified by the petition and affidavit of 1916. Even so far as Fundilal is concerned, the entire absence of evidence in support of the allegation that the Rani was attempting to bring

(1) 1 Ind. Cas. 238; 5 N. L. R. 4; 9 Cr. L. J. 211.

about a miscarriage has been ignored. Looking to all these circumstances I consider that the order of acquittal in favour of each of the accused should be reversed and I hereby set those orders aside. The three non-applicants will be re-tried by such Magistrate other than the one who acquitted them as the District Magistrate may select for the purpose.

Case sent back.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 272 OF 1919.
July 16, 1919.
Present:—Sir George Knox, KT.,
Acting Chief Justice.
DUNYAPAT AND OTHERS—APPLICANTS
versus
EMPEROR - OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 379 - Theft—Tenant removing trees belonging to landlord—Custom set up by tenant—Burden of proof.

The accused, tenants of a village, removed certain trees which had been uprooted in a duststorm. The trees were the property of the *zemindar*, and the accused admitted having removed them, but alleged that under a custom in the village they had the right to do so, and produced certain extracts from the *wajib-ul-arz* in support of their allegation. The Court held that the removal of the trees amounted to the offence of theft, and convicted the accused accordingly:

Held, that the extracts from the *wajib ul-arz* did not evidence a custom authorising the removal of fallen trees by tenants without the consent of the landlord: that the accused had failed to prove that the removal was not dishonest, and as the removal caused loss to the landlord which was wrongful to him and caused wrongful gain to the accused, the case fell within illustration (*a*) of section 378 of the Penal Code, and the conviction was justified [p. 790, col. 2; p. 791, col. 1.]

Criminal revision against the order of the Additional Sessions Judge, Cawnpore, dated the 27th February 1919.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Complaint was instituted by one Pandit Bawa Ram to the effect tat on the 20th of June a duststorm swept through the village of Mahotra, with the result that nine Mahwa and one mango tree were uprooted. In addition to these trees uprooted by this duststorm there were two old Mahwa trees which had fallen a year before and were lying on the ground. The accused, who are tenants in the village Mahotra, removed these uprooted trees and the two Mahwa trees which had fallen the year previous and took possession of them. The tenants appeared and admitted having taken the trees and kept them within their possession. The Courts below have found that the removal of these trees amounted to an offence of theft.

It has been argued in revision in this Court that the act of the tenants was wanting in the element of dishonesty which is a necessary essential of every theft. The argument is that the Zemindar has been attempting to enforce his rights without having recourse to the Civil Court. The case, it is said, is for the Civil Courts and not for the Criminal Courts. The plea is raised that there is a custom in this village whereby tenants can under such circumstances remove trees. An extract from the *wajib ul-arz* of 1860 and an extract from the *wajib-ul arz* of 1880 were read over to me as proving that the custom set up by the tenants exists and prevails in this village. I do not understand these extracts as in any way evidencing a custom authorizing tenants to remove without the consent of the Zemindar whole trees which have been uprooted by duststorms. But I am not going to lay down any finding as to whether such a custom does or does not exist in the village of Mahotra—that is a matter for the Civil Court. All I have to consider is whether it has been proved in this case that the tenants dishonestly removed certain trees. The Courts below have found and the tenants have admitted that they did remove the trees. It was for them to prove that the removal was not dishonest. The removal certainly caused loss to the Zemindar which was wrongful loss to him and caused wrongful gain to the accused. The accused caused this loss by means which at the time of employing those means they knew to be likely to cause it. It may well be that they had some intention of, by this act, creating as well evidence of a custom to remove the trees in their favour. As the evidence on the record stands, that

loss was wrongful loss and the case falls within illustration (*a*) of section 378 of the Indian Penal Code. I was referred to the case of *Bhagwat Saran Misir* v. *Emperor* (1). There is no finding in this case that the accused was acting *bona fide*, on what he supposed to be his legal right.

The sentence of fine does seem to me to be severe. I reduce the fine to a fine of Rs. 320 or Rs. 40 on each one of the accused. Of this sum, if realised, Rs. 300 will be given to Pandit Bawa Ram, who appears *prima facie* entitled to the trees that were removed. In other respects the sentence passed by the Court below will stand good.

Sentence reduced.

(1) 35 Ind. Cas. 167; 14 A. L. J. 399; 17 Cr. L. J. 295.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 811 OF 1918.

February 7, 1919.

Present:—Sir Henry Rattigan, KT, Chief Judge, and Mr. Justice Abdul Raoof.

BAHAL SINGH AND ANOTHER —CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 302, 325—Attack made by two persons—Death caused by one—Offence—Murder—Intention—Grievous hurt.

Where two persons armed with deadly weapons make an attack upon another and it is proved that death was caused by a blow inflicted by only one of them, both cannot be convicted of the offence of murder under section 302, read with section 34 of the Penal Code; to make both equally liable for the murder it ought to be established that both of them struck the deceased. The one who struck the blow is guilty of murder and the other, who must have known that grievous hurt would in all probability be caused, is guilty of having abetted an offence under section 325, read with section 109, of the Penal Code. [p. 795, col. 2;p. 796, col. 1.]

Appeal from the order of the Sessions Judge, Lahore, dated the 13th November 1918.

Messrs. *Morton*, *Beechey* and *Nand Lal*, for the Appellants.

Mr. *Mul Chand*, Public Prosecutor, for the Respondent.

JUDGMENT.—Four men, namely Bahal Singh, Mula Singh, Dhara Singh and Fateh Singh, were committed to the Court of Session on a charge of murder of one Dula Singh under section 302, Indian Penal Code. The two latter, *i. e.*, Dhara Singh and Fateh Singh, were acquitted by the learned Sessions Judge, who convicted the two first, namely, Bahal Singh and Mula Singh, and sentenced them to death. Both of them have filed appeals to this Court and the case has also come up before us under a reference under section 374, Criminal Procedure Code, for the confirmation of the sentence of death passed upon them.

The case as set up on behalf of the prosecution was that the families of Mohkam Singh and Wir Singh were not on good terms. Mohkam Singh had three sons, Fateh Singh, Bahal Singh and Mula Singh, and a daughter, *Musammat* Kisso. Dhara Singh, the accused No. 3 in the case, is the son of Bahal Singh. Wir Singh's family is represented by Labh Singh, Kehr Singh, Sher Singh, Kunden Singh and Dula Singh, the five sons of Wir Singh. Labh Singh has two sons, Gurdit Singh and Ranjit Singh. It is alleged that Gurdit Singh entered the house of Mohkam Singh's family with the object of having sexual intercourse with *Musammat* Kisso. A complaint was filed against Gurdit Singh in the Court of the Tahsildar of Chunian under section 451, Indian Penal Code. There were several adjournments of the hearing of this case. One of the dates fixed for the hearing of this case was the 22nd of July 1918, and a day previous to this, *i. e.*, on the 21st of July 1918, Gurdit Singh along with his father, Labh Singh, left the village of their residence, namely, Chak No. 24, in order to attend the Court of the Tahsildar of Chunian. It appears that the other brothers of Labh Singh did not reside in this village but they had their residences elsewhere. On account of this feud with the family of Mohkam Singh, Labh Singh was in constant fear of molestation and injury from the members of Mokham Singh's family. For this reason Dula Singh and Kehr Singh, who lived in a village called

Jamsher, had been called and requested to stay with Labh Singh's family to be of use and help to them. Therefore, they had for some time been living in Labh Singh's house. It is stated that when leaving for the Court of the Tahsildar of Chunian Labh Singh told his wife, *Musammat* Kishen Kaur, to look the door of the compound and requested his neighbour, Wadhawa Singh, also to look after his family during his absence. Labh Singh had left in the morning. About midday Kehr Singh went out of the house to get fodder. *Musammat* Kishen Kaur was left in the house with Dula Singh, who was sleeping on a *charpoy* under a shed. At about 2-30 P.M., it is stated, Bahal Singh climbed over the wall and came into the compound of the house with a *gandasa* in his hand. The other accused, Mula Singh, Fatteh Singh and Dhara Singh, also came in immediately after. *Musammat* Kishen Kaur called out to Dula Singh who, having got up from his bed, was assailed by the accused persons with *gandasas* and *dangs*. Dula Singh was killed on the spot. *Musammat* Kishen Kaur tried to run away but she was caught by the accused, Dhara Singh, while climbing a ladder and was pulled down. She was compelled to hand over the key of the compound to the assailants. The door was opened and certain other persons were also admitted into the house. She was lifted by Indar Singh, one of the men who had just been let in, and Dhara Singh, who took her out of the house, threw her upon a heap of manure, tore her clothes and maltreated her. When the accused had left the house she returned to her compound and found Dula Singh lying dead. One Wadhawa Singh was seen trying to give Dula Singh some milk in order to revive him. He, however, left the place when *Musammat* Kishen Kaur re-entered the house naked. Narain Singh, the Lambardar, came in and the whole story was related to him by *Musammat* Kishen Kaur how the four accused had assailed Dula Singh and maltreated her.

On the return of Kehr Singh to the compound and the arrival of Sher Singh, another brother of Labh Singh, they started in the company of Narain Singh, the Lambardar, to report the matter at the Police Station Pattoki. The report was made at 8-15 P. M., on the evening of the 21st July 1918. It was made by Narain Singh alone as his two companions, Kehr Singh and Sher Singh, had left him in the way and had gone to look for Labh Singh in the village at Bhai Kot, having requested Narain Singh not to make any report until the arrival of Labh Singh. In the report it was stated that Narain Singh was sitting under a *tahli* tree that day near the village well. He suddenly heard the voice of Dula Singh uttering the words "*mar gae, mar gae.*" Upon this he went to the house of Dula Singh and saw Bahal Singh and Mula Singh, sons of Mohkam Singh, Jat, residents of the village, coming out of the house of Dula Singh. Bahal Singh had a *chhavi* in his hand while Mula Singh a *dang*. When he went inside the house, he saw Dula Singh lying murdered on the ground and blood oozing out of his head. *Musammat* Kishen Kaur said to him that Bahal Singh and Mula Singh after murdering the deceased had taken to their heels. He gave as the reason for the murder the trespass by Gurdit Singh into the house of Bahal Singh and Mula Singh with the object of committing adultery with *Musammat* Kisso, their sister, about which a complaint had been lodged in the Court of the Tahsildar of Chunian.

It is to be borne in mind that in this report only two names were mentioned, namely, those of Bahal Singh and Mula Singh. When the Police arrived at about midnight, *Musammat* Kishen Kaur stated that Dula Singh had been killed by the four accused persons. She, however, reserved her full statement till after the return of her husband, Labh Singh. Narain Singh the Lambardar, who had made the report, was examined as a witness for the prosecution in this case. It appears from his statement that he tried to modify his previous statement contained in the first information report. He admitted having seen two men running away from the house of Labh Singh. He stated: "I saw two men running away, one had a *dang* and the other had some weapon, it might have been a *gandasa* or a *chhavi*. Something was shining, it might have been the ferule of a stick. I went into the compound. I did not identify either of the two men

I found Dula Singh lying murdered and *Musammat* Kishen Kaur sitting beside him. She told me that he had been murdered by Bahal Singh and Mula Singh." He admitted having gone to the *thana* and having reported that a murder had been committed, but in order to minimise what he had reported to the Police he stated in his deposition: "I do not know what the Police wrote. I did not have the report read out to me. I got no copy of the report given to me." In his cross-examination he stated that Bahal Singh accused had opposed him at the time of his appointment as a Lambardar. The Sub-Inspector, Gobind Sahai, who had taken down the first information report made by Narain Singh, Lambardar, in his deposition stated that he took down the statement made by Narain Singh, that he wrote exactly what he said and that he gave him a copy of the statement. He read out the statement to him and he had acknowledged it to be correct. A receipt for the copy was taken from him. According to the evidence of the Sub-Inspector, the brother Kehr Singh also came to report and he reported against the four accused. Having taken down the report, as we have mentioned above, the Sub-Inspector went to the house of Labh Singh and arrived there at about midnight. He prepared the statement of injuries, and sent the body for *post mortem* examination with Mahna Singh constable. *Musammat* Kishen Kaur was examined by him, but she refused to give a full statement till the arrival of her husband but she did give him the names of the four accused. On the arrival of her husband she did make a fuller statement and handed over to the Sub-Inspector her torn clothes, a *dang* and a padlock. *Musammat* Kishen Kaur in her statement before the Court of Session stated that about $3\frac{1}{2}$ months ago in the afternoon Dula Singh was lying on a bed in the compound. She was also in the compound working at her spinning wheel a few paces distant from Dula Singh. Ranjita and her little daughters were playing about. The door of the compound was locked for fear of enemies. At that time Bahal Singh came into the compound followed by the other three accused. Bahal Singh first struck Dula Singh on the head. According to her statement the other three accused, namely, Mula Singh, Fatteh Singh and Dhara Singh, also attacked Dula Singh and hit him. Fatteh Singh and Mula Singh had *gandasas*. They struck Dula Singh on the top of the head. Fatteh Singh and Mula Singh struck at exactly the same time and in the same place. Dula Singh fell to the ground. Then Dhara Singh struck Dula Singh on the stomach two or three times with a *dang* which he had in his hand. According to this witness three of the accused persons had delivered strokes on the head of the deceased before he fell to the ground.

According to the medical evidence, however, it would appear that there was only one incised wound, 5 inches *by* 2 inches, found on the head of the deceased and that death was stated to have been caused "by injury *ante mortem*, homicidal and with some sharp weapon." Ranjit Singh, son of Labh Singh, corroborated the statement made by his mother *Musammat* Kishen Kaur.

Kehr Singh was also examined as a witness in this case. He admittedly was absent from the compound of Labh Singh at the time of the occurrence but he tried to make out that he came back just in time to observe from a distance the four accused persons going to the house of Wadhawa Singh. The evidence of this man has been altogether discarded by the learned Sessions Judge, and for very good reasons. Labh Singh also admittedly was not present on the day of the occurrence and his evidence was merely formal. The learned Sessions Judge, having taken into consideration the discrepancies to be found between the first information report and the statement of *Musammat* Kishen Kaur as to the number and identity of the accused persons, came to the conclusion that it was not fully established that Fatteh Singh and Dhara Singh were also among the assailants. Upon a review of the entire evidence, he, however, came to the conclusion that the case against Bahal Singh and Mula Singh was established beyond any reasonable doubt. He found that Mula Singh admitted that he went into the compound of Labh Singh and had a fight with Dula Singh in the course of which he killed

the latter. As regards Bahal Singh the learned Sessions Judge found that as against him also the case had been fully made out upon the evidence of *Musammat* Kishen Kaur and Ranjit Singh. He preferred to rely upon the original statement of Narain Singh, the Lambardar, and held that Bahal Singh's presence was established. The plea of *alibi* set up on behalf of Bahal Singh was rejected by the learned Judge for very good reasons.

The defence set up by Mula Singh was that he had struck Dula Singh in self-defence in retaliation of an attack made by Dula Singh upon him. His story was that he was watering his horse when it got loose, ran away and entered the house of Labh Singh attracted by the neighing of the colt in Labh Singh's compound. He followed the horse into the house and Dula Singh at once sprang upon him and hit him on the head with a *dang*. There was a *kahi* lying by, which he picked up and used it in self-defence when he was being attacked by Dula Singh. The two witnesses called in support of this defence were disbelieved by the learned Sessions Judge for very cogent reasons.

Having found that both Bahal Singh and Mula Singh had entered the house, the learned Sessions Judge then considered the question as to who actually delivered the fatal blow which brought about the death of Dula Singh. In his opinion it was established that several men, of whom Bahal Singh and Mula Singh were two, had invaded the compound of Labh Singh armed with *gandasas* and that they had immediately assaulted Dula Singh and that one of their number struck him on the head and killed him. He also held that it was proved that the common intention of the assailants was to kill some members of this family. He preferred to believe the theory that the party of assailants had come with the intention of killing some one in Labh Singh's family. Taking this view of the case the learned Sessions Judge applied section 34 read with section 33, Indian Penal Code, and held that all were guilty of the murder of Dula Singh. He, therefore, convicted both Bahal Singh and Mula Singh under section 302, read with section 34, Indian Penal Code, and sentenced both of them to death.

It has been contended on behalf of the appellants that the case has not been made out against them upon the evidence on the record. On behalf of Bahal Singh it was urged that there was no reliable evidence to establish that he was one of the assailants. Now there can be no doubt that Bahal Singh and Mula Singh were named from the very commencement. Their names were mentioned in the first information report. *Musammat* Kishen Kaur and Ranjit Singh both named them and although Narain Singh, the Lambardar, tried to minimise the first statement, he did state that *Musammat* Kishen Kaur had told him that Dula Singh had been murdered by Bahal Singh and Mula Singh. We, therefore, entirely agree with the learned Sessions Judge in the conclusion that the presence of both the appellants has been established beyond any possible doubt.

As regards the motive of the accused and the intention with which they came to the house of Labh Singh, we have come to a different conclusion from that arrived at by the learned Sessions Judge. The real grievance which Bahal Singh's family members had against the family of Labh Singh was that Gurdit Singh had disgraced their family by having sexual intercourse with *Musammat* Kisso. It was as to this that they had complained to the Court. We think that their object in going to the house of Labh Singh was to bring about by retaliation the same kind of disgrace upon Labh Singh's family to which their family had been subjected. In our opinion they intended simply to insult and disgrace *Musammat* Kishen Kaur, the wife of Labh Singh. No doubt they went there armed, as they thought it prudent to guard against possible opposition and danger. We do not think that we would be justified in holding under these circumstances that they had the intention of killing anybody. In all probability while attempting to molest *Musammat* Kishen Kaur they were opposed by Dula Singh and thereupon Mula Singh struck him with the weapon which he had, which cut the parietal bone and caused the death.

As regards Mula Singh there can be no doubt upon his admission that it was he who delivered the fatal stroke. He must be taken to have intended to kill the man as he must have known the consequences of the use of the dangerous weapon with which he delivered the stroke (section 300, clause 3, Indian Penal Code). He is, therefore, certainly guilty of the offence of murder. His story about the horse and subsequent fight with Dula Singh and his plea of self-defence cannot be entertained. The story on the face of it appears to be absurd. As has been shown, there is evidence, which we believe, to the effect that the door of the compound was closed and locked. It was not, therefore, possible for the horse or Mula Singh to have entered the compound through the door. The story of the horse having been proved to be false, the plea of self-defence based upon it must necessarily fail.

As regards Bahal Singh, although we believe the evidence with regard to his presence, we do not think that he can be found guilty of the offence of murder. The act which caused the death of Dula Singh has not been established against him. According to the medical evidence there can be no doubt that only one stroke was delivered and that stroke has been found to have been delivered by Mula Singh. It, therefore, follows that *the criminal act* was not done by Bahal Singh and Mula Singh jointly in furtherance of their common intention. Section 34, Indian Penal Code, runs thus:—

"When a criminal act is done by several persons (in furtherance of the common intention of all), each of such persons is liable for that act in the same manner as if it were done by him alone."

According to this section, in order to make both Bahal Singh and Mula Singh equally liable for the murder of Dula Singh, it ought to have been established that both of them struck the deceased. It was so established in the two cases of the Allahabad High Court relied upon by the learned Public Prosecutor. In the case of *Queen-Empress* v. *Mahabir Tiwari* (1) Strachey, C.J., made the following remarks:

"There can be no doubt, however, that the appellant was one of the persons committing the dacoity; and the evidence shows that, upon Gajraj seizing the appellant while the dacoits were engaged in plundering the threshing floor, all the dacoits attacked and beat him with *lathis*, *and that the appellant similarly joined the rest in so beating him*. It is thus clear that the attack on Gajraj was made by the dacoits, including the appellant, in furtherance of the common intention of all, and, therefore, each of them was liable under section 34 of the Code in the same manner as if he were the sole assailant."

In the case of *Emperor* v. *Gulab* (2) the finding was that "abuse followed between the parties and thereupon, according to the evidence for the prosecution, the three men attacked Hardial with their *lathis*. Ganga Prasad was also armed with a *lathi* and a regular fight took place between two men on one side and three on the other." It was held in that case that "the three accused were all armed with the same class of weapon. They all attacked Hardial. . . . . The three accused were moved by a common intention. That intention may not have been to cause death, but in carrying out their intention they all used deadly weapons and they must be deemed to have known that they were likely to cause death." Upon this finding it was held in that case that section 34 applied. Such is not the case here. In the case of *Emperor* v. *Nirmal Kanta Roy* (3), Stephen, J., at page 1088* observed as follows:—

"The second point depends on the terms of section 34. This provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. In this case the killing of Nripendra was, according to the evidence, done by one person who was not the accused. It was, therefore, not done by several persons and I do not see how the section can apply. The only act he can be liable for under the section is one done by several persons of whom he was one, *i. e.*, by the man who escaped and himself. They may have committed many criminal acts together, but they did not both kill

(1) 21 A. 263; A. W. N. (1899) 76; 9 Ind. Dec. (N. S.) 876.

(2) 47 Ind. Cas. 805; 40 A. 686; 16 A. L. J. 731; 19 Cr. L. J. 953.

(3) 24 Ind. Cas. 340; 41 C. 1072; 18 C. W. N. 723; 15 Cr. L. J. 460.

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Nripendra. The difference between the acts of the two men is that the one actually killed the Inspector, and the other accused merely attempted to kill him. In order to make the accused liable for murder, under section 34, it would be necessary to say that an offence and an attempt to commit it are the same act which seems to me not to be the case." We entirely agree in the view taken by Stephen, J., as to the applicability of section 34.

We are clearly of opinion that Bahal Singh has not been rightly convicted of the offence of murder under section 302 read with section 34, Indian Penal Code. He, however, was a member of the invading party. They had both armed themselves, according to the evidence, with deadly weapons. It must have been known to Bahal Singh that in case of opposition the weapons would be used and at least it must have been known to him that in all probability grievous hurt would be caused. He must, therefore, be taken to have abetted an offence under section 325 read with section 109, Indian Penal Code. Therefore, while upholding the conviction and confirming the sentence of death in the case of Mula Singh, we set aside the conviction and sentence passed upon Bahal Singh under section 302/34 and we convict him under sections 325/109, Indian Penal Code, and sentence him to seven years' rigorous imprisonment.

Appeal accepted in part.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 443 OF 1919.
August 13, 1919.
Present:—Mr Justice Rafique.
MANNI SINGH AND OTHERS—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Security proceedings—Evidence for prosecution and defence balanced—Bond, whether should be required.

In a case under section 110 of the Criminal Procedure Code if the evidence for the defence is as good as that for the prosecution, no bonds should be taken from the accused. [p. 797, col. 2.]

Criminal revision from an order of the District Magistrate, Etawah, dated the 17th of June 1919.

Mr. *J. M. Banerjee*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision from an order of the District Magistrate, dated the 17th of June 1919, confirming an order of Thakar Pateshwari Prasad Singh, Magistrate, First Class, dated the 28th of May 1919, directing the applicants to furnish security in different sums under section 110 of the Code of Criminal Procedure. It is urged on behalf of the applicants that the learned Magistrate committed several irregularities in the proceedings that he held against them, under section 100 of the Code of Criminal Procedure, and that the evidence for the defence with regard to the character of the applicants is just as good as, if not better than, that for the prosecution. In support of the first contention the learned Counsel refers this Court to the order of the Magistrate made sometime about the 2nd of April 1919. Under that order the applicants were brought before him under a warrant instead of summonses. The learned Counsel refers to the provisions of section 114 of the Code of Criminal Procedure, where it is distinctly laid down that on information received a summons "shall" issue. It is further urged that the learned Magistrate had made enquiries outside the Court and probably had formed his opinion before he commenced the proceedings against the applicants. In support of this contention the following sentences from the judgment of the Magistrate are quoted: "With regard to Raja Sahib's part in this, I may frankly say that it was on my asking him about the character of these men that he mentioned to me but I did not quite act on it. I had my own independent inquiries made from Pataaris and Mahawa people and people of other villages." There is some foundation for the contention for the applicants. However, in the present case I think it desirable to consider whether the evidence justifies the order made by the learned Magistrate. The evidence on behalf of the prosecution may be divided into three heads, namely,

LABHU *v.* EMPEROR.

first, evidence relating to the association of the applicants with bad characters, *secondly*, the connection of the applicants with certain dacoities, *thirdly*, the evidence with regard to their character. Now with regard to the evidence as to the connection of the applicants with certain dacoities, the evidence is obviously false. Some witnesses depose to the effect that they had seen some of the applicants either immediately before or after the commission of dacoities in Chandarpur and Juhika. They admitted in their evidence that they did not give this information to the Police when the dacoities were under investigation. It is hardly credible that the witnesses would have withheld the information from the Police during the investigation of the crimes, if they really had seen the applicants in or about the scenes of the dacoities immediately before or after their commission. Some of the witnesses depose to having seen the applicants on one or two occasions taking food to or holding conversation with some people who have been recently convicted of dacoity. Again the same remark applies to these witnesses that they did not mention this fact to the Police either during the investigation or after the investigation of any of the dacoities committed recently in the district. The majority of the witnesses depose to the general repute of the applicants. They all say that the applicants are of bad character. The word used by them is "*badmash*". The witnesses are a Sub-Inspector of a Thana other than that within the circle of which the applicants live, the Naib of the Raja of Jogamanpore, a Patwari and a tenant of the Raja. The number of witnesses for the prosecution is 16, two of whom only come from the village where the applicants live. The others come from other neighbouring villages. On behalf of the defence 22 witnesses have been produced, two of whom come from the village of the applicants and the others from neighbouring villages. Some of them are of good status in life as far as money goes. All of them with one voice say that the applicants are men of good character and a great many of them say that there is enmity between the applicants and the Raja of Jogamanpore. After carefully considering the evidence for both sides in the case I am compelled to come to the conclusion that the evidence for the defence is just as good as, if not better than, that for the prosecution. There can be no doubt that the present proceedings are due to the bad blood between the Raja and the applicants. I do not for a moment say that the proceedings have been initiated by the Raja and that he has procured false evidence. It is quite possible that his servants, knowing that the Raja is displeased with the applicants, have got up the case against the applicants either to please their master or get rid of men who would naturally be on bad terms with the servants of the Raja. It has been laid down in this Court more than once that in a case under section 110, Criminal Procedure Code, if evidence for the defence is as good as that for the prosecution, no bonds should be taken from the accused. I, therefore, allow the application, set aside the order of the lower Court and direct that if any of the applicants are in jail they should be set at liberty at once, and if any or all of them have given bonds, those bonds should be discharged.

Application allowed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 1367 OF 1918.

February 25, 1919.

Present:—Sir Henry Rattigan, KT., Chief Judge.

LABHU AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal trial—Complainant, death of—Abatement of proceedings—Compoundable and non-compoundable offences.

On the death of a complainant during the pendency of a trial the proceedings abate if the offence complained of was personal to the complainant, that is, if it was one which could be compounded without the sanction of the Court. In other cases, the proceedings do not abate. [p. 798, cols. 1 & 2.]

Case reported by the Sessions Judge, Amritsar, with his letter No. 730 of 12th December 1918.

FACTS.—The accused, on conviction by Mahant Raghbir Singh exercising the powers of a Magistrate of the 1st Class in the Amritsar District, were sentenced, by order dated November 23rd, 1918, Labhu under

section 325 of the Indian Penal Code to one month's rigorous imprisonment, and Bhagtu under section 323, Indian Penal Code, to pay a fine of Rs. 50 or in default to undergo one month's rigorous imprisonment.

GROUNDS.—Though the death of the complainant during the pendency of the proceedings has not been made a ground of revision, the file shows that the complainant Fazal Din had died prior to November 14th 1918, and from the statement of his mother before me it appears that he died at the *end of October*. It is clear, therefore, from *Rama Nand* v. *Emperor* (1) that the right to carry on the prosecution under section 323, Indian Penal Code, did not survive to the legal representative of Fazal Din, and I think that a prosecution under section 325 must stand on the same footing, the only reason which could exist for making a distinction being that the composition of an offence under section 325, Indian Penal Code, requires the sanction of the Court.

I accordingly recommend that the convictions be set aside, and have directed that the accused Labhu be released on bail pending the orders of the Chief Court.

ORDER.—In this case Bhagtu was charged with having committed an offence under section 323, Indian Penal Code, and Labhu was charged at the same trial with having committed an offence under section 325, Indian Penal Code, the complainant being one Fazal Din who died during the progress of the trial. Labhu was convicted and sentenced to one month's rigorous imprisonment and Bhagtu was also convicted and directed to pay a fine of Rs. 50. The proceedings have been forwarded for revision by the Sessions Judge, Amritsar, on the ground that the right to carry on the prosecution abated on the death of the complainant and that consequently the accused persons should not have been convicted. *Rama Nand* v. *Emperor* (1) is authority for holding that the charge under section 323, Indian Penal Code, was in respect of an offence personal to the complainant and that upon the complainant's death proceedings in respect to that charge must be deemed to have abated. Acting upon this authority, so far as Bhagtu is concerned, I accept the recommendation of the Sessions Judge and set aside the conviction and direct the fine, if levied, to be refunded.

It appears to me, however, that there is an essential difference in this respect between cases falling under section 323 and section 325, Indian Penal Code, inasmuch as the former are componndable without the sanction of the Court, whereas an offence under section 325, Indian Penal Code, cannot be compounded unless the Court expressly grants sanction. While, therefore, the former cases may be held to be personal to the complainant, the latter cannot fall within the same category. I, therefore, uphold the conviction of Labhu, but as he has already suffered nineteen days' imprisonment, I reduce his sentence to the amount of imprisonment already undergone by him.

Revision partly accepted.

(1) 40 Ind. Cas. 1008; 26 P. R. 1917 Cr.; 18 Cr. L. J. 688; 31 P. W. R. 1917 Cr.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS No. 276 OF 1919.

August 6, 1919.

Present :—Mr. Justice Rafique, Mr. Justice Stuart and Mr. Justice Wallach.

In the matter of Pandit AMRITA LAL, MUKHTAR OF GORAKHPUR.

Legal Practitioners Act (XVIII of 1879*), s.* 13 *(f)—Unprofessional conduct—Letter, abusive, addressed to Sub-Divisional Officer.*

A Mukhtar practising in a Sub-Division addressed certain letters to the Sub-Divisional Officer in connection with a copy for which he had applied. The contents of the letters were grossly insulting, and the matter was reported to the High Court, where it was contended that, on the facts, there was nothing which would entitle the Court to take action under sections 13 and 14 of the Legal Practitioners Act:

Held, that the Mukhtar could be proceeded against under section 13 (*f*) of the Act. [p. 799, col. 1.]

Civil miscellaneous, on a report of the District Judge, Gorakhpur, dated the 17th of April 1919, under section 14 of the Legal Practitioners Act.

Mr. *P. D. Tandon*, for the Appellant.

The Officiating Government Advocate, for the Crown.

JUDGMENT.—A notice has been issued to Pandit Amrita Lal, Mukhtar, by a Full Bench of this Court on a report of the District Judge of Gorakhpur, dated the 17th of April 1919, to show cause why the report made against him should not be accepted and why proper orders should not be passed against him under section 14 of the Legal

In the matter of AMRITA LAL.

Practitioners Act. The substance of the complaint is contained in the District Judge's report and the accompanying papers. It is that the Mukhtar in question, who practises in the Criminal and Revenue Courts in the Kasia Sub-Division of Gorakhpur, had been grossly insulting to a Sub-Divisional Officer in that Court. The language objected to was contained in three letters, dated the 22nd of July, 31st of July and the 5th of August 1918.

We have heard the learned Counsel who represented the Mukhtar in question. He argued upon the wording of sections 13 and 14 of Act XVIII of 1879 but, in the main, confined his plea to a frank admission that the language used in these letters was most improper, coupled with a submission for clemency on the ground that his client had been misled and betrayed into using the language of an improper kind for which he felt genuine regret now that he had time to reconsider his position.

The suggestion that on the facts there is nothing which entitles us to take action under the provisions of sections 13 and 14 of Act XVIII of 1879 cannot possibly be supported. The provisions of section 13 (*f*) clearly cover the case, and it is unnecessary to discuss whether it would not also fall under the provisions of section 13 (*b*). The facts are very simple.

The Mukhtar had applied to the Sub-Divisional Officer for a copy of a judgment of acquittal. The record, in which the judgment had been passed, did not happen to be in the copying department of the Sub-Divisional Officer of Kasia and through no fault of his, he was unable to supply a copy of that judgment. It was open to him to forward the application to the headquarters of the Gorakhpur district where the record had been transmitted in the ordinary course, and possibly it was his duty to have forwarded the application to headquarters. It is not quite clear whether the rules of the Kasia Courts had been properly posted up to date but, in any circumstances, if the officer in charge of the copying department had directed, even without official authorisation, that the Mukhtar should himself apply at the headquarters for the copy, he would not have done anything serious or anything which a reasonable person could take exception to. What he did was this. He returned the application to the Mukhtar, who refused to receive it. He sent it again to him by post. The Mukhtar again refused to receive it. Finally the application was torn up. By this act the Mukhtar might have been put to a loss of some thirteen annas. On this the Mukhtar addressed the officer in charge of the copying department (the officer in question being the Sub-Divisional Officer, a Deputy Collector and Magistrate of standing and position) a letter, the terms of which were deliberately insulting and offensive. He followed this up with an even worse letter and ended that particular transaction by a third letter, which was the worst of the three. These letters would have been perfectly intolerable if addressed by one private person to another private person, and it is difficult to understand how any man, holding the responsible position which attaches to members of the legal profession could have been so misguided as to write them.

The question remains, how is this man to be dealt with? His learned Counsel has put forward everything that can reasonably be said on his client's behalf, and we do not consider that he has said anything too much. He has certainly not said too little. He pleads that the case should be met by a reprimand. Now we have a right to look, not only to the letters with which this man was charged before the Sub-Divisional Officer, but to certain other papers upon the record to gather how far a reprimand will meet the case. We find from one of the papers, which was a letter admittedly written by this Mukhtar some months after the first incident, *i.e.*, a letter, dated the 20th of March 1919, that when there was a difficulty about renewing his certificate as a Revenue Agent (a matter with which we have no concern, that has already been decided by the Revenue Authorities), he addressed the Sub-Divisional Officer of Kasia not only in the most offensive manner but actually went so far as to threaten him. The threats undoubtedly were foolish to a degree, they were more like the ravings of a silly child who had lost his temper than the statements of a responsible man. But we are bound to take into consideration that this

man, who, we find, when he was proceeded against in the first instance, had said that he had done nothing offensive and that he did not mean to do anything wrong, a few months later used worse language than before. How can we reasonably expect, if we take the lenient view which his learned Counsel has asked us to do, that he will not return to his avocation feeling that he has gained a moral victory, and be even more offensive than before ? We naturally do not wish to stand in any man's way, but we are bound to protect not only Magistrates who are doing their duty and should be helped rather than hindered by members of the Bar but also the credit of the legal profession, and it is our duty to take notice of a incident like this in a manner which shall make for the improvement of the person concerned. The Sub-Divisional Magistrate who made the enquiry suggested that a year's suspension would be sufficient to bring this Mukhtar to his senses. The District Judge appeared to have thought that a larger period was necessary. We are in no way bound by the suggestions made by these officers under section 14 of the Legal Practitioners Act. Now the matter has come before us, it is our duty to take the action which we consider necessary and after consultation we have come to the conclusion that the least that we can do is to suspend this Mukhtar for two years. He will be suspended from practice for two (2) years accordingly. At the same time he is warned to mend his ways when he returns to practice as his next slip may be his last. The suspension will take place from the date of this order and he will deposit his certificate of practice with the Registrar of the High Court within a week.

Mukhtar suspended.

PUNJAB CHIEF COURT.
CRIMINAL REVISION No. 707 OF 1918.
December 14, 1918.
Present:—Mr. Justice Martineau.
KRISHEN DEO SINGH—PETITIONER
versus
HARI SINGH—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 431, 435—Proceedings under s. 145—Revision—Death of applicant—Application, whether abates.

An application under section 435 of the Criminal Procedure Code for the revision of an order passed under section 145 of the Code abates upon the death of the applicant, the right to carry on the proceedings conferred by sub-section (7) of section 145 being confined to proceedings before a Magistrate.

Criminal revision from the order of the District Magistrate, Lyallpur, dated the 20th May 1918.

Messrs. *Beechey* and *Obedulla*, for the Petitioner.

Messrs. *C. Bevan Petman*, *Sewa Ram Singh* and *Govind Das*, for the Respondent.

JUDGMENT.—In this case Sardar Krishen Deo Singh applied for revision of an order of the District Magistrate of Lyallpur, which was apparently intended to be an order under section 145 of the Criminal Procedure Code. While the application was pending the applicant died. His mother wishes to prosecute the case as his representative, and Counsel have appeared on her behalf.

Counsel for the respondent contends that the application for revision abates, and I think the contention is correct. The provision in section 145 (7) of the Criminal Procedure Code that proceedings under that section shall not abate by reason only of the death of any of the parties thereto relates only to proceedings before the Magistrate. In *Khazana* v. *Queen-Empress* (1), where a person whose appeal from an order convicting him of an offence had been dismissed died while his application for revision was pending, it was held that by analogy to section 431 of the Code, the application must abate. Following that authority I hold that the application in the present case abates. I also see no sufficient reason for this Court to interfere on its own motion with the District Magistrate's order.

Revision rejected

(1) 6 P. R. 1893 Cr.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 913 OF 1917.

December 13, 1918.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Walmsley.

SARADA SUNDARI DASYA WIDOW OF SONATON SAHA—PLAINTIFF—APPELLANT

versus

GANGAHARI SAHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Order not appealed against, effect of.

An order passed in appeal which is appealable but against which no appeal is filed, becomes final and must be given full effect to irrespective of whether that order was right or wrong.

Appeal against the decree of the District Judge, Rungpur, dated the 7th February 1917, modifying that of the Subordinate Judge of that District, dated the 29th May 1912.

Babus *Sarat Chandra Roy Chowdhury* and *Rishindra Nath Sarkar*, for the Appellant.

Babu *Atul Chandra Gupta*, for the Respondents.

JUDGMENT.

FLETCHER, J.—The matter raised in the present appeal is this: The plaintiff brought a suit to recover certain amounts that had been awarded to her by some arbitrators on the footing that her deceased husband had an interest in a business. The case went to trial and the present plaintiff succeeded in the first Court to a very considerable extent, though not to the whole of the claim. Both parties then appealed to the District Judge and the District Judge allowed the appeal of the defendant to a certain extent and disallowed the appeal of the plaintiff. Thereupon the plaintiff appealed to this Court and the case came on for hearing before Mr. Justice Newbould, and what Mr. Justice Newbould did was this: He reversed the decision of the lower Appellate Court and remanded the case for determination on the merits. That was what Mr. Justice Newbould stated he intended to do. That order remained unappealed against. It was just as much as an order of any other Court. An order unappealed against must be given full effect to and this order, being unappealed against, I think, ought to be

given full effect to. In that view of the case, the decision of the learned Judge, which reversed rightly or wrongly the decision of the lower Appellate Court and remanded the case for trial on the merits, must be taken to be final. At the same time I think that this case is covered by Order XLI, rule 33 of the Civil Procedure Code. The observations of Lord Justice Stirling in the case of *Attorney-General* v. *Simpson* (1) seem to show that an order under Order XLI, rule 33, which is substantially in the same terms as the English Order LVIII, rule 4, would cover a case like the present. In that view, Mr. Justice Newbould had ample jurisdiction to make the order remanding the whole case for determination on the merits. Whether he had or had not, I think the present appeal must fail and be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

(1) (1901) 2 Ch. 671; 70 L. J. Ch. 328; 85 L. T. 325; 17 T. L. R. 768.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 69 OF 1919

July 31, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

NAND KISHORE—PLAINTIFF—APPELLANT

versus

ABDUL RAHMAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 21, 107, O. VII, r. 10, O. XLI, r. 33, O XLIII, r. 1 (a)—Appeal—Order by Appellate Court returning plaint for presentation to proper Court—Appeal, second, whether lies—Place of suing, objection to—Failure of justice, finding as to—Court, duty of.

An order passed by an Appellate Court directing the plaint filed in the case to be returned for presentation to the proper Court, is appealable to the High Court. [p. 802, col. 1]

An Appellate Court, before allowing an objection as to the place of suing, should consider and decide whether there has been a failure of justice consequent on the suit having been instituted in the wrong Court. [p. 802, col. 2.]

TARAPADA MITRA *v.* JAGADAMBA KUMARI.

Appeal from an order of the Subordinate Judge, Moradabad, dated the 1st February 1919.

Mr. *Nehal Chand*, for the Appellant.

The Hon'ble *S. Raza Ali*, for the Respondent.

JUDGMENT.—This is an appeal from an order passed by the Subordinate Judge of Moradabad in an appeal directing the plaint filed in the case to be returned to the plaintiff for presentation in the proper Court. The suit was brought in the Court of the City Munsif of Moradabad. One of the pleas taken in defence was that the suit was not cognizable by that Court but should have been brought in the Court of the Munsif of Sambhal. The learned City Munsif set down the suit for hearing, framed proper issues, held that the cause of action had arisen within his jurisdiction and gave the plaintiff a decree. On appeal the learned Subordinate Judge held that no part of the cause of action had arisen within the jurisdiction of the Court of the Munsif of Moradabad City. Without going further into the matter he passed the order now under appeal. That order, no doubt, could be passed under the powers of an Appellate Court as specified in section 107 of the Civil Procedure Code and is also covered by the provisions of Order XLI, rule 33 of the same Code. It is nevertheless an order returning a plaint to be presented to the proper Court, such as is referred to in Order VII, rule 10 of the Code of Civil Procedure. An objection has been taken in this Court to the effect that no appeal lies. On the wording of Order XLIII, rule 1 (*a*), we were disposed in any case to overrule this objection, but we find that the point is covered by clear authority. It was decided under the former Code of Civil Procedure in *Wahidullah* v. *Kanhaya Lal* (1) that an appeal lay from the order of an Appellate Court directing a plaint to be returned. Subsequently in the case of *Dalip Singh* v. *Kundan Singh* (2) a Bench of this Court has held that the present Code of Civil Procedure makes no change in the law in this respect. We are, therefore, content to follow these authorities. Assuming that the appeal lies, it raises only one question, namely, whether the lower Appellate Court has not overlooked the provisions of section 21 of the Code of Civil Procedure. The case before us is in fact very similar in principle to that of *Dalip Singh* v. *Kundan Singh* (2), above referred to, except that in that case reference was made to the provisions of clause 2 of section 11 of the Suits Valuation Act (VII of 1887), whereas in the present case the question was one of territorial jurisdiction and reference is made to the closing part of section 21 of the Code of Civil Procedure. We think the appeal must succeed on this ground. The lower Appellate Court, before allowing the objection as to the place of suing, should have considered whether there had been a failure of justice consequent on the suit having been instituted in the Court of the City Munsif of Moradabad instead of in the Court of the Munsif of Sambhal in the same district. This point has been altogether overlooked and we must, therefore, follow the precedent set in the case above referred to by setting aside the order under appeal and sending back the case to the lower Appellate Court to be re admitted under its original number in the file of pending appeals and disposed of on the merits. We order accordingly. Costs of this appeal will abide the event of the suit.

Appeal accepted.

(1) 25 A. 174 (F. B.); A. W. N. (1902 222.
(2) 22 Ind. Cas. 614; 36 A. 58; 12 A. L. J. 21.

PATNA HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 43 OF 1917.

June 29, 1917.

Present:—Mr. Justice Roe.

TARAPADA MITRA—DECREE-HOLDER—APPELLANT

versus

Rani JAGADAMBA KUMARI—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Interest, recovery of—Court-fees, whether payable.

In equity and in law a party is required to pay a Court-fee upon the sum for the recovery of which he seeks the assistance of the Court. Thus, where

a decree-holder sues to recover a sum as interest in addition to the sum named in the decree, he must pay Court-fees on the amount he claims. [p. 804, col. 1.]

Proceedings under section 47 of the Civil Procedure Code which are of the nature of a suit are chargeable with Court-fees. [p. 804, col. 1.]

FACTS.—The decree holder-appellant in this case brought a suit for recovery of money due on a hand-note, Rs. 3,000 principal, and Rs. 4,963-15-0 interest up to the date of the suit. The trial Court gave him a decree for the full amount with costs and interest at 6 per cent. per annum from the date of suit till the date of realization. The decree holder made an application for execution of his decree against Kunj Behari Singh who was one of the judgment debtors, claiming therein Rs. 9,513-6-0, being total of principal and interest up to the date of the application. Of this sum Rs. 908-6-5 represented the amount of interest from the date of the institution of the suit up to the execution of the decree. Kunj Bahari took exception to the application for execution. He contended *inter alia* that as the principal was Rs. 3,000, execution for thrice that amount could not be taken out under the usury law. The execution Court gave effect to the objection and reduced the amount claimed in the application from Rs. 9,513 6-0 to Rs. 5,660-2-9. The decree-holder appealed against the above order to the High Court and paid Rs. 2 as Court-fee. The Stamp Reporter submitted that the decree-holder-appellant ought to have paid an *ad valorem* Court-fee on Rs. 908-6-6, because this sum was the interest which the decree sought to be executed had made payable in respect of the subject-matter of the suit between the date of its institution and the execution of the decree. Rs. 2 was not sufficient Court-fee on the memorandum of appeal.

The Taxing Officer considering the case of general importance referred it to the Taxing Judge. In the course of his order of reference, the Taxing Officer observed as follows:—"The whole question is whether *ad valorem* Court-fee is to be paid on the amount of interest which a decree sought to be executed has made payable in respect of the subject-matter of the suit; or whether a Court-fee of Rs. 2 is sufficient as has been paid in this particular case. The contention is that Rs. 2 is sufficient in view of Government Notification No. 2650 of the 10th of September 1889 as amended by No. 4344 S. R. of the 6th October 1893, in which it is laid down that the fees chargeable on appeal from orders under clause (*c*) of section 244 of the old Code of Civil Procedure, Act XIV of 1882, shall be limited to the amount chargeable under Article 1 of the Second Schedule of the Court Fees Act of 1870. Clause (*c*) of section 244 of the old Code of Civil Procedure runs as follows: —

'Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof.'

"Questions of interest which a decree makes payable in respect of the subject-matter of a suit were dealt with in clause (*b*) of section 244 and were, therefore, excluded from the notification; consequently under the old Code there was no reduction in the matters of interest. It is contended, however, that this clause (*b*) is included in clause (1) of section 47 of the present Code by virtue of the word 'all' with which this section begins. The question is whether this view is correct.

Under the old Code undoubtedly *ad valorem* Court-fee was chargeable. Has the present Code made any change in this? I think not. Mesne profits were also included in clause (*b*) of section 244 of the old Code, but the matter of mesne profits has been settled and *ad valorem* Court fee is to be paid on this. There seems to be no doubt that interest as well as mesne profits were intended to be taken out of execution proceedings. This is the view taken by Woodroffe and Ameer Ali in their edition of the Code at pages 230 and 231, where they say: 'On the same principle, namely, that questions regarding the amount of both mesne profits and interest should be determined by the decree and not in execution, clause (*b*) of the former section has been omitted.' In this view the word 'all' does not bring in any portion of clause (*b*) of section 244. There seems to be little

doubt that this view is correct but as I can find no ruling on the subject and as there will be many cases of the kind, I direct that this case be placed before the Taxing Judge for orders."

Mr. *Panchanan Banerji*, for the Appellant.

ORDER.—The first question for consideration is whether Notification VI, Appendix C, Part A, applies to applications for execution of a decree in respect to interest accruing since the date of the decree itself. The ruling reported as *Vithal Hari Athavle* v. *Govind Vasudeo Thosar* (1) is of a date prior to the repeal of the old Civil Procedure Code. By the re-drafting of section 244 in the form now taken by section 47 of the new Code, the notification under consideration has been to a great extent annulled, and now operates mainly upon orders which are appealable under Order XLIII. It cannot affect the provisions of section 47, clause (2), which is entirely new. That clause distinctly contemplates the levy of a Court-fee upon proceedings which are of the nature of a separate suit. It was clearly intended to apply to cases like the present. There is no reason at all why a distinction should be made between the price paid by a suitor for the aid of the Court in the recovery of a sum due upon the original plaint and the price paid for the aid of the Court in the recovery of the sum due upon a petition supplementing the original plaint. In equity and in law the appellant is required to pay a Court fee upon any sum for the recovery of which he asks the assistance of the Court.

The next question is what sum should be paid in this instance. Obviously the plaintiff should pay a Court-fee on any amount which is in addition to the sum named in the decree that he seeks to execute. I am not concerned with the Court-fee paid in the Subordinate Judge's Court. In this Court it will be necessary only to consider how much the appellant hoped to get from the Subordinate Judge and still hopes to get from this Court in addition to the sum which he had obtained by his original decree, and deduct from that sum the amount which he actually did get from the Subordinate Judge. The result will be the value of the relief which he seeks in appeal. Upon that value an *ad valorem* Court-fee must be paid.

Order accordingly.

(1) 17 B. 41; 9 Ind. Dec. (N. s.) 27.

SIND JUDICIAL COMMI SIONER'S COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 23 OF 1915.

May 31, 1918.

Present:—Mr. Pratt, J. C., Mr. Fawcett, A. J. C. and Mr. Kemp, A. J. C.

Kazi SHAFI MAHOMED—APPELLANT

versus

CHOITHRAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of decree—Payment out of Court—Decree-holder, whether bound to certify payment within any fixed period—Obligation, nature of.

Except where an Act of the Legislature provides a time for the performance of a duty, the ordinary and natural inference is that the obligation to perform that duty is a continuing obligation. [p. 812, col. 2.]

A decree-holder can, at any time, certify a payment to the Court, and it is enough if he mention the payment in his application for execution [p. 809 col 2; p. 810, col 1; p 811, col. 2; p. 813, col. 1.]

Second appeal against the order of the District Judge, Larkana.

ORDER OF REFERENCE.

PRATT, J. C.—(*November* 2, 1917.)—This is an appeal from an order of the Sub-Judge, Sukkur, allowing execution of a decree.

The execution application was filed on the 20th April 1914 for execution of a money decree of 1903, which directed payment by annual instalments with a proviso that the whole amount would be payable in case of two defaults.

There was a prior execution application on the 20th of April 1911, but there was no execution application between 1903 and 1911 and the question that arose was whether the decree was alive decree on the 20th April 1911.

Payments of instalments had been made between 1903 and 1911, and it is contended that the decree would not be time-barred in 1911 if those payments were recognised by the Court of execution.

These payments had not been certified and the lower Court allowed the decree-holder to certify after the execution application had been filed.

The lower Court's order was made before the decision in the case of *Narsoomal* v. *Tirathmal* (1), where it was held that a payment by a judgment-debtor operates from the date when it is certified, and that if it is certified after the expiry of what would otherwise be the period of limitation, it would not prevent the execution application from being time barred.

The judgments of other High Courts on this point are not uniform. The Calcutta and Madras High Courts have decided that payments may be certified after the period of limitation for execution has expired: *Eusuffzeman Sarkar* v. *Sanchia Lal Nahata* (2) and *Rajam Aiyar* v. *Anantharatnam* (3). It is difficult to say what would be the view of the Bombay High Court, for that Court has in *Hansa Gadhaji* v. *Bhauda Jagaji* (4) taken the novel view that section 258 of the Code of 1882 and presumably also Order XXI, rule 2 (3), is discretionary and not mandatory and that in order to prevent fraud, even the Court executing a decree may admit evidence of uncertified payment. This seems opposed to the plain words of the section and is opposed to the whole course of decisions on that section. The Allahabad High Court in *Chhattar Singh* v. *Amir Singh* (5) has come to the same conclusion as that arrived at in *Narsoomal* v. *Tirathmal* (1). The *ratio decidendi* of the Allahabad case is that it would obviously not be within the spirit of Order XXI, rule 2, that certifying of payments on the foot of a decree should rest entirely with the decree-holder and I doubt if this is correct. The certificate by the decree holder is merely an admission which the Court is bound to record. If it were intended that the proceeding should be contentious and that the Court might refuse to record it, the words in rule 2 (3) would have been "certified and recorded" instead of "certified *or* recorded." No period of limitation applies to the process of certification: *Tukaram* v. *Balaji* (6), and this is because the law of limitation applies to litigants and not to the Court and is not to be inserted when the Court is merely asked to do its duty: *Balaji* v. *Kushaba* (7).

The judgment in *Narsoomal* v. *Tirathmal* (1) seems at first sight to accord with the intention of the Legislature in amending section 258 of the Code of 1882. For the words "shall not be recognised as a payment or adjustment of the decree by any Court executing the decree" have been substituted for the words "shall not be recognised by any Court executing the decree." This variation of the section was evidently intended to supersede the cases in which it was held that an uncertified payment may be recognised for the purpose of determining the question of limitation: *Kutubullah Sarkar* v. *Durga Charan* (8). It would seem, therefore, anomalous that a decree holder should be allowed to certify a payment after such a delay that his execution application would otherwise be time-barred.

But on a closer consideration of the subject I confess that the anomaly seems to me to be more apparent than real.

If there has been part payment or, as here, the payment of one instalment, the period of limitation runs from the date of that payment. The decree remains alive for three years from that date. When the decree-holder presents an application with a request that the payment be certified and recorded, he says in effect "record the payment which has kept my decree alive and having recorded it pray grant me execution for the balance." It is the payment which has kept the decree alive, and it is a mistake to regard the process of certification as a revival of the decree.

The effect of the amendment, therefore, is that a decree holder who relies on a payment to avoid limitation must certify it. But as he may do so at any time, he may do so when he files his execution application as in *Eusuffzeman Sarkar* v. *Sanchia Lal Nahata* (2). The amendment, therefore, is merely formal and makes no substantive change in the law.

(1) 30 Ind. Cas. 51; 9 S. L. R. 27.
(2) 34 Ind. Cas. 606; 43 C. 207; 20 C. W. N. 272; 23 C. L J. 390.
(3) 31 Ind. Cas. 318; 29 M. L. J. 669; 18 M. L. T. 75; (1916) 1 M. W. N. 127.
(4) 33 Ind. Cas. 232; 40 B. 333; 18 Bom. L. R. 22.
(5) 32 Ind. Cas. 590; 38 A. 204; 14 A. L. J. 132.
(6) 21 B. 122; 11 Ind. Dec. (N. S.) 84.
(7) 30 B. 415; 8 Bom. L. R. 218.
(8) 13 Ind. Cas. 424; 16 C. W. N. 396.

To return to the case of *Narsoomal* v. *Tirathmal* (1) the main argument there was that a payment is not a payment until it is certified, because it is only when certified that it operates as a discharge *pro tanto* of liability. But whether the payment operates as discharge of liability seems irrelevant, for the principle on which section 20 of the Limitation Act rests is that the act of payment is an admission by the maker of the payment that there is a liability to pay.

Again the payment is only a nullity so far as the Court of execution is concerned. If the decree-holder recover in execution although he has been paid out of Court, the judgment-debtor has a remedy by suit, provided his cause of action and the relief he seeks do not involve the determination of any question reserved by section 47 to the Court of execution. See on this point the judgment of Pigot, J., in *Azizan* v. *Matuk Lal Sahu* (9). He cannot sue for the money wrongfully taken from him in execution but he can sue for the money the payment of which was not certified. He may say in effect "I paid the money to the decree holder in order that he may apply it in discharging the decree. He has not done so, therefore, I am entitled to recover it." See the judgment of Farran, C. J., in *Haji Abdul Rahiman* v. *Khoja Khaki Aruth* (10). No fiction will get over the fact that money was paid. This is well illustrated by the case of *Tukaram* v. *Anantbhat* (11). The consideration for the bond in suit in the case was an uncertified payment. Sir Lawrence Jenkins said :—"We at one time were in doubt as to whether it would be said there was no consideration for the bond, inasmuch as it was not certified under section 258, but we think there is no sound foundation for this doubt. In the first place it overlooks the change in the last clause in the section, and in the next place it would be contrary to the fact to hold that there was no consideration." The payment is, therefore, a fact, but the Court of execution will not recognise the payment as made under the decree until it is certified. But as soon as it is certified, the scales fall from the eyes of the Court of execution and it sees the thing as it is and the payment operates as a payment under the decree, at the time when it was made.

The case of *Venkaji Babaji Naik* v. *Shidramapa Balapa Desai* (12) was referred to as presenting a close analogy. There the payment of interest could not be proved without reference to a document which was inadmissible for want of registration. But to complete the analogy it must be assumed that the document could have been registered at the time of the suit. If that were so, the payment of interest could be proved by the document as a payment at the time it was made and not as a payment at the date of registration.

It was also said that Order XXI, rule 2 (1), was enacted for the benefit of the judgment-debtor and that the rule would be rendered nugatory if the decree holder were allowed to certify at any time. But I do not think the rule was enacted for the benefit of the judgment-debtor. The Legislature was certainly not thinking of the interests of the judgment-debtor when in rule 2 (3) it prevented him from pleading an uncertified payment. The policy of the rule seems to be that referred to by Lord Macnaghten in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (13) that "it is of the utmost importance that all objections to execution should be disposed of as cheaply and as speedily as possible." Payments under the decree should be recorded while the evidence as to such payment is fresh, and the judgment-debtor should take steps to enforce such a record within the time limited by Article 174. If he does not so much the worse for him, as the Court of execution will not entertain a plea of a payment not certified or recorded. But there is no time limit for the certification by the decree-holder, for he should not be prevented from doing his duty.

I doubt, therefore, if the case of *Narsoomal* v. *Tirathmal* (1) is correctly decided and would refer this appeal for decision to a Full Bench.

CROUCH, A. J. C.—(*November* 2, 1917).—The judgment-creditor in this case held a decree dated 20th November 1903 for Rs. 979-8-0

(9) 21 C. 437; 10 Ind. Dec. (N. S.) 922.
(10) 11 B. 6 at p. 26 (F. B.): 6 Ind. Dec. (N. S.) 4.
(11) 25 B. 252 at p. 262; 2 Bom. L. R. 1012.

(12) 19 B. 633; 10 Ind. Dec. (N. S.) 444.
(13) 19 C. 633 at p. 689 (P. C.); 19 I. A. 161; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898.

without interest, payable by yearly instalments of Rs. 112 on the 15th January 1904 and the 15th January of successive years, which contained a proviso that on failure of two successive instalments the unpaid balance was to become payable forthwith.

It has been found by both the lower Courts that payments equivalent to the first five instalments, and paid and received as such, were made by the judgment-debtor during 1904-09, that nothing was paid towards the instalments of 15th January 1909 and of the 15th January 1910; and *prima facie* the unpaid balance became due on the 16th January 1910

On the 24th April 1911, the judgment-creditor put in an application for execution, stating in the appropriate column that the first five instalments had been paid. Notice was issued under Order XXI, rule 22, but the plaintiff not appearing on the day of hearing, the application was dismissed with costs.

The application with which we are now dealing was filed on the 20th April 1914. In that application the judgment-creditor again admitted payment of the first five instalments.

The original Court was of opinion that, in order to duly certify a payment under Order XXI, rule 2, a judgment-creditor should put in a separate petition giving rise to a definite proceeding, and that, no such petition having been filed, the payments of the several instalment amounts had not been "certified" and that, accordingly, they could not be recognised by the Court for any purpose whatever. The Court, therefore, treated the instalments as not paid, and held that the whole balance became due on the 16th January 1908, and that the decree was time-barred prior to the first application of 20th April 1911, and dismissed the application with costs. The fact that the very basis of the decision is admittedly fictitious—for both sides contended that the first five instalments had been paid—suggests that the decision is incorrect.

The lower Appellate Court held that a payment could be certified by a judgment-creditor under Order XXI, rule 2, at any time, and that the admissions of payment in the two applications constituted due certifying under the rule, and set aside the order of the first Court, ordering execution to issue for the balance of the decretal amount.

The judgment-debtor now appeals and Mr. Rupchand on his behalf relies on the judgment of this Court in *Narsoomal* v. *Tirathmal* (1). Order XXI, rule 2, declares that no payment or adjustment by a judgment debtor, which has not been certified or recorded as prescribed in the rule, shall be recognised by any Court executing the decree.

Clause (1) states that where any money is paid out of Court, the decree-holder shall certify such payment to the Court, and the Court shall record the same accordingly.

Under clause (2) the judgment-debtor may also inform the Court of the payment and apply to the Court to issue a notice to the decree-holder to show cause why payment should not be recorded as certified.

Article 174 of the Limitation Act, First Schedule, limits the period within which a notice can issue under clause (2) to 90 days. Rule 2 is merely a rule of procedure, declaring that, unless there be evidence of a specified and conclusive nature, the Court executing the decree shall not recognize a payment or adjustment made out of the Court. The object of the rule is to reduce to the utmost simplicity the settlement by the Court executing the decree of any dispute as to whether or not a particular payment has been made towards the decretal debt. Where a decree-holder makes a written admission that he has received payment, that is, *prima facie*, conclusive proof against him. If he fail or refuse to make written admission of a payment actually made, the judgment-debtor may within 90 days of payment initiate proceedings to have the question tried and determined. But, after the lapse of 90 days, the Court may refuse to try the matter as a contentious question, and if there be no written admission when the question comes before the Court, it must ignore the payment.

There is nothing in the rule to justify the contention that the judgment-creditor can certify a payment only by application. An application is, essentially, a formal request to the Court to pass some order

and it is suggested that the judgment-creditor must at least ask that the payment be recorded. But under clause (1) the judgment creditor has merely to "certify," that is, file a declaration in writing that the payment has been made. The "recording" follows, or should follow automatically; but it is enough for the purposes of clause (3) that the payment is certified.

No particular form of certificate is prescribed, and no such brief period of limitation is laid down for the certifying by a judgment-creditor, as is prescribed for an application by the debtor; for, otherwise, the judgment-creditor, by informality in his certificate or delay in filing it, might recover his debt several times over, even though he truthfully admitted payment in his successive applications for execution. The fact that he is bound to certify all previous payments in any application for execution prevents the rule from working injustice to the debtor. But a written admission by a decree-holder that he received part payment on a certain date is not proof of such payment as against the judgment debtor, and, where limitation is pleaded, and it is to the interest of the judgment-creditor to admit a certain payment, and of the judgment debtor to deny it, the provisions of section 20 Limitation Act, declare that the fact of payment must appear in the handwriting of the person making the same. Thus, it appears that, whenever payment is denied by one party or the other, the Court executing the decree can insist on the production of what at least purports to be a written admission by the party denying payment, before it recognises the payment or even goes into the question at all.

It has been argued on the strength of *Narsoomal* v. *Tirathmal* (1) that no payment which is not certified "before the expiration of the prescribed period" is an "effectual payment" under section 20, Limitation Act, so as to prevent an application for execution being barred.

The learned Judge in that case held the test of a good payment under section 20, Limitation Act, to be "Is it of such a nature that it would be an answer to a suit brought by the plaintiff to recover the amount?" If the judgment-creditor put in an application for execution within 3 years of the decree without admitting the payment the debtor cannot plead payment, because it has not been certified. Therefore, the payment is not such as to be an effective answer to a suit, and is not effective until certified. It follows that a payment which is not certified till *after* the expiration of the prescribed period is insufficient to operate for the benefit of the judgment creditor under section 20. Further Order XXI, rule 2, was intended for the protection of the judgment-debtor, and not for the creditor's benefit, and to hold that a decree-holder can certify at the last moment and still get the benefit of section 20, Limitation Act, would practically make the rule a dead letter.

But, with reference to the learned Judge, part payment of a debt *is* valid and could be pleaded in a suit by the plaintiff, for the restriction imposed by clause (3) binds only the Court executing the decree. The test offered is unsatisfactory because it is difficult to understand how, in the face of section 47, Civil Procedure Code, any suit could lie. Nor can I conceive a Court granting a decree to a plaintiff for a debt which he admitted had been discharged. The admission would be conclusive.

The payment, if really made, is *pro tanto* a good discharge. Clause (3) permits the Court to ignore an uncertified payment on the fiction that it has not been made. The judgment creditor is bound to disclose all payments and adjustments when making further application for execution. If he fail, through inadvertence, to certify a payment, the Court cannot recognise the payment until it is certified, but the judgment-creditor can be given an opportunity to amend his application. If he deliberately and fraudulently deny a payment, he can be prosecuted criminally and sued for the recovery of any money obtained as a result of his fraud.

Nor can I discover in the rule any ground for the proposition that it is intended for the protection of the judgment-debtor, and that to allow judgment-creditor to certify a payment more than three years after date of decree would be an evasion of its provisions. The rule does not purport to deal with the question of limitation, and to read into a rule of

procedure an important modification of the provisions of the Limitation Act is, in effect, to alter substantive law. The principle embodied in the phrase "*ultro citroque*" is one to which appeal can be made when it is sought to unfairly enforce a contract, but there is no authority, as far as I am aware, for extending the principle to a statutory bar.

The combined result of the rule of procedure and of the provisions of the Limitation Act is that, when the Court executing the decree is asked to determine whether or not part payment of the decretal debt has been made, it can refuse to go into the question unless it has before it a written admission of payment by the judgment-creditor, or the question has been heard and determined in the affirmative on an application duly filed by the judgment-debtor; and, if the judgment-debtor deny that a payment effective for the purposes of section 20, Limitation Act, has been made, then the Court must have before it, also a written admission made by or on behalf of the debtor.

The view herein expressed is consistent with that taken in *Eussuffzeman Sarkar* v. *Sanchia Lal Nahata* (2), *Khushalchand* v. *Nandram* (14), *Hansa Gadhaji* v. *Bhawa Jogaji* (4), *Tukaram* v. *Babaji* (6) and *Biroo Gorain* v. *Jainurat Koer* (15).

It is asserted that the High Court of Allahabad has taken a different view. In *Bhajan Lall* v. *Cheda Lall* (16) it was held (by a single Judge) that a judgment creditor cannot certify a payment made to him out of the Court after the decree has become barred by limitation (See head-note and page 825*). To the ruling as thus stated no exception can be taken, but we must not confuse adjective and substantive law. If, as a matter of fact, part payment has been made within 3 years, the decree cannot be time-barred merely because the special form of proof demanded by a rule of procedure has not been recorded within three years. If a party has a right, he is *prima facie* entitled to prove it.

(14) 12 Ind. Cas. 572; 13 Bom. L. R. 977; 35 B. 516.
(15) 13 Ind. Cas. 63; 16 C. W. N. 923; 16 C. L. J. 174.
(16) 24 Ind. Cas. 215; 12 A. L. J. 825.

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This case has not been reported in the Indian Law Reports but was referred to and followed in *Chhattar Singh* v. *Amir Singh* (5). In that case it was assumed that a decree-holder might at any time come in with an application to the Court that he should be at liberty to certify a payment and have it recorded; but the Court had before it nothing but an application for execution alleging that certain payments had been made, and held that it had not been the practice in that province to recognise such admission as "certifying" within the rule. This was a sound basis for the finding; a rule of practice was interpreted according to the practice of the Court. But, the last paragraph of the judgment suggests that the learned Judges were under the impression that to satisfy the requirements of clause (3) of the rule the payment had to be both certified *and* recorded.

I concur in the order proposed by the learned Judicial Commissioner.

Mr. *Rupchand Bilaram*, for the Appellant

Mr. *Kimatrai Bhojraj*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

PRATT, J. C.—I have fully stated my reasons in the referring judgment to which I adhere. Order XXI, rule 2 (1), makes it obligatory on the decree holder to certify payment and on the Court to record the same.

The decree holder may do so at any time and when he has done so, the bar of sub rule (3) is removed and the payment or adjustment is a fact which can be proved either for the purpose of extending limitation under section 20 or of fixing a new starting point for limitation under Article 182 (7).

I do not agree that the object of sub-rule (3) is to provide a sanction for the obligation imposed on the decree holder. It is rather, as I have already pointed out, intended to impose a sanction on the judgment-debtor. No doubt if a decree-holder certifies only after his execution application has been filed, the Court might refuse to allow the execution application to be amended in accordance with the fact certified and reject it on the ground that it did not comply with Order XXI, rule 11 (2) (*e*), but this is purely a matter concerning

the exercise of the discretion given by Order XXI, rule 17.

I concur in dismissing the appeal with costs.

FAWCETT, A. J. C.—I concur that the appeal should be dismissed with costs. The decree-holder in his application of 20th April 1911 stated that all the first five instalments had been paid up on due dates and that the first default in payment of two consecutive instalments arose on 15th January 1910. On the basis of these statements the application was within time under Article 182 (7) of the Limitation Act. What then are the grounds on which it can be said that the application of 1911 was out of time? The first one raised is that the instalments were not actually paid on the due dates, as stated in the application but otherwise (as has been held by both the lower Courts), so that there had been two consecutive defaults at any rate on 15th January 1908. But it is common ground between the parties, and has been held proved, that the payments made up to 1909 satisfied all the first five instalments; and, as the Sub Judge points out, the circumstances clearly justify the application of the principles of waiver and estoppel laid down in *Kashiram* v. *Pandu* (17), which has been followed by this and other High Courts. It is not, therefore, open to the appellants to raise this plea.

Mr. Rupchand's next contention is, that it is the duty of the decree holder to certify payments out of Court *at once*, and he asks the Court to hold that he is bound to do so within the time allowed for the judgment-debtor, *viz.*, 90 days or at any rate within the ordinary period of limitation prescribed for execution of a decree, *viz.*, three years from the time when limitation begins to run. But to fix a definite period of limitation in this manner would be to legislate rather than to construe the enactment contained in Order XXI, rule 2, Civil Procedure Code; and, in my opinion, there is nothing in that rule that could possibly justify the Court in doing this, especially in face of the fact that the Legislature has expressly placed such a time limit in the case of the judgment-debtor and omitted to do so in the case of the judgment-creditor. At the same time there is one qualification that I would make. I think sub-rule (3) of Order XXI, rule 2, clearly implies that a payment or adjustment on which a decree-holder relies for showing that his application for execution is within time, must be certified by him before the question whether such payment or adjustment should be recognised, first comes before the Court executing the decree; and that a payment or adjustment certified thereafter cannot be recognised. To hold otherwise leads to a manifest absurdity. If the decree-holder can certify a payment or adjustment at any time after the question arises (for instance, even in appeal as the District Judge held could be done in this case), then so far as the decree-holder is concerned, there is no practical distinction between an uncertified and a certified payment, and the former can be turned into the latter whenever the decree-holder finds this convenient. An object of sub rule (3) is clearly to provide a 'sanction' (in the Austinian sense) for the obligation imposed in the previous part of the rule; and so far as the decree-holder is concerned, this object would be entirely neutralised by a construction of the rule, permitting the decree holder to certify a payment or adjustment at any time without any restriction whatever. That being so, I think the Court must construe the words "certified or recorded" in sub-rule (3) as at any rate restricted to payments or adjustments "certified or recorded" before the question of their recognition arises in execution, so as to avoid a manifest absurdity and a result that cannot reasonably be held to have been intended by the Legislature, *cf.* Maxwell on the Interpretation of Statutes, 3rd Edition, page 177, and Hardcastle on Statutory Law, 3rd Edition, page 175. These considerations do not appear to have been present to the minds of the Judges in the cases which hold that a decree-holder can certify at any time without restriction. The leading case on the point is *Tukaram* v. *Babaji* (6). Farran, C. J., in his judgment there merely follows the similar opinion expressed by him in *Haji Abdul Rahiman* v. *Khoja Khaki Aruth* (10), which in turn is based on the Calcutta Full Bench ruling in *Fakir Chand* v. *Madan Mohan Ghose* (18). In that case the judgment in stating the facts says:—"The plaintiff applied under section

(17) 27 B. 1; 4 Bom. L. R. 688.

(18) 4 B. L. R. 130: 13 W. R. (F. B.) 40.

216 of Act VIII of 1859 for the issue of a notice calling on the judgment-debtor to show cause why the decree should not be executed against him, and he stated that the defendant had paid the earlier instalments which became due more than three years before the time of the application, and the question was whether the plaintiff could be allowed to prove that those payments had been made to him as the instalments became due, the payments not having been made by the defendant to the plaintiff, through the intervention of the Court." It is clear, therefore, that the plaintiff did sufficiently certify the payments by his statements in his application for execution; and according to later rulings no formal subsequent certification was really necessary. This and later cases such as *Lakki Narain* v. *Felamani Dasi* (19) and *Rajam Aiyar* v. *Anantharatnam* (3) merely proceed on the fact of no period of limitation being prescribed for such a case; but if my view is correct, this is not conclusive. The case of *Eusuffzeman Sarkar* v. *Sanchia Lal Nahata* (2) in effect adopts that view and does not go against it. For, all the learned Judges say on this point is, "It appears to us that the decree-holder may either apply to certify payment before execution or may do so on the application for execution." They do not say that he can do this after the application for execution, on which the question of recognition arises. In *Narsoomal* v. *Tirathmal* (1) this point was not gone into, because (on the view taken in that case) it was unnecessary to do so for its decision.

The only other ground on which it can be said that the application was time-barred is the view adopted by the Allahabad High Court in *Ohhattar Singh* v. *Amir Singh* (5). It was there held that a statement in the application that the first four instalments had been received could not be treated as a "certifying" under Order XXI, rule 2, and that the Court was bound, therefore, to assume that no such payments had been made. But this view is based mainly on a different practice stated to exist in the United Provinces, whereas this Court has already in *Narsoomal's case* (1) held that, in Sind, there is no valid reason why payments should not be certified in the application for execution. The payment of the first five instalments was, therefore, sufficiently certified in the application of 1911, and could be recognized by the executing Court. The payments were no doubt incorrectly stated in that application, but the statement gave the net result as accepted by the parties. It was, therefore, really a case of an "adjustment" of part of the decree which was duly certified to the Court.

I can find nothing in *Narsoomal's case* (1) which prevents the appeal being dismissed, and the question of the correctness of that decision in regard to payments relied on under section 20 of the Limitation Act does not really arise. But, as the point has been fully argued, I may say that on further consideration I think the arguments, on which the judgment in that case is based, are not sound. They apply to the point under discussion a recognition test for determining what (in cases other than an actual payment in money) is a good payment under section 20 of the Limitation Act and the corresponding English Law, *cf.* Halsbury's Laws of England, Volume XIX Article 116, page 70. That test, however, cannot be properly applied to a money-payment, and that being so, I think it cannot be applied at all in the manner in which it was in that judgment.

KEMP, A. J. C.—This second appeal involves the decision of a question under Order XXI, rule 2 (1) of the Code of Civil Procedure.

On 20th November 1903, plaintiff obtained a decree on an award for Rs. 979-8-0 payable by annual instalments of Rs. 112 per annum.

The decree provided that in default of payment of any two consecutive instalments the whole amount should become due. The instalments were payable on and from 15th January 1904.

On 20th April 1914 the decree-holder filed an application for execution in which he gave credit for five annual instalments of Rs. 112 each and applied for execution of the balance, Rs. 419-8-0. That application was dismissed for default.

On 20th April 1914 he again applied for execution notifying in his application that the

(19) 27 Ind Cas. 11; 20 C. L. J. 131.

payments for which he had given credit in his application of 20th April 1911 were not made in the amounts and on the dates stated in that application, but that they amounted in all to Rs. 560 and represented the first five annual instalments. As a matter of fact the payments were made as under:—

Rs. 112 some time in 1904.
Rs. 150 on 3rd February 1906.
Rs. 174 on 26th February 1907.
Rs. 112 on 20th January 1909 and
Rs. 12 further were given credit for in grain.

It is clear from the above that the first two consecutive defaults occurred on 15th January 1906. This, however, was waived by the acceptance of Rs. 150 on 3rd February 1906. Subsequent defaults were similarly waived by the acceptance of subsequent payments, and the position at the date of the application for execution of 20th April 1911 was that the whole balance of the decree had become payable on 15th January 1910 by virtue of default in payment of two consecutive instalments on 15th January 1909 and 15th January 1910.

Prior to the application of 20th April 1911 none of the payments had been certified as required by Order XXI, rule 2 (1) of the Code. Subsequently, on 20th April 1914, after his application of 20th April 1911 had been dismissed for default of appearance, the decree holder filed his second application for execution. The Sub Judge, Mehar, considered it was time-barred on the ground that the Court could take no notice of payments which were not certified. The District Judge, Larkana, reversed this order, holding that there was no time-limit for certifying such payments. Clearly, unless the Court can take notice of the payments, the decree would be time-barred.

The judgment-debtor appealed and the appeal came on before Pratt, J. C., and Crouch, A. J. C. Both these learned Judges were of opinion that payments under Order XXI, rule 2 (1), could be certified by the decree-holder at any time. They considered, however, that their decision was inconsistent with the decision in *Narsoomal* v. *Tirathmal* (1) and referred the point, therefore, for decision to this Full Bench.

The reference appears to have been made under Part II, Chapter I, rule 3 of the Rules of the Court, both Judges having concurred that the matter before them should be heard by a Full Bench.

Now it is to be noted that the facts in *Narsoomal* v. *Tirathmal* (1) were not the same as in the present appeal, although it is true that the same question arises in both cases as to whether there is any period of limitation prescribed for a decree-holder certifying payments under Order XXI, rule 2 (1) of the Code. There was, however, this distinction between the case of *Narsoomal* v. *Tirathmal* (1) and the present case, that in the former the decree-holder sought by the payment *to extend* the period of limitation by invoking the assistance of section 20 of the Limitation Act, whereas in the case before us he asks the Court to say from what date limitation began to run.

It may be that there are different principles applicable to these two sets of facts and I prefer, therefore, to restrict my decision to the facts of the case before us.

Turning to Order XXI, rule 2 (1), it seems to me to lay down in clear and express terms an absolute duty on the decree-holder to certify payments made under the decree. It lays down in equally clear terms the duty of the Court to record such payments. That being so, I fail to see how it can be said that any period of limitation is prescribed for performing this duty cast upon the decree-holder. That appears to me to be the short answer to the contention that if the decree-holder does not certify such payments within a certain time, be it 90 days as Mr. Rupchand contends or 3 years under Article 181 of the Limitation Act, he is barred from certifying them.

Except where the Act provides a time for the performance of a duty, the ordinary and natural inference is that the obligation to perform that duty is a continuing obligation.

In the case before us the decree-holder does not, as in the circumstances where section 20 of the Limitation Act is relied upon, seek any advantage by getting the payments certified.

The judgment debtor admits the payments, so that there remains nothing for the Court to do but record them. Had the judgment-debtor disputed the payments or any of them, it would have been obligatory on the Court at the instance of the decree-holder to

have inquired into the fact of the payments. Order XXI, rule 2 (1), only applies when the money has been paid and to see whether it has to perform the duty of recording payments, the Court must first decide whether the payments have been made.

The conclusion that no period of limitation is prescribed for the decree-holder to certify payments under the decrees is also, perhaps, supported by the fact that the Legislature has expressly provided in Article 174 of the First Schedule of the Limitation Act for the case of the judgment-debtor who has an option in making the application under Order XXI, rule 2 (2), whilst no express provision is to be found in the Limitation Act for the case of the decree-holder on whom there is cast the duty to apply.

The trend of decisions seems to favour the same view. The cases have all been discussed in the judgments of the learned Judges who made this reference and I cannot see that any profitable result can be achieved by going over them again.

It is also clear from the rulings that it is enough to satisfy the provisions of Order XXI, rule 2 (1), if the decree-holder mentions the payments in his application for execution.

In this case I have assumed that receipt of an instalment or instalments in arrears amounts to a waiver of the default. Mr. Rupchand wishes to dispute that, but I am not prepared to depart from the ruling in *Kashiram* v. *Pandu* (17) and the decisions of this Court on the point.

I, therefore, think the appeal should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 178 OF 1918.

December 5, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

MANGALATHAMMAL—DEFENDANT No. 3—APPELLANT

versus

VEERAPPA GOUNDAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 2—Suit for possession based on title as landlord, dismissal of—Second suit based on reversionary right, whether maintainable—Cause of action—Res judicata—*Multiplicity of claims.*

The dismissal of a suit for possession of property wherein the plaintiff claims to be the defendant's landlord, does not bar a subsequent suit by the plaintiff against the same party for possession as the reversionary heir of the last male owner, either under section 11 or under Order II, rule 2, Civil Procedure Code, as the title put forward in the first suit based on the contractual relationship of landlord and tenant and the title put forward in the second suit as one of the heirs of the last male owner constitute different causes of action. [p. 815, col. 2; p. 816, col. 1; p. 816, col 2.]

Ramaswami Ayyar v. *Vythinatha Ayyar*, 26 M. 760; 13 M. L. J. 448, *Parambath Manakkal* v. *Puthengattil Moosan*, 28 M. 406 and *Pittapur Raja* v. *Suriya Row*, 8 M 520 (P. C.); 12 I. A. 116; 9 Ind. Jur. 274; 4 Sar. P. C. J. 638; 3 Ind. Dec. (N. S.) 356, followed.

Per *Sadasiva Aiyar*, J.—One of the considerations to be kept in mind when considering the question what ground of attack ought to have been advanced in the first suit is whether under Order II, rule 2, Civil Procedure Code, it was 'practicable' to have framed the first suit by alleging the facts put forward in the second suit without the evidence respectively adduceable on the two sets of facts becoming mutually destructive. [p. 817, col. 2.]

Appeal against the order and judgment of the Court of the Temporary Subordinate Judge, Madura, in Appeal Suit No. 16 of 1918, preferred against the decree of the Court of the 2nd Additional District Munsif, Madura, in Original Suit No. 2 of 1917.

FACTS appear from the judgment.

Mr. *T. M. Krishnaswamy Aiyar*, for Mr. *K. Rajah Aiyar*, for the Appellant.—The lower Appellate Court should not have remanded the suit. The present suit is barred by reason of the decision in Original Suit No. 129 of 1913. The allegation in the present suit was a 'ground of attack' which was open to the plaintiff in the prior suit. Not having availed himself of it, he could not again be permitted to harass the defendant with fresh facts and causes of action

The question is not whether the allegations in the second suit are superficially destructive of the allegations in the first, but whether a judicial mind can grasp the title in both suits as substantially the same.

Mr. *K. V. Krishnaswami Aiyar*, for the Respondent.—The present suit is not barred either under section 11 or under Order II, rule 2, Civil Procedure Code, by reason of the decision in Original Suit No. 129 of 1913. The titles set up in the two suits are different and the causes of action are separate and are not identical. The title in the first suit was based on the relationship of landlord and tenant. In the present suit the plaintiff claims as heir of the last owner. He need not have rested his case on this title also or as an alternative in the former suit. Every suit need not include every cause of action or every claim which a party has. See the Privy Council decision in *Pittapur Raja* v. *Suriya Row* (1). See also *Ramaswami Ayyar* v. *Vythinatha Ayyar* (2), in which the Judges observed that a plaintiff need not unite all the causes of action which he might have against the defendant in respect of the *corpus* or object-matter of the suit, but that he is only required to bring forward his whole case as to the matter of litigation on the question of right involved in the suit.

JUDGMENT.

SPENCER, J.—The question raised in this appeal is one of *res judicata*. The contesting parties are the plaintiff and his sister, the 3rd defendant. The District Munsif dismissed the suit, holding that it was barred by reason of the decision in Original Suit No. 129 of 1913 by the Appellate Court. The Subordinate Judge, who was the same Judge who decided the appeal in the other suit, held that his decision did not operate as *res judicata* in this suit and sent the case back to the District Munsif for deciding the other issues.

In Original Suit No. 129 of 1913 (587 of 1912) the plaintiff sued as lessor to recover rent and to obtain possession of the suit house from the 3rd defendant, setting up (1) an arrangement whereby his own mother Nagammal and his two aunts Almelu and Mariayee, being unable to discharge the debts of their mother Chellayee and aunt Minakshi, agreed to let 1st plaintiff have the exclusive possession of the suit property on condition of his discharging those debts, (2) a lease of the house from month to month to the 3rd defendant. He alleged in the plaint a single cause of action which was the date of default in the payment of rent, April 1st, 1912.

The District Munsif found for the plaintiff on the issue as to letting and against the defendant upon the independent title set up by her. He did not decide the question as to the plaintiff's title, as he considered the issue unnecessary. He gave the plaintiff a decree for rent and possession. The Subordinate Judge found against the plaintiff both on the lease and on the exclusive title set up by him and dismissed the suit.

In Original Suit No. 129 of 1916 the plaintiff sued as reversionary heir of his great grandfather, Thandavamurthi Goundan, to obtain (1) a declaration of his own and his cousin Palani Goundan's (2nd defendant's) title as reversioners, (2) possession of the house marked A in the plan together with mesne profits. He repeated in his plaint with some variations as to time and persons concerned the story about the family arrangement under which he was to discharge the debts of Chellayee and Minakshi. He alleged a partition in March 1910 (that is, prior to the institution of his prior suit but not mentioned in his plaint in that suit), whereby the family arrangement referred to above was re opened and the family houses were divided into three shares and the house marked A was allotted to his share. He stated his causes of action for this suit as arising on three different dates, *viz.*, December 7th, 1908, when his grandmother's sister, Minakshi, who had a daughter's estate died, March 1910, when the alleged partition took place, and February 2nd, 1916, when on appeal he lost his suit in the Subordinate Judge's Court.

As an alternative relief, he asked that if the partition alleged were found against, the family houses might now be divided and the one marked A might be given to

(1) 8 M. 520 (P. C.); 12 I. A. 116; 9 Ind. Jur. 274; 4 Sar. P. C. J. 638; 3 Ind. Dec. (N. S.) 356.
(2) 26 M. 760; 13 M. L. J. 448.

him and put in his possession as his exclusive share.

The question whether the plaintiff is to be debarred from proceeding with the present suit must now be viewed from two different standpoints, namely, that of section 11 and that of Order II, rule 2 of the Civil Procedure Code. While it may be confidently asserted that the plaintiff's right as a reversioner has never hitherto been "directly and substantially in issue" in any former suit, it may be argued *contra* with some reason that public policy does not permit a defendant to be harassed with a multiplicity of suits with all the ingenuity that may be employed in so framing a plaint as to dress up a stale claim in new colours. It may be urged that the 3rd defendant has successfully defeated an attempt to deprive her of possession of the property that she enjoys, only to find herself subjected to a renewed attack on the same property at the instance of the same party (her brother) who has already once failed on the verdict of three Courts. Explanation IV to section 11 of the Civil Procedure Code lays down that any matter which *might and ought* to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter substantially in issue in such suit. No doubt the plaintiff might in Original Suit No. 587 of 1912 have taken his stand upon his right to succeed to his great-grandfather's property upon the death of Minakshi, seeing that the woman died in 1908 and her sister Chellayee died in 1905. There would have been no objection under Order II, rule 3, to such a joinder of the causes of action in the two suits. He might also have mentioned the partition of properties in March 1910 which he now puts forward. But can it be said that he ought to have done so? To answer this question we must turn to Order II, rule 2, which says that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Now the Privy Council so long ago as 1885 had occasion in *Pittapur Raja* v. *Suriya Row* (1) to construe the words of the corresponding section of the Code of 1859, which declared that "every suit shall include the whole of the claim arising out of the cause of action." They then observed that this did not mean that every suit should include every cause of action or every claim which the party had; and they applied the test cited from *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (3) of seeing whether the claim in a new suit was in fact founded on a cause of action distinct from that which was the foundation of the former suit. The wording of the Code of 1908 upon this point is a little different from that of 1859, as it substitutes the words "whole of the claim which the plaintiff is entitled to make in respect of the cause of action" for the words "whole of the claim arising out of the cause of action."

But Order II, rule 2, clause (1), is identical in language with section 43 of the Code of 1882, and in *Ramaswami Ayyar* v. *Vaythinatha Ayyar* (2) this Court adopted the interpretation of the Privy Council and applied it to section 43 which was the law then in force. The learned Judges (Benson and Bashyam Aiyangar, JJ.) also dealt with section 42, which was worded in practically the same language as Order II, rule 1, of the present Code, and ran thus: "Every suit shall, as far as practicable, be framed so as to afford ground for a final decision upon the subjects in dispute and so to prevent further litigation concerning them." They observed that the object of this section was not to require the plaintiff to unite all the causes of action which he might have against the defendant in respect of the *corpus* or object matter of the suit, but merely to require him to bring forward his whole case as to the matter of litigation on the question of right involved in the suit. They explained the expression "the subjects in dispute" as signifying the jural relation between the parties to the suit, for the determination of which the suit is brought.

If we take this decision to be good law (and I see no reason why we should dissent from it), it may be said that the jural relation of lessor and lessee, on which Original Suit No. 587 of 1912 was based, in respect of the house comprised in the present suit was quite different from the jural relation of owner by right of succession and trespasser, which governs the suit of 1916. The dates when the causes of action arose in the two suits are also different. Of course a finding upon

(3) 11 M. I. A. 551; 8 W. R. (P.C.) 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208.

a certain issue or issues in one suit may be *res judicata* in a later suit between the same parties without the whole of the later suit being barred by *res judicata*.

I am, therefore, of opinion that the learned Subordinate Judge was right in remanding the suit for disposal on the issues other than issue No. 3, which was upon the question of *res judicata*. This appeal should be dismissed, and each party should be directed to bear his own costs in the appeal.

SADASIVA AIYAR, J.—I agree but I wish to express in my own words my opinion on the legal question involved. Those questions are of great difficulty and were argued strenuously on both sides. In the plaint in the Suit No. 129 of 1913 of the Additional District Munsif's Court of Madura (587 of 1912 of the Principal District Munsif's Court) the plaintiff stated that his grand-aunt Minakshi died "two years ago" (see the 5th paragraph of Exhibit I, dated 21st October 1912) That means that she died about October 1910. The 7th paragraph of that plaint states that the plaintiff's mother and her two sisters entered into some arrangement with the plaintiff (ignoring evidently the defendants Nos. 1 and 2 and the plaintiff's brother Pachaimuthu) about paying the debts of the plaintiff's grand aunt Minakshi and his grandmother Chellayee. This implies that agreement was after Minakshi's death in about October 1910 and that she was not a party to it.

In the plaint in the present suit No. 129 of 1916, the plaintiff does not state when his grand-aunt Minakshi died but says (paragraphs 7 and 8 of the plaint) that, after the death of Minakshi and in March 1910, a division took place between the 1st defendant, 2nd defendant and the plaintiff re-opening a previous arrangement between the defendants Nos. 1 and 2 and the plaintiff and Minakshi. Thus Minakshi, according to the present plaint, had died before March 1910 and the family arrangement set up in this suit was between her and the plaintiff and the defendants Nos. 1 and 2 during her lifetime (and not as between the plaintiff and the plaintiff's mother and the plaintiff's two aunts as set up in the former suit). The cause of action in the former suit was substantially based on the contractual relationship of landlord and tenant between the plaintiff and the 3rd defendant whereas in the present case, it is based on the alleged joint title of the plaintiff and of the defendants Nos. 1 and 2 and on a division between them in March 1910. Having regard to the preponderance of the weight of authority among the many decisions of this Court, of which only *Ramaswami Ayyar* v. *Vythinatha Ayyar* (2) and *Prambath Manakkal* v. *Puthengattil Moosamu* (4) need be quoted, the former dissenting from *Guddappa* v. *Tirkappa* (5) and both overruling *Rangasami Pillai* v. *Krishna Pillai* (6) in favour of the view that the explanation to the *res judicata* section as regards "grounds of attack" does not affect a plaintiff where he sues on a different cause of action and that a suit based on the contractual relationship of tenancy is based on a different cause of action from that based on title, I am constrained with reluctance to hold that the present suit not barred by *res judicata* by the decision in the former suit.

As regards the question whether the expression "cause of action" will include the facts which were available to the plaintiff to put forward on the date of the previous suit, which, however, he so omitted to put forward in the first suit and which he had put forward for the first time in the second suit in order to establish substantially the same title on which the first suit was brought, the better opinion is that the expression will generally include such facts. But the decided cases disclose that considerable difference of opinion frequently results when learned Judges proceed to consider whether the title set up in the second suit and sought to be established by a particular set of facts is substantially the same as the title set up in the first which was sought to be established by another set of facts and whether hence, the cause of action in the two suits is the same. For instance in *Arunachalam Chetty* v. *Meyyappa Chetty* (7) (decided by Subramania Aiyar and Davies, JJ.), a minor who failed in the first suit to set aside a compromise decree passed during his minority on the allegation of fraud on the part of his guardian, was held precluded from bringing a second suit on the new allegation that the decree was

(4) 28 M. 406.
(5) 25 B 189; 2 Bom. L. R. 872.
(6) 22 M. 259; 8 Ind Dec. (N. S. 184.
(7) 21 M. 91; 8 M. L. J. 28; 7 Ind. Dec. (N. S.) 421

passed without obtaining the consent of the Court. But in *Ramaswami Ayyar* v. *Vythinatha Ayyar* (2) the learned Judges, Benson and Bashyam Aiyangar, JJ., disapprove of the decision in *Arunachalam Chetty* v. *Meyyappa Chetty* (7) (see page 774*). In *Masilamania Pillai* v. *Tiruvengadam Pillai* (8) Sir Arnold White, C. J., and Miller, J., differed on the question whether the second suit based on a claim to be the next reversioner, on the allegation that the plaintiff was the sister's son's son of the last male owner, was barred by the dismissal of a former suit in which also the plaintiff had claimed to be the next reversioner but traced his title as the alleged adopted son of the brother of the last male owner. Owing to such difference of opinion, the case went before the present learned Chief Justice (then Wallis, J.) and he held that the title as reversioner was the substantial cause of action in both suits and he decided that the second suit was barred. I shall quote some instructive observations from that judgment: "Apart altogether from authority, it appears to me that, in a suit to establish a claim as reversioner, that claim should be held to be the subject in dispute within the meaning of the section. I should not omit to observe that the provisions of section 42 as to the framing of suits are only to be applied 'as far as practicable,' and if the plaintiff would have been embarrassed in the former suit by relying not only on his alleged adoption by the divided brother of the deceased but also on his descent from the sister of the deceased, it may well be that he would not have been bound to rely on both grounds. This would, I think, be the case if the evidence in support of one ground might be destructive of the other grounds. But there could be nothing of this kind in the present case, and I do not think there is anything unreasonable in holding that the plaintiff in the former suit ought to have relied upon his descent from the deceased's sister as well as upon the adoption, so that if proof of the adoption failed, he might still establish his right as reversioner on the ground of this descent and prevent further litigation regarding it. The judgments of the learned Judges who made the reference do not expressly refer to section 42 of the Civil Procedure Code, and although *Ramaswami Ayyar* v. *Vythinatha Ayyar* (2) is cited, it is, I think, possible that the attention of the learned Judges was not specially directed to the observations as to the scope of section 42 which are to be found in different parts of a very lengthy judgment. If I had been obliged to form a conclusion upon the earlier authorities, and apart from section 42, I should have found the task one of great difficulty." Section 42 of the old Civil Procedure Code corresponds to the present Order II, rule 1.

One of the considerations then to be kept in mind when considering the question what grounds of attack ought to have been advanced in the first suit seems to be whether under Order II, rule 1, it was "practicable" to have framed the first suit by alleging the facts put forward in the second suit without the evidence respectively adduceable on the two sets of facts being mutually destructive.

Mr. T. M. Krishnaswami Aiyar for the appellant (if I understood him aright on his subtle points) argued that even where the facts newly alleged in the second suit may be destructive of the facts alleged in the first suit, if the title can be grasped by the judicial mind as substantially the same in both suits, the second suit would be barrrd as *res judicata* and prohibited under Order II, rule 1. He put forward the following or a similar illustration. *A* has two sale-deeds (say dated respectively in May and June 1910) conveying to him the same property. One was executed by *B* and the other by *C* *A* was doubtful whether *B* or *C* was the owner and so he got sale deeds from both. He then sued trespasser *D* on the strength of his sale deed from *B*. That suit was dismissed as *B's* title was found against. Can *A* then sue *D* again on the strength of his sale deed from *C*? Mr. Krishnaswami Aiyar argued that *A* cannot do so and that he ought to have put forward his case under both the sale deeds in the first suit, though the title of *B* rested on proof of facts inconsistent with those on whose proof *C's* title had to be established. I think that I need only say that the balance of the authorities seems to be in favour of the view that the second suit is main-

(8) 31 M. 385.

*Page of 26 M.—*Ed.*

tainable in the above illustration (by Mr. T. M. Krishnaswami Aiyar), though in one sense the jural relation in the two suits between the two parties is the same, namely, the plaintiff as owner and defendant as trespasser. I do not, however, consider it necessary to consider the question in detail because in the present case, the title put forward in the first suit (based on the contractual relationship of landlord and tenant) and the title put forward in the present suit (the title as one of the three heirs of the last male owner) constitute different causes of action, according to several precedents of this Court binding up upon me.

Having thus expressed my concurrence with the conclusion of the lower Appellate Court on the third issue in the suit, namely, whether the suit itself is barred by *res judicata*, I wish to point out before getting rid of this appeal that at least one other issue ought to have been framed by the District Munsif, namely, whether the finding in the former suit against the plaintiff in respect of his exclusive title to the ownership of house site A (see paragraph 4 of Exhibit IV) is *res judicata* as between the plaintiff and the 3rd defendant and against the plaintiff in the present suit. The distinction between a finding on an issue being *res judicata* and the suit itself being barred as *res judicata* must be clearly kept in mind, and this new issue must also be decided in the remand hearing before the District Munsif. I do not wish to express any opinion on this new issue at this stage.

In the result I agree that the appeal ought to be dismissed. The parties will bear their respective costs of this appeal.

M. C. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 476-B OF 1917.

February 7, 1919.

Present:—Mr. Mittra, A. J. C.

DEWAJI—PLAINTIFF—APPELLANT

versus

AMRITA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 93—Execution of decree—Sale—Warrant of title—Purchase-money, whether can be recovered on eviction by third person—Limitation Act (IX of 1908), Sch. I, Art. 97—Suit to recover money paid on existing consideration, which afterwards fails, maintainability of.

There is no implied warranty of title in an auction-sale under the Civil Procedure Code, either by the decree-holder or by the Court and, therefore, no action lies against the decree-holder for a return of purchase-money paid at a Court auction in execution of a money decree, when the purchaser is evicted by a third party who successfully establishes his title to the property in a regular suit. [p. 818, col. 2; p. 820, col. 1.]

Where the right, title and interest of the judgment-debtor is sold and the conveyance effectually passes it, there can be no failure of consideration, for the consideration was the right, title and interest, which *ex hypothesi* passed, though it was valueless. The same argument applies when property is sold as property believed to belong to the judgment-debtor, where the sale, as in a Court auction, is by implication one with all risks and all defects. [p. 821, col. 1.]

A suit for money paid for an existing consideration which afterwards fails, such as is contemplated by Article 97 of Schedule I to the Limitation Act, lies if there is a contract between the parties. [p. 821, col. 1.]

Appeal against the decree of the District Judge, Amraoti, in Civil Appeal No. 128 of 1917, decided on 7th September 1917, arising out of Civil Suit No. 149 of 1916, in the Court of the Munsif, Darwah, decided on 26th April 1917.

The Hon'ble Sir *Bipin Krishna Bose*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—The point for decision is whether an action lies against the decree-holder for a return of the purchase money paid at a Court auction in execution of a money decree, when the purchaser is evicted by a third party who successfully establishes his title to the property in a regular suit.

In *Krishnaji* v. *Ladhuram Ghasiram* (1) I held that, apart from fraud or neglect

(1) 42 Ind. Cas. 440.

of a duty, an auction-purchaser is not entitled to maintain a suit under the present Code of Civil Procedure for the return of the purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold.

In my view there is no implied warranty of title either by the decree-holder or the Court in such sale, and the statutory right recognised by Order XXI, rule 93, is now confined to the case where a sale of immoveable property is set aside under rule 92, there being nothing corresponding to the 2nd paragraph of section 315 of the Code of 1882, which recognised a similar right "when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it."

I have dealt with many of the cases now cited in my previous judgment. The only new case to which my attention has been drawn is one which fully supports my view: *Nannu Lal* v. *Bhagwan Das* (2).

The following passage in my previous judgment has been criticised on behalf of the appellant:

"As the present Code of Procedure, like Act VIII of 1859, does not recognise such a right except when a sale is actually set aside under Order XXI, rule 92, the plaintiff's suit has, in my opinion, been rightly dismissed."

It is correctly pointed out that there are certain changes which have taken place since 1877 which were not noticed in the judgment. Under Act VIII of 1859, section 249, the proclamation shall declare that the sale extends only to the right, title and interest of the defendant in the property specified therein. It is, therefore, urged that there could be no warranty of title under section 249, and section 259 there allowed the purchaser to receive back his purchase-money only when a sale of immoveable property is set aside. A change in the law has undoubtedly been introduced since 1877. What the sale proclamation now offers is no longer the right, title and interest of the judgment debtor, but the property to be sold which has to be fully described, so as to give the intending purchaser all necessary information as to what he is going to buy. This is clear from section 287 of the Codes of 1877 and 1882 and also from Order XXI, rule 66, which further requires an application for an order for sale to be verified, so far as the matters required to be specified in the proclamation are known to or can be ascertained by the person making the verification. Similarly, when an attachment of immoveable property is applied for, a specification of the judgment-debtor's share or interest in such property, "to the best of the belief of the applicant" and "so far as he has been able to ascertain the same," has to be made. (See section 237 of the Codes of 1877 and 1882 and Order XXI, rule 13.) I fully agree that a duty is now cast upon the decree holder, for a breach of which an action in damages would lie. This I have already recognised in my previous judgment. If fraud or deceit is established in reference to the specification of the property the auction-purchaser will undoubtedly have a remedy, but I cannot regard this statutory duty on the part of the decree holder as creating an implied warranty of title. If an ordinary sale-deed contained a covenant that the vendor believes the property sold to be his, but does not assert or warrant it to be so, one could scarcely argue that there was an implied warranty of title, especially when the sale is by implication one with all defects in the title.

So far as the particular points just dealt with are concerned, the present Civil Procedure Code has been framed on the same lines as the repealed Code of 1882. I agree with the following observations of Straight, C. J., and Banerji, J., in *Chandar Mukerji* v. *Nain Sukh* (3):

"We think that a purchaser is only entitled to receive back his purchase-money under the conditions stated in section 315, whether by application under that section or by suit. As regards private sales, there is under section 55 (2) of the Transfer of Property Act, in the absence of a contract to the contrary, an implied covenant for title by the vendor. As regards sales under a decree of a

(2) 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1216.

(3) 23 A. 355 at p. 356; A. W. N. (1901) 101.

Court, there is no warranty of title either by the decree-holder or by the Court. Section 237 of the Code shows that the decree-holder, when applying for execution, has only to specify the judgment-debtor's share or interest in the property 'to the best of his belief,' and 'so far as he has been able to ascertain the same.' Section 287 and the form of proclamation of sale prescribed by the rules of this Court show that the proclamation only professes to specify the particulars prescribed by the section, including the property to be sold and the judgment debtor's interest therein, 'as fairly and accurately as possible,' and 'as far as it has been ascertained by the Court' and subject to possible errors, mis-statements and omissions. * * * The result is that the purchaser must be taken to buy the property with all risks and all defects in the judgment-debtor's title, except as provided by sections 313 and 315, that in the absence of fraud his only remedy is to recover back his purchase-money, where it is found that the judgment-debtor had no saleable interest in the property at all."

The last clause in this passage, it need hardly be pointed out, is inapplicable to the present Code. I hold, therefore, that there is no implied warranty of title under the Civil Procedure Code.

The following cases have been quoted before me on behalf of the appellant to show that a regular suit lay under the Code of 1882 for recovery of the purchase-money: *Munna Singh* v. *Gajadhar Singh* (4), *Kishun Lal* v. *Muhammad Safdar Ali Khan* (5), *Shanto Chandar Mukerji* v. *Nain Sukh* (3), *Gurshidawa* v. *Gangaya* (6), *Hari Dayal Singh Roy* v. *Sheikh Samsuddin* (7), *Nityanund Roy* v. *Juggat Chandra Guha* (8) and *Ram Kumar Shaha* v. *Ram Gour Shaha* (9). These cases proceed upon the view that the remedy by an application given by section 315 was not exhaustive. But they do not support the contention that an action lay independently of the 2nd paragraph of section 315 either on an implied warranty of title or for failure of consideration. It may be mentioned that the decisions allowing a regular suit, though unanimously adopted by the learned Judges, have been sometimes doubted as in *Kishun Lal* v. *Muhammad Safdar Ali Khan* (5). The right recognised in such cases was a statutory right to which Article 120 of the Limitation Act was generally applied, and not Article 62, as the remedy given by the Code was not a suit for money had and received. *Nilakanta* v. *Imamsahib* (10), *Amrita Lal Bagchi* v. *Jogendra Lal Chowdhury* (11) and *Sidheswari Prasad Narain Singh* v. *Goshain Mayanand* (12). In the last cited case at page 423* the learned Judges say:—

"The real reason is that in a sale by the Court or its officer, there is no warranty of title, and the money which the purchaser pays cannot, either in law or equity, be said to have been received by the Court, its officer, or the creditors for the use of the auction-purchaser."

The appellant strongly relies upon the following observations of their Lordships of the Privy Council in *Dorab Ally Khan* v. *Abdool Azeez* (13):—

"There is, no doubt, a further question whether the plaintiff has shown a case which, if proved, would entitle him to recover back the purchase-money as money had and received to his use as upon a total failure of consideration."

In that case the judgment debtor had title to the property sold, and if the Sheriff of Calcutta who sold immoveable property in Oudh had jurisdiction, his conveyance would have passed the title. Their Lordships say:—

"It was solely because he (the Sheriff) was acting beyond his territorial jurisdiction that the sale became inoperative and wholly ineffectual."

The decision was based on the principle that the Sheriff may be held to

(4) 5 A. 577; A W. N. (1883) 130; 3 Ind. Dec. (N. S.) 491.
(5) 13 A. 383; A. W. N. (1891) 138; 7 Ind. Dec. (N. S.) 244.
(6) 22 B. 783; 11 Ind. Dec. (N. S.) 1106.
(7) 5 C. W. N. 240.
(8) 7 C. W. N. 105.
(9) 2 Ind. Cas. 559; 37 C. 67; 13 C. W. N. 1030; 10 C. L. J. 558.

(10) 16 M. 361; 3 M. L. J. 134; 5 Ind. Dec. (N. S.) 958.
(11) 15 Ind. Cas. 707; 40 C. 187.
(12) 19 Ind. Cas. 986; 35 A. 419; 11 A. L. J. 606.
(13) 3 C. 806 at p. 816; 5 I. A. 116; 2 C. L. R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 1 Ind. Dec. (N. S.) 1097 (P. C.).

* Page of 35 A.—*Ed*

undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction, and to this extent there was an implied warranty. This case is, therefore, no authority for holding that an action for money had and received lies, if the judgment debtor in an execution sale has no interest in the property sold. No other case on this point has been cited. As Lord Sumner in *Sinclair* v. *Brougham* (14) says, the action for money had and received cannot now be extended beyond the principles in the decided cases.

When only the right, title and interest is sold and the conveyance effectually passes it, there can be no failure of consideration, for the consideration was the right, title and interest which *ex hypothesi* passed, though it was valueless. It would seem that the same argument would apply when property is sold as property believed to belong to the judgment debtor, where the sale, as in Court auctions, is by implication one with all risks and all defects. Moreover, a suit for money paid upon an existing consideration which afterwards fails, such as is contemplated by Article 97 of the Limitation Act, does not seem to lie except where there is a contract between the parties.

It is urged that the fundamental principles of the law of contract apply to execution sales, and in support of this the observations of their Lordships of the Privy Council in *Mahomad Kala Mea* v. *Harperink* (15) are relied upon. It is contended that as section 55 (2) of the Transfer of Property Act now recognises an implied warranty of title, such a warranty of title should also be implied in an execution sale. The fact that the law has been changed in the case of voluntary sales does not justify a judicial extension of the law to the case of involuntary sales.

Lastly, it is pointed out that the view taken by this Court will have the effect of practically depriving the auction-purchaser of all remedy after the confirmation of the sale. This is a matter for the Legislature to consider and not for Judges.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

(14) (1914) A C 398 at p. 453; 83 L. J. Ch. 465; 111 L. T. 1; 58 S J. 302; 30 T. L R. 315.

(15) 1 Ind. Cas. 122; 36 C. 323; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom. L. R. 227; 19 M. L. J. 115; 36 I. A. 32 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1001 OF 1918.

April 22, 1919.

Present :—Mr. Justice Phillips and Mr. Justice Napier.

SUNDARAM PILLAI—PLAINTIFF'S LEGAL REPRESENTATIVE—APPELLANT

versus

RAMASAMIA PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Succession to maiden's stridhanam—*Father's brother's son, whether to be preferred to sister.*

Where a maiden's mother and father are dead, the heirs to her *stridhanam*, under the Mitakshara School of Hindu Law, as followed in Madras, are her father's *sapindas*, the father's brother's son being preferred to the maiden's sister, who only comes in after the male *sapindas* [p 823, col. 2.]

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 67 of 1917, preferred against the decree of the Court of the Subordinate Judge, Tinnevelly, in Original Suit No. 54 of 1915.

FACTS appear from the judgment.

Mr *T. R. Venkatrama Sastri*, for the Appellant.—The text enumerates the heirs as "the mother, the father, on their failure their next of kin." "Their next of-kin" means strictly the Sapindas, that being the gist of the text of Mitakshara "*Pratyasan*" (= nearest) is the word. *Marya Pillai* v. *Sivabagyathachi* (1) and *Kamala Bai* v. *Bhagirathi Bai* (2). The Sapindas are of both the father and the mother, as the mother becomes exclusively a member of her husband's family and so her Sapindas are strictly her husband's Sapindas. *Janglubai* v. *Jetha Appaji* (3). In Bombay the sister is a preferable heir, for a special

(1) 12 Ind. Cas. 128; 21 M. L. J. 850; (1911) 2 M. W. N 168; 10 M. L. T. 494; 36 M 116 at p. 118.

(2) 16 Ind. Cas. 939; 38 M. 45; 23 M. L. J. 518; (1912) M. W. N. 1136; 12 M. L. T. 499.

(3) 32 B. 409; 10 Bom. L. R. 522.

law prevails there as regards female heirs.

Dwarka Nath Roy v. *Sarat Chandra Singh Ray* (4) (father's daughter and father's father's brother's son).

Tukaram v. *Narayan Ramchandra* (5). The Mayukha says that the *stridhanam* must go to the nearest heir of the deceased or to the nearest heir of the father or husband of the deceased. This is adopted in *Tukaram* v. *Narayan Ramchandra* (5). But the principle alone can be applied but not the actual rule as the father's sister and other females are not heirs in Madras. Mayne, Hindu Law, 8th Edition, page 752, paragraph 539.

Mr. *P. R. Ganapathy Aiyar*, for the Respondents.—Placitum 11 does not apply. This is special property.

Kamala Bai v. *Bhagirathi Bai* (2) is a clear case which lays down that all our pet theories regarding father's heirs and females not taking are not to be applied as regards *stridhanam* property.

[NAPIER, J.—But that is based on placitum 11 which, you say does not apply.]

There is nothing in the Mitakshara providing specifically for the failure of the father and the mother. So the other texts too.

Smriti Chandrika, Chapter IX, section 3 (quoting Baudhayana and Brihaspati). Ghose, Volume II. The father's sister and others are declared equal to a mother. The inference, therefore, is that after the father those equal to the mother will take.

[PHILLIPS, J.—If they are equal to the mother, they must take equally with the mother.]

The mother's is also a personal right to succeed. Saraswati Vilasa says the same. Ghose, Volume II, page 1008 (placitum 326).

[NAPIER, J.—If we are bound by the law as laid down in the Mitakshara, we cannot, according to the Privy Council, refer to any and every text writer.]

Only on matters provided for in the Mitakshara. In *Arpandai Vathiyar* v. *Ragubali Mudaliar* (6) a mother's sister's son was preferred to a mother's brother's son.

[PHILLIPS, J.—The passage cited from Saraswati Vilasa does not refer to a maiden's estate but to that of a woman dying after betrothal and before marriage.]

Yes.

See *Bai Kesserbai* v. *Hunsraj Morarji* (7) and *Janglubai* v. *Jetha Appaji* (3). The text of Brihaspati is clearly explained.

[PHILLIPS, J.—That text is used in the Mayukha as regards a married woman. How can we apply it to a maiden's estate under the Mitakshara?]

Marya Pillai v. *Sivabagyathachi* (1).

Next, in cases of succession to a woman's property, the word 'Sapinda' is to be widely construed. See *Kamala Bai* v. *Bhagirathi Bai* (2). That is the sense in which it is used in the Mitakshara. In that sense the father's sister is a nearer Sapinda.

Mr *Venkatrama Sastri* in reply.—The general direction in placitum 11 of the Mitakshara must be read with placitum 30, which applies specifically to maidens. The omission in placitum 30 to refer back to placitum 11 does not warrant the importation of other texts which do not conform to the Mitakshara. The secondary mothers mentioned in the Smriti Chandrika and the Saraswati Vilasa are to be regarded as such only for regulating succession to their property and not the reverse. Further these texts have no relation to a maiden's estate. The Saraswati Vilasa, Placita 327, 328, put it clearly that way, Ghose Volume II, page 1008.

PHILLIPS, J.—Quite so If they were equal to mothers, they must necessarily come in before the father.]

See *Bai Kesserbai* v. *Hunsraj Morarji* (7). *Raju Gramany* v. *Ammani Ammal* (8) has held that this text is inapplicable to cases governed by the Mitakshara when the effect would be to override the latter. The text of Brihaspati is not referred to in the Chapter on Inheritance to Males. See also *Venkatasubramaniam Chetti* v *Thayarammah* (9). The Privy Council have held in *Buddha Singh* v.

(4) 11 Ind. Cas. 872; 39 C. 319 at p. 323; 15 C. W. N. 1036; 15 C. L. J. 23.
(5) 14 Ind. Cas. 438; 36 B. 339; 14 Bom. L. R. 89.
(6) 5 Ind Cas. 280; 33 M. 439; (1910) M. W. N. 44; 20 M. L. J. 275; 7 M. L. T. 203.
(7) 30 B. 431 (P. C.); 10 C. W. N. 802; 4 C. L. J. 9; 8 Bom. L. R. 446; 3 A. L. J. 484; 1 M. L. T. 211; 16 M. L. J. 446; 33 I. A. 176.
(8) 29 M. 358; 1 M. L. T. 68.
(9) 21 M. 263; 7 Ind. Dec. (N. S.) 542.

Laltu Singh (10) that the Smriti Chandrika starts on fundamental principles different from the Mitakshara (at page 619*) and cannot be referred to except for elucidation of dubious passages in the Mitakshara.

Next, as regards the meaning of "Sapinda" the Mitakshara clearly excludes women (see Placitum 11). See Chapter II, section 1.

JUDGMENT.

PHILLIPS, J.—The sole question for determination in this appeal is whether plaintiff or 3rd defendant is the heir to the property of one Gomati Ammal, a maiden. Plaintiff is the father's brother's son of Gomati's father, whereas 3rd defendant is the sister of Gomati's father. In *Kamala Bai* v. *Bhagirathi Bai* (2) it was held that when a maiden's mother and father are dead her heirs are her father's Sapindas, and this case followed *Janglubai* v. *Jetha Appaji* (3), *Tukaram* v. *Narayan Ramchandra* (5) and *Dwarka Nath Ray* v. *Sarat Chandra Singh Ray* (4). In Mitakshara, Chapter II, section 11, Pl. 20, there is a text of Baudhayana which says: "The wealth of a deceased damsel let the uterine brethren themselves take. On failure of them it shall belong to the mother, or, if she be dead, to the father," but the Mitakshara is silent as to the succession in default of mother or father. In the above mentioned cases the rule of succession to the property of a woman married in an unapproved form contained in Pl. 11 of the same section was applied by analogy, and it would appear that this decision of three High Courts would be final, but it is contended for respondents that a text of Brihaspati contained in the Smriti Chandrika (Chapter IX, section 3, placitum 36) and the Saraswati Vilasa (placitum 327) provides for the succession after the mother and father. This text no doubt immediately follows the text of Baudhayana in the Smriti Chandrika, but there does not appear to be any connection between the two, for Brihaspati's text relates to what are called secondary mothers, and deals with the succession to their property. In the Saraswati Vilasa the text follows a placitum relating to the property of a betrothed damsel. It is difficult to believe that the succession to a maiden is analogous to the succession to secondary mothers, for a maiden cannot by any stretch of language be treated as a secondary mother, whereas there is no such difficulty in the case of the persons cited, *i. e.*, mother's sister, uncle's wife, father's sister, etc. There is also another difficulty in the way of applying the text in the way contended for by respondents' Vakil, which is that the persons enumerated are the heirs to a maiden's estate, for in the Smriti Chandrika the persons enumerated are said to be equal to a mother. If that be so, they would take the succession after the mother to the exclusion of the father. This is directly opposed to Baudhayana's text in the Mitakshara, which, in this Presidency, must always be preferred to the Smriti Chandrika, when they are not in agreement. Respondents' contention must, therefore, be negatived for two reasons, *firstly*, because Brihaspati's text does not at all refer to the succession to a maiden's property, and *secondly*, because if it does refer to it, it is opposed to the Mitakshara. I, therefore, follow *Kamala Bai* v. *Bhagirathi Bai* (2) and hold that the heirs to Gomati's property are her father's Sapindas. So far I agree with the District Judge, but he has followed the Bombay High Court in holding that a sister is a nearer heir than the father's brother's son. In Madras, however, the law is that the father's brother's son is to be preferred, the sister only coming in after the male Sapindas. I am unable to accept the contention, based on the single sentence of the judgment in *Kamala Bai* v. *Bhagirathi Bai* (2) that the father's Sapindas, in a case when the property of a female is concerned, are different to the Sapindas in the case of a male's property. In the absence of any rule to the contrary the Sapindas must always be the same. The appeal is accordingly allowed, and the Subordinate Judge's decree restored with costs both here and in the lower Appellate Court.

NAPIER, J.—The question raised in this second appeal is as to the succession to the *stridhanam* property of one Gomati Ammal. The deceased Gomati Ammal

(10) 30 Ind. Cas. 529; 37 A. 604; 20 C. W. N. 1; 22 C. L. J. 481; 13 A. L. J. 1007; 17 Bom. L. R. 1022; 29 M. L. J. 434; 18 M. L. T. 409; (1915) M. W. N. 772; 2 L. W. 897; 42 I. A. 205 (P. C.).

*Page of 37 A.—*Ed.*

inherited the property under a Will from her father, one Muthia Pillai, and it is conceded that the mother is also dead. The contesting parties are the son of the paternal uncle of the deceased's father and the father's sister of the deceased, the uterine brothers who admittedly would have a preference to anyone else having failed. The point has been expressly decided in two cases in *Janglubai* v. *Jetha Arpaii* (3) and *Tukaram* v. *Narayan Ramchandra* (5), and the view taken by that Court was followed by two learned Hindu Judges of this Court in *Kamala Bai* v. *Bhagirathi Bai* (2). It is suggested before us that this question requires reconsideration, in view of the fact that the Mitakshara does not definitely decide the point and that the Bombay High Court relied on the Veeramitrodaya, a work which is not followed in Madras. It is further contended before us that the question is disposed of by a text in the Smriti Chandrika, the language of the Mitakshara is based on the authority of Baudhayana's text, for Baudhayana says: "The wealth of a deceased damsel let uterine brothers themselves take, on failure of them, it shall belong to the mother, or if she be dead to the father." (Chapter II, section 11, placitum 30). As the text stops there, this Court applied the analogy of the succession to the property of a childless married woman which is provided for in placitum 11 of the same section. There the succession is stated as being "to the mother and to the father; on failure of them their nearest-of-kin takes the succession." The translation is that of Borrodaile. The High Court, however, preferred "to their Sapindas" as being a more correct translation. The judgment then proceeds as follows:—"We see no reason for not accepting the view of the Bombay High Court that the Sapindas both of the father and the mother must be understood to mean the same persons, as the mother becomes a member of the father's family on her marriage." It is to be noted that the learned Judges do not expressly follow the language of Veeramitrodaya which is definite on the subject as did the High Court of Bombay, but proceeded by way of analogy arriving at the same result. It is not, therefore, correct to say that the decision of this Court is based on a text which is not an authority in the Presidency.

It remains to consider the text relied on by Mr. Ganapathy Aiyar in his contention that this ruling is incorrect. I feel naturally considerable diffidency in construing a text which is translated, not being myself acquainted with the original Sanskrit. But in spite of that I am satisfied that the text has nothing whatever to do with the subject. In Smriti Chandrika, Chapter IX, section 3, placitum 36, Brihaspati enumerates secondary mothers and points out who takes their property. The sister of a mother, the wife of a maternal or of a paternal uncle, the sister of a father, the mother of a wife and the wife of an elder brother are declared equal to a mother. If they leave no male issue of their body nor a son of a daughter nor a daughter, a sister's son and the like shall inherit their property. Taken by itself, this text has, on its face, no application because we are not construing here the succession to secondary or *quasi*-mothers. The only mother with whom we are concerned is the real mother; and the question is who on the death of such real mother and father is to succeed. The next objection is that if this text is to apply, it contradicts the language of placitum 30 itself, for that is specific, the words being: "It shall belong to the mother or if she be dead to the father," not to the heirs of the secondary mother. The text is interesting as laying down that these *quasi* mothers are to be treated as real mother's, but admittedly no such broad proposition is accepted in Hindu Law as applied in this Presidency. The only reason which Mr. Ganapathy Aiyar could urge for applying this text is that it follows the placitum in the Smriti Chandrika which is identical with placitum 30 in the Mitakshara. Both of these texts are to be found in the Smriti Chandrika in section 3, "succession to a woman's property." We were informed at the Bar that the numbers given in the English translations are not in the original, which is borne out by the fact that Placitum 36 in Mr. Krishnaswami Aiyar's translation is No. 21 in Ghose's translation. The chapter contains a series of texts on succession to the property of women generally and explanations of the terms used by the sacred writers and the whole chapter is in the nature of dissertation on conflicting views of the authorities.

The only passage which deals with inheritance to the wealth of a damsel appears to be the one placitum of Baudhayana above referred to. The placitum relied on seems to be a note by the learned commentator to the effect that where in the preceding paragraphs inheritance to a mother is dealt with, a specific line of succession is to be applied to these secondary mothers and has no connection whatsoever with the quotation from Baudhayana in the preceding passage. I am confirmed in this view that the passage relied on has nothing whatever to do with the subject by the fact that although Smriti Chandrika is a recognized authority of secondary weight in Madras, the learned Vakils who appeared before our learned brothers in *Kamala Bai* v *Bhagirathi Bai* (2) did not think that the passage was worth putting before their Lordships for consideration. In this respect I agree with the judgment of my learned brother.

M. C. P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2318 OF 1909.

August 13, 1912.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

BANWARILAL SINGH—PLAINTIFF—APPELLANT

versus

DWARKANATH MISSIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Permanent tenancy - Presumption—Evidence Act (I of 1872), s 90—Document more than 30 years old—Copy, admissibility of—Execution, proof of—Non-admissible evidence—Objection, failure to take, effect of—Bengal Tenancy Act (VIII B. C. of 1885), s. 18A, scope of—Landlord not party to document—Document, whether can be used as against landlord—Minor—Admission by guardian, effect of—Court of Wards, admission by, whether binding on minor.

In an action in ejectment the 1st defendant, who claimed the property as purchaser of the right, title and interest of the other defendants who had been in possession of the disputed property by right of inheritance from their father, produced a certified copy of a *dar-mokarari*, purporting to have been executed in 1830 and containing a recital of the existence of the tenancy, and a certified copy of a mortgage-bond of 1861, in which the *factum* of the permanent character of the tenancy was acknowledged by the grantor of the mortgage, and also other proofs showing that the tenancy which had descended from father to son for three generations was effectively transferred from time to time and was held at a uniform rate for at least eighty years before the institution of the suit:

Held, (1) that from these circumstances the Court could legitimately infer that the tenancy, which was of unknown origin, was in its inception of a permanent character; [p. 829,col. 1.]

(2) that the inference to be drawn was one of law from facts found or admitted. [p. 829, col. 1.]

Mohoram Sheikh Chaprasi v. *Telamuddin Khan*, 13 Ind. Cas. 606; 15 C. L. J. 220: 16 C. W. N. 567, relied on.

Where a *dar-mokarari* lease granted in 1830 was not in existence and there was no proof of its execution and a certified copy of the document obtained in 1861 and since then produced in Court on several occasions was received at the trial in evidence:

Held, that the certified copy was admissible in evidence, though there was no proof of the execution of the original document which had been lost. [p. 828, col. 1.]

Shahzadi Begam v. *Secretary of State*, 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 439; 34 I. A. 194 (P. C.), followed.

The omission to take objection to the admission of a document which is absolutely inadmissible does not make it admissible in law [p. 828, col. 2.]

Section 18A of the Bengal Tenancy Act does not prevent the use of a document, to which the landlord is not a party, to show that there was an assertion by the tenant at the time that the tenancy was of a particular description. [p. 827, col. 2; p 828, col. 1.]

Admissions made by the guardian of the person of an infant as to the property rights of the latter are not binding on the infant, but such admissions may be receivable in evidence for other purposes. [p. 828, col. 1.]

An admission by the Court of Wards, made at the time when the estate was in charge of the Court, cannot bind or prejudice the infant proprietor. [p. 828, col. 2.]

Appeal against the decree of the District Judge, Manbhum, dated the 20th August 1909, affirming that of the Subordinate Judge, Purulia, dated the 29th March 1909.

Dr. *Rash Behary Ghose*, Babus *Bepin Behari Ghose*, *Lalit Mohan Ghose* and *Karunamoy Ghose*, for the Appellant.

Babus *Umakali Mukerjee*, *Biraj Mohan Majumdar* and *Indu Bhusan Roy*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in an action in ejectment. The 1st defendant claims as purchaser of the right, title and interest of the other defendants, who were in possession of the disputed property by right of in

heritance from their father. The original grant was in favour of the grandfather of these defendants and the question in controversy between the parties is, whether the tenancy was permanent and transferable. The District Judge, in concurrence with the Court of first instance, has found upon this question against the plaintiff. This decision has been challenged in this Court on the ground that it is based on evidence not admissible in law.

The first document to which exception has been taken is a *dar-mokarari* lease granted on the 20th February 1830 by Kanchan Singh, the first tenant. The original of this document is not in existence and a copy has been produced which was taken in 1861 and, since then, has been produced in Court on several occasions. It has been contended that as there is no proof of execution of the original, the copy cannot be received in evidence under section 90 of the Indian Evidence Act. In support of this proposition reliance has been placed principally upon the terms of section 90, and it has been argued with considerable force that by no stretch of language can it be said that in the case before us the presumption mentioned in section 90 is applicable to the copy produced. Section 90 provides that where any document purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed or attested by the persons by whom it purports to be executed and attested. It has been argued that this section contemplates the production of the original document, and that only upon such production can the Court presume that the signature and every other part of the document which purports to be in the handwriting of any particular person was in that person's handwriting. This view, it has not been disputed, may lead to hardship where the original of an ancient document has been lost (though a certified copy is in existence) and no witness is available who can speak to its actual execution; by way of analogy, it has been mentioned that a similar hardship arises in cases where an unstamped original has been lost and a certified copy cannot be received in evidence even upon payment of penalty [*Marine Investment Co.* v. *Haviside* (1) and *Kopasan* v. *Shamu* (2) which is in conflict with *Harun Chunder* v. *Russick Chunder* (3)]. We do not think any question of hardship really arises for consideration; what we have to determine is, whether the interpretation of section 90 suggested by the appellant is justified by its language; that, we think, must be conceded in his favour. But it is admitted that a different construction was placed upon section 90 by Mr. Justice Wilson in the case of *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (4), which was accepted as good law though with some hesitation by Sir Arthur Strachey in the case of *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (5). The observations in *Vasudeo* v. *Bhau* (6) possibly tend in the same direction, while the observations in *Appathura Pattar* v. *Gopala Panikkar* (7) support the contrary view. In view of this divergence of judicial opinion, it would have been our duty to construe the terms of section 90 of the Indian Evidence Act; but whatever our opinion might have been if the matter were *res integra*, we are bound by the decision of their Lordships of the Judicial Committee in the case of *Shahzadi Begam* v. *Secretary of State* (8) which, we think, concludes the point against the appellant. As it has been contended, however, that the point which now requires consideration was not decided by their Lordships, we must examine the circumstances of that case. In that case reliance was placed upon a deed of exchange, the original of which had been lost. A certified copy, obtained in 1851, was produced at the trial. The genuineness of this certified copy was questioned. The District Judge found

(1) (1872) 5 H. L. 624; 42 L. J. Ch. 173.
(2) 7 M. 440; 2 Ind. Dec. (N. S.) 891.
(3) 20 W. R. 63.
(4) 5 C. 886; 6 C. L. R. 199; 2 Ind. Dec. (N. S.) 1172.
(5) 22 A. 294 at p. 303; A. W. N. (1900) 82; 9 Ind. Dec. (N. S.) 1227.
(6) 21 B. 528; 11 Ind. Dec. (N. S.) 354.
(7) 25 M. 674.
(8) 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 439; 34 I. A. 194 (P. C.).

that the certified copy was genuine and admitted it in evidence. Upon appeal to this Court, the certified copy was pronounced a forgery and the document was consequently rejected. When the matter went before the Judicial Committee, reliance was placed on behalf of the appellant upon the certified copy, and it was argued that the certified copy was not a forgery because it bore the same stamp and water marks as other contemporary documents, admittedly genuine and produced in a previous litigation between the parties. The respondents contended that the certified copy was a forgery, and also argued that the certified copy, even if genuine, was not admissible. On behalf of the appellant in reply, reference was made to the decision in *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (4) and it was contended that the certified copy was admissible without proof of execution of the original. Lord Collins in the course of his judgment first observed with regard to the deed of exchange that the certified copy was produced from the custody of Shahzadi Begum and was found to be written on paper bearing the same stamp and water marks as other documents on the record of that litigation; he then proceeded to state that their Lordships agreed with the District Judge that it was admissible in evidence and for the reasons given by him adopted his conclusions as to its genuineness. The learned Vakil for the appellant has contended that the only question before the Judicial Committee was, whether or not the certified copy was genuine and that their Lordships did not decide whether the certified copy, if genuine, could be received in evidence because the parties at the original trial had contended that there was a genuine original which had been lost, and the only question thus was whether what was produced as a certified copy was genuine or not. In our opinion it is clear from the report of the arguments before the Judicial Committee that the question of the admissibility of the certified copy was expressly raised before their Lordships and was treated by them as really not open to serious argument. But even if it be held that their Lordships assumed the document to be admissible because it was conceded that there was a genuine original, the case before us is not distinguishable from the one before the Judicial Committee, because the judgment of the District Judge shows that even according to the plaintiff there was a genuine original lease. Reference was made on behalf of the appellant to the decision of the House of Lords in *Padwick* v *Wittcomb* (9) to show that the certified copy would not be admissible, according to the rules of evidence recognised in English Law; that decision, however, is clearly distinguishable and is of no assistance to the appellant. On the other hand, the observations in *Bullen* v. *Michel* (10) undoubtedly support the view taken by their Lordships of the Judicial Committee [see also Wigmore on Evidence, Volume III, section 2143]. It is not necessary, however, to place reliance upon the rule of English Law on the subject; the question before us must be determined with reference to the statutory provisions contained in section 90 of the Indian Evidence Act; and in view of the decision of their Lordships of the Judicial Committee in *Shahzadi Begum* v. *Secretary of State* (8), we must hold that the certified copy was properly received in evidence.

A second objection has been taken to the admissibility of this document. Our attention has been invited to section 18A of the Bengal Tenancy Act, which was introduced by section 8 of Act I of 1907 (B. C.). That section provides that nothing contained in any instrument of transfer to which the landlord is not a party shall be evidence against the landlord of the permanence, amount or fixity of rent, area, transferability or any incident of any tenure or holding referred to in such instrument. In our opinion, this section is of no assistance to the appellant. If it be assumed that the section is applicable, it merely lays down that nothing contained in the instrument to which exception is taken can be used as evidence as against the landlord of the permanence of the tenure mentioned in such instrument. This does not prevent the use of the document for an entirely different purpose, namely, to show that there was an assertion by the tenure-holder at the time that

(9) (1853) 4 H L. C. 425; 94 R. R. 165; 10 E. R. 527.

(10) (1816) 4 Dow. 297 at pp. 321, 333; 3 E. R. 1171; 2 Price 399; 16 R. R 77.

his tenancy was of a particular description. Exhibit O (the *dar mokarari patta*) must, therefore, be treated as admissible in evidence.

The second document to which exception has been taken is a usufructuary mortgage-bond executed by Durbari Singh, the son of the original tenant, on the 8th March 1861. What has been produced is a certified copy of the document, and it contains an assertion by the executant that the property granted by way of usufructuary mortgage was his *maurasi mokarari* property and that it had been possessed by his father who made a *dar-mokarari* settlement thereof with the father of the mortgagee, referring obviously to the document of the 20th February 1830. We are of opinion, for the reasons already given, that the certified copy was admissible in evidence.

The third document to which exception has been taken is the record of a statement by the mother and step-mother of the predecessor of the plaintiff in 1861. It has been argued that the guardian of the person of the infant was not competent to bind the minor by an admission as to his property-rights, and in support of this view, reliance has been placed upon the cases of *Brojendro Coomar Roy* v. *Chairman of the Dacca Municipality* (11), *Suruj Mookhi Konwar* v. *Bhagwati Konwar* (12) and *Ram Autar* v. *Mahammad Mumtaz Ali* (13). In our opinion, it cannot be disputed that the guardians of the person of the infant were not competent to bind the ward by an admission of this character. The document, however, appears to have been used in the Court of first instance, not with a view to bind the plaintiff by the admission of the guardian, but for an entirely different purpose. The plaintiff himself produced a statement by the mother of the infant to the effect that Durbari Singh, the son of the original tenant, held merely as an *ijaradar*; it was with a view to contradict this statement that the defendants produced the statement to which exception has been taken. For this limited purpose, the document was undoubtedly receivable in evidence; but apparently, it has been used by the District Judge for a wider purpose. To this extent the judgment of the District Judge is open to criticism.

The fourth document to which exception is taken is a road cess return. The objection here is really not to the admissibility of the document but rather to its proof. The document bears the seal of the Raja; it is contended that the District Judge should also have compared what purports to be the signature of the Raja on the document with his signatures in certain documents which were produced at the trial and were more than 30 years old. In our opinion, the judgment of the District Judge is not open to criticism on this point. The aspect of the matter which has been presented here, was not placed before the District Judge, and the only question argued there was about the admissibility of the document; in that objection, there was no substance.

The fifth document to which exception is taken is the record of an admission by the Court of Wards, made apparently on behalf of the predecessor of the plaintiff when the estate was in charge of the Court. It cannot be seriously disputed that the admission by the Court of Wards cannot bind or prejudice the infant proprietor. But the judgment of the District Judge is not open to criticism on this ground, because he does not really base his conclusion upon the admission.

We may observe incidentally that some of the objections urged here were not taken, at least in the same form, in the Court below, but we have allowed them to be argued fully, partly from the importance of the questions raised, and partly in view of the principle that omission to take objection to the admission of a document which is absolutely inadmissible does not make it admissible in law: *Miller* v. *Babu Madho Das* (14), *Girindra Chandra* v. *Ravendra Nath* (15), *Basawa* v. *Kalapa* (16) and *Oomatool Fatima* v. *Ghunnoo Singh* (17).

The position, then, is that we have a document of 1830 in which the existence

(11) 20 W. R. 223.
(12) 10 C. L. R. 377.
(13) 24 I. A. 107; 24 C. 853; 1 C. W. N. 417; 7 Sar. P. C. J. 148; 12 Ind. Dec. (N. S.) 1237 (P. C.).

(14) 19 A. 76; 23 I. A. 106; 7 Sar. P. C. J. 73; 9 Ind. Dec. (N. S.) 50 (P. C.).
(15) 1 C. W. N. 530.
(16) 2 B. 489; 1 Ind. Dec. (N. S.) 748.
(17) 1 W. R. 22.

of the tenancy is recited. We have further a document of 1861 in which the *factum* of the tenancy is acknowledged by the grantor of the mortgage. It is true, the landlord was not a party to these transactions; but it is not disputed on his behalf that there was a tenancy in favour of Kanchan Singh and subsequently in favour of his son Durbari Singh. We have thus a tenancy of unknown origin, which has descended from father to son for three generations, has been effectively transferred from time to time and has been held at a uniform rent for at least 80 years from 1829 up to the date of the present suit. From these circumstances we are of opinion that the Court may legitimately infer that the tenancy in its inception was of a permanent character: *Mohoram Sheikh Chaprasi* v. *Telamuddin Khan* (18).

In this view it is not material to rely upon the documents to which objection has been successfully taken, namely, the admission made by the mother and step-mother of the infant in 1861, the statement in the road-cess return, and the statement in the sale certificate, which after all is merely the allegation of the decree-holder and cannot in any way be direct evidence against the landlord. Even if all these statements be left out of consideration, the circumstances already mentioned, which have been indisputably established, support the conclusion that the tenancy was of a permanent character. It is, consequently, needless to remand the case for further consideration.

The inference to be drawn is one of law from facts found or admitted: *Mohoram Sheikh Chaprasi* v. *Telamuddin Khan* (18); the facts established by the evidence legally admissible are sufficient to support the decree of the District Judge. But we desire to add that we do not in any way depart from the principle recognised by Sir Richard Garth, C. J., in *Womes Chunder Chatterjee* v. *Chundee Churn Roy* (19), which we hold does not apply to this case.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(18) 13 Ind. Cas. 606; 15 C. L. J. 220; 16 C. W. N. 567.

(19) 7 C. 293; 3 Ind. Dec. (N. S.) 737.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 39 OF 1918.

February 20, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

AIYATHURAI PILLAI—PLAINTIFF—APPELLANT

versus

GNANAPRAKASA ODAYAR *alias* MUTHUSAMI ODAYAR—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 115—Estoppel—Institution of suit in Small Cause Court—Jurisdiction, objection to—Return of plaint for presentation to ordinary side—Order not appealed against—Revision against decree—Objection to jurisdiction, maintainability of.

Plaintiff instituted a suit on the Small Cause Side of the Munsif's Court. The defendant pleaded want of jurisdiction by the Small Cause Court and, on his objection, the Court returned the plaint for presentation on the ordinary side. Against the decree of the District Munsif, there was an appeal to the Subordinate Judge and against the appellate decree of the latter a revision petition was filed in the High Court. The defendant raised the objection in the High Court that the suit was of a small cause nature and that no appeal lay to the Subordinate Judge.

Held, that the defendant was estopped from raising the objection. [p. 830, col. 1.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Bakewell, in Civil Revision Petition No. 113 of 1917, preferred to the High Court against the decree of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit No. 97 of 1916 (Original Suit No. 55 of 1915, on the file of the Court of the District Munsif, Tiruvalur.)

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.—The order for return of the plaint to the ordinary side was obtained at the instance of the defendant respondent. That order was not appealed against. Mr. Justice Bakewell should not have allowed him to turn round and state that the suit was of a Small Cause nature.

Mr. *S. T. Srinivasagopalachariar*, for the Respondent.—Jurisdiction cannot be conferred by consent or pleadings of parties. *Ledgard* v. *Bull* (1), *Minakshi Naidu* v. *Subramanya Sastri* (2) and *Kollipara Seeta-*

(1) 9 A. 191 (P. C.); 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561.

(2) 11 M. 26 (P. C.); 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind Jur. 393; 4 Ind. Dec. (N. S.) 18.

paty v. *Kankipaty Subbaya* (3). Even assuming that the original order was proper, it cannot be said that consent or pleadings can create a substantive right of appeal.

At any rate, the suit is of a Small Cause nature and it has been held that the question of jurisdiction is not *res judicata*. See *Subba Rao* v. *Perumal Reddy* (4), *Venku* v. *Mahalinga* (5) and *Kaveri Ammall* v. *Sastri Ramier* (6). I am not estopped from objecting to the entertainment or disposal of the appeal.

[SESHAGIRI AIYAR, J.—If you accept that the suit is properly instituted, then there is also appellate jurisdiction.]

See *Rangoon Botatoung Co. Ltd.* v. *Collector of Rangoon* (7). A right of appeal does not always follow. The law does not sanction a repetition of an error of law.

JUDGMENT.—We are constrained to differ from the learned Judge and to hold that the question of jurisdiction cannot be raised. The appellant before us presented his plaint on the Small Cause Side. The learned Judge allowed the present respondent to argue that no appeal from the decision of the District Munsif in the litigation that was initiated would lie, because the suit was of a Small Cause nature and the order of return for presentation on the ordinary side was wrong. The order was not appealed against and was obtained on respondent's objection. We do not think, and have been shown no authority, that he was entitled at a later stage to object to the jurisdiction, which he had himself designated as the proper one.

The learned Judge's decision is set aside and the civil revision petition remanded for re-hearing with reference to the other points taken in it. Costs to date will follow the result and be provided for in the order to be passed.

M. C. P.

Appeal allowed; Case remanded.

(3) 1 Ind. Cas. 543 (F. B.); 33 M. 323; 20 M. L. J. 718; 6 M. L. T. 121.
(4) 37 Ind. Cas. 906; (1917) M. W. N. 318; 5 L. W. 467.
(5) 11 M. 393; 12 Ind. Jur. 421; 4 Ind. Dec. (N. S.) 274.
(6) 26 M. 104 at p. 109; 13 M. L. J. 58.
(7) 16 Ind. Cas. 188; 40 C. 21; 16 C. W. N. 961; (1912) M. W. N. 781; 12 M. L. T. 195; 23 M. L. J. 276; 16 C. L. J. 245; 14 Bom. L. R. 833; 39 I. A. 197; 6 L. B. R. 150; 10 A. L. J. 271; 5 Bur. L. T. 205 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 262 OF 1917.

December 7, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

NARAIN DAS—DEFENDANT—APPELLANT

versus

DILAWAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 71—Mortgage—Execution, proof of—Attestation, valid, what is—Recital as to consideration, value of—Burden of proof.

Where the execution of a mortgage has been proved in the manner prescribed by section 71 of the Evidence Act, and, on the face of it, it appears to have been executed in the presence of more persons than one, it is a good mortgage. [p. 831, col. 1.]

The recital in a mortgage-deed of the receipt of consideration is good *prima facie* evidence against an auction-purchaser just as it would be evidence against a purchaser by private treaty. [p. 831, col. 2.]

Second appeal from a decree of the District Judge, Meerut, dated the 21st December 1916, reversing that of the Sub-Judge, Meerut, dated the 29th June 1916.

FACTS.—This was a suit for sale on the basis of two mortgages. One mortgage was executed on the 14th December 1903 by defendant No. 1 and his brother, the father of defendants Nos. 2 and 3, and the deed was attested by five marginal witnesses; in form the mortgage combined a simple with a usufructuary mortgage. The second mortgage-deed was executed on the 6th December 1906 by defendant No. 1 for Rs. 490 and contained an acknowledgment of the receipt of the consideration by the mortgagor. Defendant No. 4 had purchased the equity of redemption and he alone contested the suit. He denied execution of the deeds according to law and their consideration.

To prove execution of the deed of the 14th December 1903 one only of the attesting witnesses was available and was produced by the plaintiff, the others were

either dead or could not be found. This witness admitted his signature on the deed, but was unable to say whether the mortgagor signed in his presence; so far as he remembered the thumb-mark and the seal of the executant were already on the deed when he signed. The scribe was also produced; he stated that the mortgagor signed in his presence, but said nothing about the other witnesses having attested the deed. A third witness identified the signature of one of the witnesses who was dead.

In proof of the consideration of the deed of the 6th December 1906, the plaintiff produced evidence in respect of the various items which made up the consideration.

The trial Court held that the plaintiff had failed to prove due execution of the deed of 1903 and consideration for the deed of 1906, the recital in this latter deed as to consideration being in its opinion insufficient to shift the burden on to the contesting defendant. The suit was accordingly dismissed.

On appeal the lower Appellate Court took a contrary view of the evidence, and decreed the claim in full, holding that, having regard to sections 69 and 71 of the Evidence Act, due execution of the earlier deed was proved, and that the recital in the later deed proved consideration.

Defendant No. 4, contesting defendant, appealed to the High Court.

Mr. *Kailas Nath Katju*, for the Appellant

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—We think that the view taken by the Court below was correct. In the first place, we consider that under the circumstances the mortgage of 1903 was proved. We think that execution of the mortgage having been proved in the manner prescribed by section 71 of the Evidence Act, and on the face of it, it appearing to have been executed in the presence of more than one person, it was a good mortgage. The next contention was, that the mortgage being a usufructuary mortgage in form, the plaintiff could not recover the money. The mortgage was in a peculiar form and combined a simple mortgage with a usufructuary mortgage. As a matter of fact when the mortgage was made, possession could not be delivered because possession was already in the hands of a prior mortgagee, who is the appellant here and was the contesting defendant in the Court below. Furthermore the mortgagee himself purchased the equity of redemption and remained in possession, keeping the plaintiff out of possession. With regard to the consideration for the second mortgage, we think the Court of first instance was wrong in holding that the recital in the bond was not evidence against Narain Das (We assume that this is what he meant.) It is clear that if the acknowledgment in the bond was admissible against Narain Das, it was *prima facie* evidence against him and even if it stood alone, cast the *onus* upon the defendant of showing that the consideration failed in whole or in part. This was expressly decided in the case of *Babbu* v. *Sita Ram* (1). That case was an appeal under the Letters Patent from the decree of a learned Judge of this Court, who held that the acknowledgment in the mortgage was good *prima facie* evidence and a Bench of two Judges were unanimous in holding that the decision of the Single Judge was correct. Furthermore on the question as to whether or not the acknowledgment in the bond was admissible against the purchaser from the mortgagor we have the decision of the late Chief Justice Stanley and one of us. The case is *Nawal Kunwar* v. *Bakhtawar Singh* (2). We think that the acknowledgment is evidence against the auction-purchaser, just as it would be evidence, against a purchaser by private treaty. Of course it is possible that in different cases the value of the acknowledgment as evidence may vary, and possibly it may be more weighty against a purchaser by private contract than against an auction-purchaser, but it is clearly evidence against both. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 25 Ind. Cas. 426; 12 A. L. J. 806; 36 A. 478.
(2) 17 Ind. Cas. 644; 10 A. L. J. 390.

PEARY MOHAN *v.* SARAT KUMAR ROY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2568 OF 1917.

May 9, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Duval.

Raja PEARY MOHAN MUKHERJEE—PLAINTIFF—APPELLANT

versus

Kumar SARAT KUMAR ROY—DEFENDANT—RESPONDENT.

Bengal Public Demands Recovery Act (I B.C. of 1895), *ss.* 10, 12, 15, 32—*Certificate, execution of—Appeal against order in execution, dismissal of—Suit to recover amount levied—Limitation—Bengal Drainage Act (VI B C. of* 1880), *ss* 2, 42, 44A, 50—*Rent-free holder, whether tenure-holder—Payment by landholder—Right to recover payment from tenure-holders.*

In execution of a certificate under the Bengal Public Demands Recovery Act the defendant realized from the plaintiff certain costs of drainage. When the certificate was filed and notice issued upon the plaintiff, he did not contest his liability. He took objection only when notice was served in proceedings taken to execute the certificate, and his objection was disallowed. He preferred an appeal, which was rejected. Then, within six months of the date on which the appeal against the order in the execution case had been disposed of, the plaintiff instituted this suit for refund of the amount realized from him in execution of the certificate:

Held, that as the suit was not brought within six months from the date of decision of an appeal from the original order of the Certificate Officer, the suit was barred by limitation under section 15 of the Bengal Public Demands Recovery Act. [p. 833, col. 2.]

A certificate under the Bengal Public Demands Recovery Act can be executed only after it has become final, and, so long as the certificate is not set aside, the judgment-debtor cannot get back the money recovered in execution of that certificate. [p. 833, col. 2]

A judgment-debtor cannot, by merely preferring an appeal against an order passed in execution of a certificate, get a fresh start of six months for bringing a suit under section 15 of the Public Demands Recovery Act. [p. 833, col. 2; p. 834, col. 1.]

A rent-free holder comes within the definition of tenure-holder in section 2 of the Bengal Drainage Act. [p. 834, col. 1.]

Under the Bengal Drainage Act the owner of an estate is primarily liable to the Collector for the apportioned sum in respect of the drainage costs, and a landholder who has made any payment in respect of lands which are held by tenure-holders immediately under him is, upon application to the Collector, entitled to recover the amount so paid. [p. 834, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Hooghly, dated the 30th May 1917, affirming that of the Munsif, 1st Court, Hooghly, dated the 30th August 1913.

FACTS appear from the judgment.

Babu *Mohendranath Roy* (with him Babu *Haradhan Chatterjee*), for the Appellant.—As to maintainability of suit, refers to section 7 of Act I of 1895 (Public Demands Rrcovery Act). Refers to sections 8, 12, 15 and 32 of Act I of 1895. Section 32 gives the right of appeal. Under section 15 this suit is within time, having been brought within six months from the decision of appeal by the Collector. Reads sections 15 and 32. The third clause of section 15 is to be taken independently. I get the benefit of the third clause if I put in a petition of objection. This is substantially a suit for cancellation of certificate and refund of money. The proceedings of the certificate officer are without jurisdiction and so it was not necessary to sue for cancellation of the certificate at all The suit prayed for a relief and I would be within time under section 15. Under the Drainage Act, it is only a person who has been declared a landholder of a rent free tenure under section 50 that can file a certificate. Reads sections 51A, 51B and 51C of the Drainage Act. Defendant in this case has no right to proceed under the aforesaid sections. As to merits, I am neither *lakheraj dar* nor proprietor. I was wrongly recorded as landholder. That matter has not been decided.

Babu *Bepin Behari Ghose* (with him Babus *Broja Lal Chuckerbutty* and *Mohesh Chandra Banerjee*), for the Respondent.—The suit is not for cancellation or modification of a certificate. Under section 12 a judgment debtor may, within 30 days, file a petition of objection denying his liability. If the certificate officer rejects his application, he can apply to the Commissioner. Then he can come to the Civil Court for some relief. Appeal must be under section 12. Section is a general section of appeal. Section 15 does not mean to say from 'any order.' Section 15 has been wrongly interpreted by the other side. Refers to *Barhamdeo Narayan Singh* v. *Bibi Rasul Bandi* (1). In this case there is no prayer for the setting aside of the certificate, therefore he cannot say that it is such a suit. The suit is not maintainable. The certificate is not *ultra vires*: refers to section 30 of the Drainage Act. Plaintiff was responsible as he was landholder. He cannot recover money which he was bound

(1) 32 C. 691; 1 C. L. J. 360.

to pay under legal process so long as the original judgment stands: *Jagannath Marwari* v. *Giridhar Singh* (2) and *Dwarka Nath Kundu* v. *Mohendra Nath Roy* (3).

Baba *Haradhan Chatterjee* replied.

JUDGMENT.—This appeal arises out of a suit for refund of certain costs of drainage, which have been realised from the plaintiff by the defendant in execution of a certificate under the Public Demands Recovery Act.

It appears that certain drainage works were constructed in the District of Howrah. The defendant is the owner of the estate within which Mauza Bali is included. The Commissioners appointed under the Bengal Drainage Act apportioned the costs of the drainage works between the proprietors, the tenure-holders and under tenure-holders and a sum of Rs. 947 was assessed upon certain *lakheraj* lands in Bali as the proportionate amount of drainage costs. The Collector realised this amount together with other sums payable in respect of the estate from the defendant. The defendant thereupon took steps to have the money realised from the plaintiff, under the certificate procedure. The certificate was filed and notice issued upon the plaintiff, but he did not contest his liability when the notice was served. Subsequently in proceedings which were taken to execute the certificate, the plaintiff took objection and the objection was disallowed. There was an appeal and the appeal was rejected on the 28th May 1912.

The present suit was instituted on the 30th August 1912. The suit was dismissed by the Court of first instance. On appeal the suit was decreed.

On second appeal the case was remanded for re-hearing the appeal after finding whether the plaintiff was declared to be the "landholder" in respect of the *lakheraj* lands in Bali within the meaning of section 50 of the Drainage Act.

The learned Subordinate Judge after remand has held that the suit is barred by limitation and that the plaintiff is not entitled to recover the amount from the defendant. It is also found that the Drainage Commissioners determined that the plaintiff was a landholder in respect of the *lakheraj* lands in Bali within the meaning of section 50 of the Act.

The plaintiff has appealed to this Court.

The first question for consideration is whether the suit is barred by limitation.

It is contended before us that the suit is not barred because section 15 of the Public Demands Recovery Act I of 1895 provides that a person deemed to be the judgment-debtor under the provisions of section 8 may, at any time within six months from the service upon him of notice under section 10, or if he files a petition of objection under section 12 from the date of the determination thereof, or if he appeals under section 32 from the date of the decision of such appeal, bring a suit in the Civil Court to have the said certificate cancelled or modified.

The plaintiff did not bring the suit within six months from the date of the service of notice under section 10, nor did he file a petition of objection under section 12. But the suit is within six months of the date on which the appeal which he filed against the order in the execution case had been disposed of. It is urged that as section 32 of the Act provides for an appeal from (among other things) any original order of a certificate officer other than the District Collector, an order in an execution case, if it is an original order of a certificate officer, is appealable under section 32 and as section 15 gives the period of six months from the date of decision of an appeal under section 32, the plaintiff's suit is not barred.

We are, however, unable to accept this construction of the section. The plaintiff has not asked for cancellation of the certificate. He has prayed for a declaration that the defendants' claim for realising the drainage charge was unjust and illegal. But so long as the certificate is not set aside, the plaintiff cannot get back the money recovered in execution of that certificate. Section 16 of the Public Demands Recovery Act provides that "when no suit is instituted by the judgment-debtor within the period specified in section 6 or section 15 or if any such suit having been instituted is finally decided against such judgment debtor, such certificate shall become absolute and shall have to all intents and purposes the same force and effect as a final decree of a Civil Court." A certificate, therefore, can be executed only after it has become final. We do not see how a judgment debtor can, by merely preferring an appeal against

(2) 29 Ind Cas. 429; 19 C. W. N. 102 at p. 111.
(3) 16 Ind. Cas. 131; 16 C. L. J. 437.

an order passed in execution of a certificate (and the certificate can be executed only after it has become final), get a fresh start of six months for bringing a suit under section 15 of the Act. Reading sections 15 and 1[illegible] together, we are of opinion that he cannot do so.

It is contended, however, that the whole proceeding is bad because the defendant had no right to realise the money from the plaintiff under the provisions of the Drainage Act.

It has been found that the Commissioners determined that the plaintiff was to be deemed the landholder in respect of *lakheraj* lands under section 50 of the Drainage Act.

Under section 28 of the Drainage Act, the Drainage Commissioners have to apportion costs of the drainage works among the several landholders and tenure-holders, and under section 30 of the Act the Commissioners are to declare whether the holders of the estate of the tenure or of the under-tenure shall be deemed to be the landholders liable to pay to the Collector the sum apportioned as payable in respect of such lands.

The defendant, who is the owner of the estate, appears to have been declared to be the landholder who was liable to pay the sum apportioned to the Collector in respect of the *lakheraj* lands of which the plaintiff was declared to be the landholder. The defendant was thus primarily liable to the Collector. The Collector realised from him the entire amount which was payable by the plaintiff in respect of the drainage costs. A rent-free holder comes within the definition of a tenure holder within the meaning of section 2 of the Act; and section 44 provides that any landholder who has made any payment in respect of lands which are held by tenure-holders immediately under him may, upon application to the Collector, be entitled to recover under the procedure prescribed by the Public Demands Recovery Act. The defendant did adopt that course and realised the amount from the plaintiff.

We think under the circumstances that the proceedings were not illegal or without jurisdiction.

That being so, the appeal fails and is accordingly dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 50 OF 1918

January 10, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MOORIATH VARIATH, KARNAVAN AND MANAGER SANKUNNI VARIAR—DEFENDANT No. 1—APPELLANT

versus

MELEDATH K. KUNJI NANGAYARAMMA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss 76 (i) 83—Malabar mortgage—Improvements effected by mortgagee, value of, whether 'amount due on mortgage' under s 83—Tender of compensation money Malabar Compensation for Tenants' Improvements Act (I Mad. of 1900), s 5, scope of.

Section 76 (*i*) of the Transfer of Property Act has no application to money due for improvements to a mortgagee in Malabar, because the value of improvements effected by such mortgagee cannot be brought under the expression 'amount due on the mortgage' in section 83 of the Act. [p. 83 , col. 1.]

A mortgagee in Malabar has a right to remain in possession till he is actually paid or till he is ejected by decree of Court and hence he is not accountable for mesne profits till either of those events happens. [p. 835, col 1.]

Parameswara Ayyan v. *Kittunni Valia Mannadiar*, 43 Ind. Cas. 173; 33 M. L. J. 591, followed.

Per *Napier*, *J*.—Section 5 of the Malabar Compensation for Tenants' Improvements Act applies to all tenants except such as have been paid If payment has been made and the term is determined or the mortgage has been discharged, the section has no application. If the 'compensation is so due,' *i. e.*, has not been paid, then the section applies. [p. 835, col 2.]

According to the policy of the Act, the compensation is to be ascertained by the Court. If a tenant accepts payment he waives his right, but if he claims assessment by the Court, there is nothing to deprive him of his statutory right under section 5, even if the amount tendered is found to be sufficient. [p. 835, col. 2; p. 836, col. .]

Second appeal against the decree of the Court of the Subordinate Judge, South Malabar at Calicut, in Appeals Suits Nos. 88 and 91 of 1917, preferred against the decree of the Court of the District Munsif, Ottapalam, in Original Suit No. 372 of 1916.

Mr. *T. Eromani Unni*, for the Appellant.

Mr. *K. Subramanya Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The contentions as to the 1st defendant's (appellant mortgagee's) right to additional compensation for improvements

(that is, in addition to what has been awarded to him by the lower Court) raise questions of fact which we cannot entertain in second appeal.

The Subordinate Judge, however, was wholly unjustified in assuming that the provisions of the Transfer of Property Act were not in the minds of the Benches of this Court which decided *Chami* v. *Ana Pattar* (1) and *Parameswara Ayyan* v. *Kittunni Valia Mannadiar* (2) and in awarding mesne profits to plaintiff after the date of the tender made in Court by the respondents under section 83 of Act IV of 1882. Mr. Justice Seshagiri Aiyar does refer to section 83 of that Act in his judgment in the former case. Section 76 (*i*) refers to section 83 by using the words "in manner hereinafter provided" and the language of the two sections (one speaking of "the amount for the time being due on the mortgage" and the other "the amount remaining due on the mortgage") is very similar when referring to the mortgagee's right to be paid his money before redemption.

Mr. Justice Seshagiri Aiyar clearly says in *Chami* v. *Ana Pattar* (1) that he agreed with the appellant's Vakil in that case "that the value of improvements cannot be brought under the expression 'amount due on the mortgage' in section 83 of the Transfer of Property Act." It follows that section 76, clause (*i*), also has no application to the money due for improvements to a Malabar mortgagee.

Nothing that has been advanced by the respondent's learned Vakil in the arguments in this case has tended to throw any doubt on the opinion I expressed in *Parameswara Ayyan* v. *Kittunni Valia Mannadiar* (2) that the mortgagee in Malabar has a right to remain in possession till he is actually *paid* or till he is ejected by decree of Court, and hence that he is not accountable for mesne profits till either of these events happens. The Legislature cannot have intended to make a mortgagee tenant liable for mesne profits on tender but not a lessee tenant, which would be the result if the respondent's contention is accepted, section 5 of the Malabar Compensation for Tenants' Improvements Act making no difference between a mortgagee tenant and a tenant holding on a mere Verumpattam or on a mere Kuzhikanom right.

The lower Court's decrees will, therefore, be modified by striking out of the first Court's decree the words beginning with "and future mesne profits" and ending with "from this date."

The parties will bear their respective costs in this second appeal.

NAPIER, J.—I agree with the decision in *Parameswara Ayyan* v. *Kittunni Valia Mannadiar* (2). The matter seems to me to be concluded by the language of section 5 of the Malabar Compensation for Tenants' Improvements Act. That section seems to apply to all tenants except such as have been paid. If payment has been made and the term is determined or the mortgage has been discharged, the section has no application. If the compensation is so due that is, has not been paid, then the section applies. The Legislature could have added the words "or a proper sum tendered" but has not thought fit to do so, although in the same section it speaks of payment or tender of the mortgage money. We are asked to import section 76 (*i*) of the Transfer of Property Act. I agree with Seshagiri Aiyar, J., in *Chami* v. *Ana Pattar* (1) that this does not apply and I further think that if it was to be applied, it would introduce a special rule in cases of mortgages while another rule based on the Malabar Compensation for Tenants' Improvements Act remained for leases, which constitute a number of cases in which compensation has to be paid. I am unable to follow Seshagiri Aiyar, J.'s reasoning at the end of his judgment in *Chami* v. *Ana Pattar* (1), as I do not understand his reference to clause 2 of section 5 of the Malabar Compensation for Tenants' Improvements Act. The Act may operate against the landlord in some cases but that can be dealt with in Court. It must also be borne in mind that according to the policy of the Act the compensation is to be ascertained by the Court; *vide* section 19 of the Act. If a tenant accepts payment he waives his right, but if he claims assessment by the Court, I can see nothing in the Act which deprives him of his statutory right under

(1) 32 Ind. Cas. 861; (1916) 1 M. W. N. 162; 3 L. W. 246.

(2) 43 Ind. Cas. 173; 33 M. L. J. 591.

section 5 of the Act even if the amount tendered is found to be sufficient.

M.C P.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 25 OF 1919.

April 7, 1919.

Present:– Pandit Kanhaiya Lal, A. J. C.

RAZZAQ ALI—PLAINTIFF—APPLICANT

versus

RAM AUTAR LAL—DEFENDANT—OPPOSITE PARTY.

Lessor and lessee—Lessor, duty of, to secure possession to lessee—Possession not secured to lessee Liability of lessor to refund money received by him from lessee.

A lessor is bound to secure to the lessee the possession of the land leased with reference to its intended use which was made known to him at the time when the lease was granted, and if he is unable to secure possession to the lessee with reference to the use he wanted to make of it, he is liable to refund any money which he may have received from the lessee.

Revision against the decree of the Munsif, Fyzabad, on Small Cause Court Side, dated the 10th January 1919.

Mr. *S. N. Roy*, for the Applicant.

Babu *Rudra Datt Sinha*, for the Opposite Party.

JUDGMENT —The defendant owned some land within the Municipal limits of Fyzabad. He let out the land to the plaintiff for the purpose of its being used for the sale of fire-wood. He received Rs 48 in advance from the plaintiff. When the plaintiff applied to the Municipal Board for permission to use the land for the purpose aforesaid, the Municipal Board refused to grant the necessary sanction. He then asked the defendant to return the amount he had paid him and, on the latter refusing to do so, filed a suit for the recovery of the said money which the Court below dismissed. The finding of the Court below was that the evidence produced by the plaintiff in support of an agreement that money would be refunded in case the permission was not granted by the Municipal Board was contradictory.

It is obvious, however, that apart from any agreement which may have been entered into between the parties, the lessor was bound to secure to the plaintiff the possession of the land leased with reference to its intended use which was made known to him at the time when the lease was granted, and if he was unable to secure possession to the lessee with reference to the use he wanted to make of it, he is liable to refund the money which he had received. In other words, the lessee is entitled in consequence of the failure of the lessor to secure possession of the disputed land to have the payment made by him refunded.

The application is, therefore, allowed and the claim of the plaintiff-appellant decreed for the recovery of Rs. 48 with costs here and hitherto. The defendant will bear his own costs throughout.

Revision accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 102 OF 1917.

January 4, 1919.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BHARAT INDU AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Syed MOHAMMAD MUSTAFA KHAN

DEFENDANT—RESPONDENT.

Profits, suit for share of, against lambardar—Lambardar. *liability of, extent of, in respect of profits due before his appointment but collected by him.*

If a *lambardar* after his appointment collects the rents in respect of a particular crop, he is liable in respect of them to his co-sharers notwithstanding that he had not been appointed *lambardar* when the rents actually fell due If he actually realises the rents, he is liable for the amount so realised. If he only recovers decrees, he is liable for the amount realised under the decrees or for the ascertained value of the decrees. [p. 837, col .]

Second appeal from a decree of the Officiating District Judge, Farrukhabad, dated the 6th September 191 , confirming that of the Assistant Collector, First Class, Farrukhabad, dated the 27th June 1916.

BADRI PARSAD SINGH *v.* ANPURNA KUAR.

Dr. *Surendra Nath Sen*, for the Appellants.

Mr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—This appeal is connected with Second Appeals Nos 103 and 104 of 1917. They arise out of suits for profits brought against the Lambardar. It appears that the plaintiffs purchased a certain share on the 22nd of January 1912, and that under their purchase they were entitled to arrears of profits. The defendant was appointed Lambardar on the 5th of February 1913. The plaintiffs claim profits for *Kharif* of 1320 and *Rabi* and *Kharif* in subsequent years. The Court of first instance granted the plaintiff a decree except in respect of *Kharif* of 1320. The plaintiff appealed and contended that the expenses allowed by the first Court were too great and that the percentage on the gross rental allowed to him was too little. He also contended that he ought to have got a decree in respect of the *Kharif* of 1320. The lower Appellate Court upheld the decision of the Court of first instance on all points and dismissed the appeals. We may say at once that we agree with the Courts below, save in so far as they dismissed the plaintiff's claim in respect of the *Kharif* of 1320. The ground upon which both the Courts dismissed the plaintiff's claim in respect of *Kharif* of 1320 was because the defendant had not been appointed Lambardar when the rents of *Kharif* 1320 fell due. This view is, in our opinion, not correct. If the defendant after he had become Lambardar collected the rents for *Kharif* 1320, he would be liable to the plaintiffs notwithstanding that he had not been appointed Lambardar when the rents actually fell due. If he had actually realised the rents, he would be liable for the amount so realised. If he had only recovered decrees, he would be liable for the amount realised under those decrees or for the ascertained value of the decrees. Before deciding the appeals we refer the following issues to the Court below:—

(1) Did the defendant realise any sums, and if so, how much in respect of *Kharif* 1320. Were these sums realised after he had been appointed Lambardar?

(2) Did the defendant obtain decrees after he had become Lambardar in respect of *Kharif* 1320? If so, how much has been realised on foot of these decrees or might by reasonable diligence have been realised?

(3) As the result of the findings on these issues, how much, if anything, is due to the plaintiffs in respect of their shares of the *Kharif* of 1320?

The parties may adduce evidence relevant to these issues. On receipt of the findings the usual ten days will be allowed for filing objections.

Issues remitted.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 161 OF 1916.

April 15, 1919.

Present:—Pandit Kanhaiya Lal, J. C., and Mr Daniels, A. J. C.

Babu BADRI PRASAD SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat ANPURNA KUAR—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s 90—Will 30 years old—Presumption—Registration, effect of.

Where a contest ranged round the genuineness of a Will executed by a *talukdar*, and the party contesting the Will pleaded that it had not been proved and that the testator was not of sound disposing, mind and the objectors failed to produce the Will although they had undertaken to do so, but a certified copy, obtained from the Registration Department was produced by the propounder of the Will, and there was evidence that the Will had been acted upon:

Held, that the Will having been duly registered and the document being over thirty years old, it must, under section 90 of the Evidence Act, be presumed that it was a genuine document, and the fact that it was registered raised the presumption that the testator was of sound mind at the time of the execution of the Will. [p. 838, cols. 1 & 2; p. 840, cols. 1 & 2.]

Appeal from the decree of the Additional Subordinate Judge, Fyzabad, dated the 30th November 1916.

Mr. *Mohammad Wasim*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra* and Babu *Mahendra Deo Varma*, for the Respondent.

JUDGMENT.

DANIELS, A. J. C.—This appeal arises out of a suit for a declaration that the plaintiffs

are not bound by certain documents executed by their father Babu Sarju Narain Singh. It was necessary for the success of the plaintiffs' case that the property should be ancestral property in which they acquired an interest by birth. This issue has been found against them and is the sole question argued before us in this appeal. It has been found that the plaintiffs acquired the property under a Will executed by their father on 2nd December 1885, exactly three years before his death. Three pleas have been pressed:—

(1) that the Will is not proved,

(2) that the testator was not of sound disposing mind, and

(3) that the testator's Will is invalid by reason of the testator's estate having been under the charge of the Court of Wards.

The Will was indirectly admitted by the plaintiffs themselves, who included it in their list of documents, gave the date of it, and undertook to produce it on the date of hearing. On the date of issues, however, they stated that they had been unable to find any trace of the Will and they accordingly denied that they derived their title to the property from it. The defendant thereupon produced a certified copy obtained from the registration department. The Will having been duly registered and the document being over thirty years old, the learned Subordinate Judge presumed its genuineness under section 90 of the Evidence Act. There is evidence going to show that the Will was acted upon inasmuch as the village of Arsa Azampur, which alone of all the property possessed by the testator was not given to his sons but was reserved to the testator's widow for her maintenance, is proved to have been in possession of the widow after the testator's death. On this issue we find that the learned Subordinate Judge was fully justified in presuming the genuineness of the Will. On the second issue the appellants produced certain oral evidence, chiefly consisting of highly interested witnesses, to show that the testator was insane. The learned Subordinate Judge did not believe this evidence and points out that reliable evidence which easily might have been called, such as the medical man who is said to have attended the testator, was not called. In another place the Subordinate Judge says that at the utmost the evidence could be taken as proving that the testator was liable to fits of insanity. On the other side we have the fact that the Will was registered, which in itself raises a presumption that the testator was of sound mind. Had he not been so, it was the duty of the registering officer under section 35 of the Registration Act to refuse to register. We have also the fact that the original Will, which is presumably in the custody of the plaintiffs has not been produced and, therefore, the Court may make any presumption regarding it unfavourable to them. Finally we have the evidence of a respectable witness Babu Manohar Lal, Vakil, that the deceased used to engage him professionally and that he had occasion to see him and meet him very frequently and that he never found him mad. If the evidence of insanity produced by the appellants is disbelieved, as I think it must be, very slight evidence of sound disposing mind on the part of the testator is sufficient and the evidence which is forthcoming is sufficient. On the third issue it has not been proved that the estate was under the Court of Wards at the time of the execution of the Will. The appellants rely on vague oral statements of the same witnesses who depose as to insanity. None of the witnesses is at all precise as to the time when the estate is said to have been taken over. The taking over of the estate by the Court of Wards is a fact which could easily have been proved by unimpeachable documentary evidence. None such evidence is forthcoming. It is, therefore, not strictly necessary to consider whether under section 173 of Act XVII of 18 6, which was then in force, a Will by a Ward of the Court would be invalid. Under the first Court of Wards Act (III of 1899) as well as under the present Act (U. P. Act IV of 19 2) there is a definite prohibition, subject to certain qualifications, against a widow making a Will without the consent of the Court of Wards, though it is provided that that consent should not be withheld from any reasonable Will. Under Act XVII of 187 there was no such prohibition. Section 173, as it stood, runs as follows:—

"Persons whose property is under the superintendence of the Court of Wards

shall not be competent to create, without the sanction of the Court, any charge upon or interest in such property or any part thereof."

The appellants' argument is that the word "interest" refers to an interest either in the present or in the future. The respondent relies that the question of a Will was never in contemplation The jurisdiction of the Court of Wards over the estate ceased with the death of the widow. A Will could create no vested interest, and any interest which arose under it could only arise after the charge of the Court of Wards had ceased. We have been referred to no reported case in which the word has been interpreted. Had it been intended to interfere with the statutory power of making a Will which had been conferred on Taluqdars by Act I of 1869, it is probable that this would have been done by express words and not left to be inferred from a general impression such as creating an interest. Having regard to these considerations and to the general scope and object of the Act, I am of opinion that section 173 (Act XVII of 1876) did not deprive a ward of the power of making a Will where he was otherwise entitled to do so. The appeal fails on all grounds and it is accordingly dismissed with costs.

KANHAIYA LAL, J. C.—The plaintiffs are the sons of Sarju Narain Singh. On the 3rd December 1871 Bhola Nath Singh and Sarju Narain Singh executed a deed of possessory mortgage in favour of the defendant and three other persons for Rs. 90,000 in respect of the property mentioned in List A appended to the plaint. On the 29th June 1892 they executed 5 deeds of further charge in favour of the same persons for a total sum of Rs. 18,582 11 11, hypothecating the said property along with some other villages. The original owner of the properties mortgaged was Mahip Narain Singh, the Taluqdar of Chandapur Birhar, whose name was entered at No. 143 in List 1 and No. 58 in List III, appended to Act I of 1869. On the 2nd May 1871 Mahip Narain Singh made a gift of the said properties in favour of his son, Sudisht Narain Singh, who died in 1888 leaving two sons Bhola Nath Singh and Sarju Narain Singh. Sudisht Narain is said to have executed a Will bequeathing his property to his sons. The plaintiffs impeach the genuineness and validity of that Will and question the right of their father to deal with the property to the prejudice of their rights. They allege that the property mortgaged was ancestral property, that their father was addicted to the use of intoxicating drugs and that the deeds of further charge were obtained by the defendant by the exercise of undue influence without the payment of any consideration. They further allege that there was no legal necessity for the said loans and that they were not bound by the decree obtained by the defendant on the said deeds or by the sale held in execution thereof. The defendant purchased at that sale. Her plea was that the property mortgaged in the deeds of further charge was self-acquired property in the hands of Bhola Nath Singh and Sarju Narain Singh, inasmuch as it was obtained by virtue of the bequest above mentioned. The Court below accepted that contention and dismissed the claim. It is admitted that the plaintiffs live jointly with their father, Sarju Narain Singh, and that Bhola Nath Singh and Sarju Narain Singh were separate in mess, residence and estate before the dates of the mortgages in question. The gift made by Mahip Narain Singh being admitted, the only question for consideration is whether Sudisht Narain Singh made a Will by which he bequeathed the said property and such under proprietary rights as he subsequently acquired in favour of his sons, Bhola Nath Singh and Sarju Narain Singh. The genuineness of the Will was admitted by the plaintiffs in the list filed by them with the plaint. It was there stated that the original Will executed by Sudisht Narain Singh in favour of Bhola Nath Singh and others on the 2nd December 1885 would be filed at the time of the first hearing. The plaintiffs have presumably the Will in their possession but they have chosen not to file it. On the date fixed for the settlement of issues, the defendant stated that she relied on that Will. She produced a certified copy of it during the progress of the hearing. The Court below admitted the certified copy in evidence, presuming it to be

genuine because the original document was registered and over 30 years old. Having regard to the admission made by the plaintiffs in the list filed by them with the plaint and the fact of registration, the Court below was justified in presuming the genuineness of the original and admitting the certified copy in evidence in proof of its contents. The Will was executed on the 2nd December 1885. Sudisht Narain Singh died on the 2nd December 1883. There was no allegation that the Will had been revoked and the mere fact that on the death of Sudisht Narain Singh mutation of names was effected in respect of the property left by him in favour of Bhola Nath Singh and Sarju Narain Singh on the ground of inheritance does not signify that there was no subsisting Will then in existence. It is not uncommon to find people applying for mutation of names describing themselves as the heirs of the deceased proprietor, whether they get the property by inheritance or bequest. If the right by inheritance is clear, any documents of alternative title which the applicants may have are seldom produced unless there is a contest; and if there is a contest, the question of possession largely influences the result. It is urged on behalf of the plaintiffs that it was at all events incumbent on the defendant to show by positive evidence that the testator was possessed of sound testamentary capacity to execute the Will and that he executed it with a full knowledge of its contents. An attempt has been made on their behalf to produce evidence suggesting that Sudisht Narain Singh was addicted to *dhatura* and other intoxicating drugs and that from 10 or 12 years prior to his death he had been suffering from insanity. The witnesses adduced on the point are, however, interested and they have been rightly disbelieved by the Court below. No medical evidence has been adduced, though Sudisht Narain Singh is said to have been under the treatment of a person named Bhagdu Ram. The evidence of Babu Manohar Lal, a Pleader of Fyzabad, shows that Sudisht Narain Singh used to take loans from him from time to time and engaged him in his cases, that he had occasion to see him and meet him very frequently and that he never found him mad. He was a man of religious habits and the testamentary disposition made by him was quite natural. The Will was registered. As pointed out in *Gangamoyi Debi* v. *Troiluckhya Nath Chowdhry* (1), the registration of a document is a solemn act performed in the presence of a competent official whose duty it is to attend the parties during the registration and see that the provisions laid down by law as to the capacity of the person registering the document are complied with. Under section 35 of the Indian Registration Act (III of 1877), then in force, the document would not have been registered, had the testator shown any signs of insanity at the time. The presumption, therefore, is against the plaintiffs who have failed to establish the allegations made by them.

The Will is valid and enforceable and the property which the father of the plaintiffs acquired by virtue of it cannot be treated as property in which the plaintiffs had any interest by birth. The family possessed no other property or nucleus from which any subsequent acquisitions could have been made. The entire property was thus the self-acquired property of Sudisht Narain Singh, who had full power of disposal over it. There is nothing to show that it was thrown into the joint stock, if any such stock existed, or that the plaintiffs were allowed any control over its income. The plaintiffs have, therefore, no right of suit. It is suggested that the estate of Sudisht Narain Singh was in charge of the Court of Wards when he executed the said Will; but no satisfactory evidence has been adduced on the point. If the estate had been in charge of the Court of Wards at or about the time when the Will was executed, evidence would have been easily obtained from the records of the Court of Wards to establish that fact. The vague statement made by the witnesses for the plaintiffs on the point cannot be trusted. Section 163 of Act XVII of 1876, then in force, empowered the Deputy Commissioner to enquire whether a person was disqualified to manage his estate and to declare him to be subject to the jurisdiction of the Court of Wards.

(1) 33 C. 537: 3 C. L. J. 349 P. C.); 10 C. W. N. 522; 8 Bom L R. 375; 1 M. L. T. 131; 16 M. L. J. 161; 33 I. A. 60 (P. C.).

No such declaration has been produced or referred to. In fact on an enquiry made from the Board of Revenue it has since been ascertained that the Court of Wards did not actually take possession of the estate of Sudisht Narain Singh till 1887. It is unnecessary in the circumstances to consider whether section 173 of Act XVII of 1876 is applicable to testamentary dispositions made by a disqualified proprietor which were to take effect after the Court of Wards ceased on his death to hold charge of his property.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2933 OF 1914.

December 9, 1918.

Present:—Mr. Justice LeRossignol and Mr. Justice Martineau.

Musammat RAHMUN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat HUSAIN BI—PLAINTIFF AND *Musammat* GHULAM BI AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 29, 30, 31—Sale by guardian with permission of Court, validity of—Necessity, want of—Fraud.

A sale, with the permission of the Court, effected by a duly certificated guardian of the property of his ward, cannot be impeached by the ward on the ground that there was no necessity for it, and, unless the Court's permission was obtained by fraud, such a sale transfers a good title to the vendee [p. 842, col 2.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 21st October 1914.

Messrs. *Govind Das* and *Parduman Das*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The plaintiff Husain Bi has sued for her share, by the Muhammadan Law, in two houses and some land left by her father Karam Bakhsh. The first Court gave her a decree, which the learned District Judge has upheld. A second appeal has been preferred to this Court by three of the defendants in regard only to one house, which has been designated as house A.

This house was sold on the 19th August 1901, after the deaths of Karam Bakhsh and his son Allah Bakhsh, by the latter's widow Ghulam Bi defendant No. 1, who had on the 21st July 1900 been appointed by the District Judge to be guardian of the persons and property both of her own sons and of the plaintiff and Nur Jan, who were Allah Bakhsh's half-sisters. The sale was effected for Rs. 1,000 in favour of defendant No. 5, who sold the house on the 6th September 1901 to defendant No. 6 and the father of defendants Nos. 7 and 8, and defendant No. 6 sold his share in 1909 to defendants Nos. 9, 10 and 11. The appellants in this Court are defendants Nos. 8, 9 and 11.

The plaintiff contests the validity of the sale effected by her guardian Ghulam Bi in 1901, on the ground that there was no necessity for it. Ghulam Bi had obtained the permission of the District Judge to sell the house on the 9th February 1901, and the first Court found that she had the benefit of the minors in view, but instead of dismissing the suit in regard to this house it passed a decree for the whole of the property claimed without giving any reasons for so doing.

The lower Appellate Court finds that the District Judge's permission for the sale was given in consequence of misrepresentation on the part of Ghulam Bi. In her application of the 19th February 1900 for being appointed guardian of the minors, Ghulam Bi described the plaintiff and Nur Jan as the daughters of Allah Bakhsh (her husband) and in the order appointing her as guardian the District Judge spoke of her as being the mother of the minors, and said that no one could be a better guardian than the mother. The lower Appellate Court concludes that the District Judge was misled by Ghulam Bi wrongly representing herself to be the mother of the minors Husain Bi and Nur Jan, and that if he had not been misled he would not have appointed her to be their guardian. The Court has, therefore, held that the order appointing her as guardian and the order sanctioning the sale of the house were obtained by misrepresentation, and that there was thus no valid permis-

sion for the sale. On this ground it has maintained the first Court's decree.

The lower Appellate Court has, however, overlooked an important document on the file of the guardianship case, namely, an application, dated the 29th April 1900, which Ghulam Bi put in on the 9th June 1900, in which she asked that she might be appointed guardian of her sons *and of her husband's sisters*. This shows that she can have had no intention of deceiving the Court. Although it has not been explained why she described Husain Bi and Nur Jan in her first application as the daughters of Allah Bakhsh, and not as her sisters-in-law, it is very probable that the reason was that they had been living with her and Allah Bakhsh and had been treated by them as though they were their own daughters. It is at any rate clear from the application which she made on the 9th June 1900 that no fraud was committed by her. The District Judge had also before him, when he appointed Ghulam Bi to be the guardian of the minors, the written statement of the collaterals of Karam Bakhsh in which they referred to Husain Bi and Nur Jan as Karam Bakhsh's daughters.

Even if what was said by Ghulam Bi in her second application and by the collaterals in their written statement escaped the notice of the District Judge in 1900, and he was misled by Ghulam Bi's first application and thought that Husain Bi and her sister were Ghulam Bi's daughters, this would not affect the validity of the appointment of Ghulam Bi as guardian. It is to be observed that Karam Bakhsh's collaterals had not discriminated between Ghulam Bi's children and the children of Karam Bakhsh, but objected to Ghulam Bi being appointed guardian of the property of any of them, and it is doubtful whether if the Judge had known that Husain Bi and Nur Jan were not Ghulam Bi's daughters but her sisters-in-law, he would have passed a different order. But in any case the appointment of Ghulam Bi as guardian would hold good, as section 48 of Act VIII of 1890 provides that an order made under the Act shall be final (subject to any order that may be passed by the High Court in appeal or revision) and shall not be liable to be contested by suit or otherwise.

Further, the order of the 9th February 1901, by which Ghulam Bi was given permission to sell the house, was not the result of any fraud, and was a valid order. It was held in *Jadu Nath Achariya* v. *Tarak Chandra* (1) that a sale by a certificated guardian of the property of his ward with the permission of the Court transfers a good title to the vendee unless the Court's permission was obtained by fraud, and a similar view was taken in *Sikher Chund* v. *Dulputty Singh* (2) and by the Privy Council in *Gangapershad Sahu* v. *Maharani Bibi* (3). The case of the appellants is all the stronger as they are not the original purchasers from the guardian.

Following the authorities mentioned above, we hold that the plaintiff cannot impeach the sale which was effected by her guardian with the permission of the Court, and that the claim for a share in house A, therefore, fails.

We accept the appeal and modify the decree so far as to dismiss the claim for a share in house A, the decree for the rest of the property in suit being maintained. The plaintiff will pay the appellants' costs throughout.

Appeal accepted.

(1) 25 Ind. Cas. 810.
(2) 5 C. 363; 5 C. L. R. 374; 5 Ind. Jur. 200; 2 Ind. Dec. (N. S.) 842.
(3) 11 C. 379; 12 I. A. 47; 4 Sar. P. C. J. 621; 9 Ind. ur. 158; 5 Ind. Dec. (N S.) 1012 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 980 OF 1917.

October 10, 1918.

Present:—Mr. Justice Spencer.

CHIDAMBARAM PILLAI—PLAINTIFF—PETITIONER

versus

MEENAKSHIAMMAL, MINOR, BY HER MATERNAL GRANDMOTHER AND GUARDIAN THANGATHAMMAL—DEFENDANT—RESPONDENT.

Hindu Law—Debt due by husband for wife's stridhanam—*Wife in possession of husband's assets after husband's death—Appropriation of debt—Testamentary bequest of debt—Intention to keep debt alive—Right of legatee—Transfer of Property Act (IV of 1882), s. 101—Merger, doctrine of, applicability of.*

CHIDAMBARAM PILLAI v. MEENAKSHIAMMAL.

A Hindu died leaving a widow and a daughter born of a former wife and about Rs. 25,000. The widow was a creditor to her husband's estate to the extent of Rs. 478 for her *stridhanam*. Shortly before her death, she made a Will devising this debt to the plaintiff, who sued to recover the amount from the daughter who succeeded to the estate after the widow's death. The suit was dismissed on the ground that the widow having become possessed of assets whereby she could have paid off her debt, the debt became extinguished:

Held, (1) that the widow's possession of the assets did not amount to a payment of her *stridhanam* debt, there being no analogy between executors who are creditors to the estate paying their debts out of the estate, and a widow who is entitled to enjoy the whole of the income of the estate; [p. 844, cols. 1 & 2.]

(2) that the widow's *stridhanam* not being at law a charge or incumbrance within the meaning of section 101 of the Transfer of Property Act, there was no merger because in the case of a limited owner the presumption was against merger. [p. 844, col. 2; p. 845, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Tinnevelly, in Small Cause Suit No. 276 of 1917.

This petition coming on for hearing on the 20th February 1918, the Court made the following

ORDER.—Before I can dispose of the point of law raised in this petition, it is necessary to know:—

(1) Whether the debt of Rs. 478 from Nellayappa Pillai to his wife Velammal was *stridhanam* in the hands of the latter?

(2) Whether Nellayappa Pillai at his death was possessed of sufficient assets for the discharge of this debt from his estate?

(3) Whether Velammal did any act denoting an intention of satisfying the debt due to her out of her husband's estate?

The Subordinate Judge is requested to return findings on these issues within six weeks after adducing evidence.

Ten days will be allowed for filing objections to the finding after notice of return of the same shall have been posted up in this Court.

In compliance with the above order, the Subordinate Judge submitted the following

FINDING.—I have been directed to submit my finding on the following points:—

(1) Whether the debt of Rs. 478 from Nellayappa Pillai to his wife Velammal was *stridhanam* in the hands of the latter?

(2) Whether Nellayappa Pillai at his death was possessed of sufficient assets for the discharge of this debt from his estate?

(3) Whether Velammal did any act denoting an intention of satisfying the debt due to her out of her husband's estate?

2. *1st issue.*—The account (Exhibit A 1) has sufficiently been proved to be a genuine account. The witness called on the defendant's side admits that the entries at page 6 of Exhibit A-1 up to 10th Karthigai are in the hand of Velammal's husband Nellayappa Pillai himself. He also admits that the last item (receipt of Rs. 100 in Velammal's favour) found at page 96 of the account (Exhibit A-1) is in the hand of Nellayappa Pillai. In that page balance from page 6 has been brought forward. Hence there can be no doubt as to the truth of the debt itself. P. W. No. 1 swears that the debt is Velammal's *stridhanam* and there is no evidence *contra*. The fact that her husband has opened a separate ledger in her name shows that it is her separate property.

3. *2nd issue.*—It is admitted that Nellayappa Pillai left assets to the extent of Rs. 25,000 at his death.

4. *3rd issue*.—There is no evidence that Velammal did any act indicating an intention of satisfying the debt out of her husband's estate.

This civil revision petition came for final hearing on the 3rd October 1918, after the return of the finding of the lower Court upon the issues referred by this Court for trial.

Mr. *N. Kunjithapadam Aiyar*, for the Petitioner.—The Subordinate Judge erred in holding that the debt due to the widow was extinguished by her becoming the owner of her husband's estate. The analogy of executors does not apply. The estate of a testator vests in the executor for purposes of administration and he can deal with it as he pleases. The case of a Hindu widow is different.

There is evidence that the widow intended to keep the debt alive. The fact that she bequeathed the debt is evidence of such intention. The widow is entitled to enjoy the entire income of her husband's estate.

There is no merger. The only statutory merger is contained in section 101 of the Transfer of Property Act. Under that section where the owner of a charge or incumbrance becomes entitled to the property, the charge

shall be extinguished. The *stridhanam* is not a charge.

Mr *K. V Sesha Aiyangar*, for the Respondent.—The possession of assets by the widow amounts to payment of her debt. The widow was in possession of the income of her husband's property out of which she could have paid her husband's debt to her.

The debt has become merged.

JUDGMENT.—The facts necessary to be stated for the disposal of the question of law raised in this petition are these. One Nellayappa Pillai died in January 1915 leaving a widow and a daughter born of a former wife; also about Rs. 25,000 assets. The widow was a creditor of her husband's estate to the extent of Rs. 473 which he owed her for her *stridhanam*. In January 1916 the widow made a Will devising this debt of Rs. 473 to the plaintiff and died shortly after. The plaintiff brought this suit to recover the amount from the daughter, who succeeded to the estate of her father after the widow's death. The Subordinate Judge dismissed the suit, holding that it was not maintainable on the ground that, by the widow becoming possessed of assets whereby she could have paid off her own debt, the debt became extinguished. For this proposition he relied upon certain observations occurring in *Husainara Begum* v. *Rahmannessa Begum* (1) and in Chitty on Contract, page 774 (4th Edition). In the former, which was a case of a mortgagee appointed as administrator of his mortgagor's estate, it was stated that possession of assets amounts to payment on the principle that there is an extinguishment of the debt if the person who is to receive the money is also the person who ought to pay, reference being made to Williams on Executors, 10th Edition, Volume I, page 1058, and to *Wankford* v. *Wankford* (2). These deal with the case of a debtor making a creditor his sole executor and leaving assets which come into that executor's hands. It is not alleged in this case that Nellayappa Pillai made his widow his executor in law or that she took out Letters of Administration to his estate. The principle which applies to executors does not extend to widows as such. A Hindu widow succeeding to her husband's estate is in a different position from an executor. This has often been pointed out. I will cite only one of the recent decisions of the Calcutta High Court: *Sudhir Chandra Das* v. *Kamal Chandra Dutta* (3), where the position of an executor was defined by Chitty, J., in the following and other words: "It was argued that, as a widow or a guardian of a minor or *shebait* was a manager, therefore, an executor, who was also a manager, stood in the same position. The argument is obviously fallacious. The analogy is in no sense complete, and the cases which deal with the peculiar powers of widows, guardians or *shebaits* have really no bearing upon the present question * * * * * An executor under Statute is the legal representative of a deceased person for all purposes and all the property of the deceased person vests in him as such. * * * * * * * * * The executor is, therefore, in many respects in a different position from a Hindu widow succeeding to her husband's estate, a guardian of a minor, or a *shebait* of an idol. The estate of the testator is absolutely vested in the executor for the purposes of administration and he can deal with it as he pleases, subject, of course, to the responsibility for the due administration of the estate."

An attempt has been made to support the Subordinate Judge's decision by invoking the doctrine of merger. In this country the only statutory merger is that created by section 10, Transfer of Property Act, which runs thus:—"Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuation would be for his benefit."

Now the widow's *stridhanam* in the present suit was at law not a charge or incumbrance within the meaning of this section, as it was not attached to any land. Again, in equity the question of merger is one of intention, the presumption being that a person having a right to act in one of two ways is assumed, in the absence of evidence to the contrary, to have acted according to his interest: *Vide Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (4). In the case of a limited

(1) 8 Ind. Cas. 837; 38 C. 342 at p. 347; 13 C. L. J. 3.
(2) (1698) 1 Salk. 299 at p. 305; 91 E. R. 265.
(3) 41 Ind. Cas. 503; 45 C. 538; 21 C. W. N. 1043.
(4) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

owner the presumption is against merger, as it is not for his or her advantage that the charge should sink for the benefit of the remainderman (Halsbury's Laws of England, Volume XIII, page 147). It is not for the advantage of a widow to pay off her *stridhanam* debt out of the income of her husband's estate as she is entitled to enjoy the whole of the income of the estate. The obligation she is under to discharge her husband's debts is a religious and a moral obligation. Moreover, if intention is to be gathered from circumstances, the inference in this case is that the debt was intended to be kept alive, for not only has the Subordinate Judge found on the third issue remanded to him that there was no evidence that the widow did any act indicating an intention of satisfying the debt out of her husband's estate, but the very fact of her making a Will bequeathing the debt to the plaintiff denotes an intention on her part to keep it alive. On this preliminary point the Subordinate Judge's decision must, therefore, be reversed and the suit will be remanded for disposal on the other issues arising in the case. Costs will abide and follow the result.

Appeal allowed; *Case remanded.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 715 OF 1915.

December 9, 1918.

Present:—Mr Justice LeRossignol and Mr. Justice Wilberforce.

BAHAR KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KISHEN CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Reversioners cultivating portion of land sold during lifetime of alienor, effect of—Estoppel.

The fact that the reversioners of a vendor cultivate a portion of the land sold, during his lifetime, as tenants of the vendee, does not operate to estop them, on the death of the vendor, from contesting the sale by suing for possession.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 8th December 1914.

Shaikh *Umar Bakhsh*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This was a suit by reversioners for possession of land, 59 *kanals* 18

marlas in area, which was sold in 1878 by Sultani Khan and Bibi Sahibu, his sister in-law, jointly. Bibi Sahibu died in December 1908 and Sultani Khan had predeceased her. The Courts below have dismissed the suit, holding that as the plaintiffs during the lifetime of Bibi Sahibu cultivated a portion of the land sold to the vendees, as tenants of the vendees, that circumstance taken together with 35 years' silence estopped the plaintiffs from challenging the sale.

The plaintiffs come here in second appeal and though we cannot agree, inasmuch as during the lifetime of Bibi Sahibu the plaintiffs could not sue for possession, that cultivation by them as tenants of part of the land operates as an estoppel against them, still we hold that the appeal must fail, for from the evidence on the record it is quite clear to us that the sale was for consideration and necessity. The consideration for the sale consisted of an earlier mortgage, the interest on that mortgage and a bond, registered, of 1874 for Rs. 280. That bond itself arose out of an earlier bond of 1865 and that again was based upon an earlier bond, registered also, of 1865. Moreover we find that the mutation in 1883 was attested by Amir Khan, who was father of some of the plaintiffs and brother of others.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 66 OF 1918.

April 16, 1919.

Present:—Mr. Lyle, A. J. C.

ACHHAIBAR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HARGOBIND SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Decree against limited owner, whether binds remainderman—Transferee from remainderman—Possession, suit for Limitation, commencement of.*

In 1867 *FS* made a Will bequeathing his property to his widow with remainder to her daughter. In 1878 *CB* sued the widow alone to recover the property, basing his claim on an earlier Will He was granted a decree and obtained possession of the property. In 1879 the widow and her

daughter gifted the property to *C* who sold his rights to the present plaintiff. On the death of the widow the plaintiff brought the present suit against the representatives of *CB.* to recover possession of the property, but the suit was dismissed on the ground that the plaintiff was bound by the decision in the suit brought by *CB.* against the widow, and that it was barred by limitation. The plaintiff appealed:

Held, (1) that the suit was not barred by the rule of *res judicata*, inasmuch as the widow did not fully represent the estate, and that, therefore, the decision in the suit brought by *CB.* was not binding on her daughter nor on the plaintiff who claimed through the latter, [p. 846, col. 2.]

(2) that the suit was not barred by limitation, inasmuch as the only interest which *C.* obtained in the property by the gift in his favour was the vested remainder of the daughter, and as the latter could not have brought a suit until her mother's death, the cause of action for the present suit arose when the mother died. [p. 847, col. 1.]

Appeal from the decree of the Subordinate Judge, Fyzabad, dated the 21st May 1918.

Messrs. *A. P. Sen*, *Jiban Krishna Banerjee*, *S. C. Gputa* and *Nripendranath Datt*, for the Appellants.

Messrs. *Mohammad Wasim* and *Imtiaz Ali*, for the Respondents.

JUDGMENT.—The facts necessary to be stated for the decision of this appeal are as follows :—

Certain property belonged to Fateh Singh who died in 1867. In 1876 he made a Will bequeathing the property to his wife *Musammat* Mahadei, with remainder to her daughter *Musammat* Paraga. In 1878 one Chandra Bali brought a suit for recovery of the property against *Musammat* Mahadei, basing his claim on a Will executed by Fateh Singh in 1866. *Musammat* Paraga was not a party to that suit. Chandra Bali obtained a decree against *Musammat* Mahadei and he and his successors have been in possession of the property since 1878. In 1879 *Musammat* Mahadei and her daughter *Musammat* Paraga executed a deed of gift of the property mentioned in the Will of 1867 in favour of one Chandika. Chandika sold his rights to the property to the plaintiffs-appellants. *Musammat* Mahadei died in 1916 and after Mahadei's death the plaintiffs brought this suit against Hargobind Singh and others, the representatives of Chandra Bali, for possession of the property.

The learned Subordinate Judge without recording evidence has dismissed the suit, on the ground that the plaintiffs are bound by the decision in the suit brought by Chandra Bali against the parties and that the suit is barred by limitation.

In coming to his finding on the question of *res judicata*, the learned Subordinate Judge has relied on the decision of their Lordships of the Privy Council in the case of *Pertabnarain Singh* v. *Trilokinath Singh* (1) That was a case, however, in which the previous suit had been brought against a person who succeeded to the estate as a Hindu widow, and it was held by their Lordships that as the widow fully represented the estate in the former suit, a subsequent suit brought by a claimant whose interest vested in him only upon the death of the widow was barred. In the present case, however, if the Will of 1867 be a valid Will, *Musammat* Paraga had from the death of Fateh Singh a vested interest in the estate, though she could not claim possession of the estate until the death of *Musammat* Mahadei. Her cause of action for possession of the estate under the Will would not arise until *Musammat* Mahadei's death. In *Pertabnarain Singh's case* (1) the widow fully represented the estate and the previous suit was fully contested, whereas in the present case *Musammat* Mahadei did not fully represent the estate, nor did she contest the suit brought by Chandra Bali. All the rulings to which the learned Pleader for the respondents has referred me are cases in which the previous suit was brought against a person who held a Hindu widow's estate and no case on all fours with the present one has been cited. It seems to me that assuming the Will of 1867 to be a genuine and valid one, *Musammat* Paraga had from the date of Fateh Singh's death a vested interest in the estate, that in the suit brought by Chandra Bali in 1878 *Musammat* Mahadei did not fully represent the estate and that, therefore, the decision in that suit was not binding on *Musammat* Paraga and it is, therefore, not binding on the plaintiffs appellants who claim through *Musammat* Paraga.

Nor can I agree with the finding of the learned Subordinate Judge that the suit is barred by limitation. *Musammat* Mahadei's title was determined by the

(1) 11 C. 186: 11 I. A. 197: 8 Ind. Jur. 697: 4 Sar. P. C. J. 567; Rafique & Jackson's (P. C.) No. 86; 5 Ind. Dec. (N. S.) 883 (P. C.).

decree obtained against her by Chandra Bali in 1878 and, therefore, she was unable to convey any interest in the property to Chandika under the deed of gift of 5th July 1879. The only interest which Chandika obtained in the property under that deed of gift was the vested remainder of *Musammat* Paraga. *Musammat* Paraga could not have brought a suit for possession of the property until the death of *Musammat* Mahadei, and the cause of action for the present suit brought by the representatives of *Musammat* Paraga arose on *Musammat* Mahadei's death. In this view of the case it cannot be held that the suit is barred by limitation.

The appeal is, therefore, allowed and the suit will go back to the lower Court for re-admission under its original number and for trial of the other issues and decision on the merits. Costs of this appeal will follow the result.

Appeal allowed; Case remanded.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 424 OF 1915.

December 4, 1918.

Present:—Mr. Justice LeRossignol and Mr. Justice Martineau.

MUHAMMAD RAMZAN KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SARDAR BEGAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Minor—Mother, whether natural guardian—Act of mother, when binding on minor child—Civil Procedure Code (Act V of 1908), Sch. II, paras. 20, 21—Arbitration, reference to—Time within which award must be made—Delay, effect of—Party, right of, to call upon arbitrators to make award or renounce appointment.

Although according to Muhammadan Law a mother is not a natural guardian, yet her action, when no natural guardian is in existence, which is obviously and manifestly to the advantage of her minor child, is binding on the minor. [p. 848, col. 2.]

The period of time within which arbitrators should issue their award depends upon the facts of each particular case, and it is always open to either party to call upon the arbitrators either to give their award or to renounce their appointment. [p. 848, col. 2.]

Where an unreasonable amount of delay occurs, and the issue of the award, after a long period of inactivity, synchronises with a dispute between one of the arbitrators and the attorney of one of the parties, the award must be regarded with great suspicion [p. 848, col. 2.]

First appeal from the decree of the District Judge, Lahore, dated the 11th May 1914.

Lala *Moti Lal*, R. S. for the Appellants.

Mr. *Badr ud Din Kureshi*, for the Respondents.

JUDGMENT.—This appeal arises out of an application under Order XX of the Second Schedule to the Code of Civil Procedure to have an award, made on a reference to arbitration without the intervention of the Court, filed in Court and a decree passed in accordance therewith. The following pedigree table will explain the relationship between the parties:—

MUHAMMAD KHAN.

Fazal Dad Khan,	Ramzan Khan, plaintiff No. 1.
Muhammad Afzal, married:— 1. *Musammat* Zainab, plaintiff No. 4; 2. *Musammat* Sardar Begum, defendant No. 1.	*Musammat* Wazir Begum, plaintiff No. 2.
Muhammad Iqbal, plaintiff No. 3.	
Musammat Kamar-un-nisa, defendant No. 2.	*Musammat* Aisha, defendant No. 3.

Ramzan Khan and Muhammad Afzal were disputing concerning their joint property during the lifetime of Muhammad Afzal and on the death of the latter in

order to put an end to those disputes, the parties signed a reference to arbitration on the 11th June 1905. Owing, however, to the resignation of one arbitrator that reference proved abortive and a fresh one was signed on the 28th July 1905, by which Mubarik Ali Shah and Chaudhri Barkat Khan were appointed arbitrators with Pir Sardar Shah as umpire. The District Judge dismissed the suit, on the grounds that the minor defendants, *Musammat* Kumar un-nisa and *Musammat* Aisha, were not properly represented in the reference to arbitration inasmuch as their mother, *Musammat* Sardar Begam, was not their legal guardian; secondly, that the reference was not acted upon; and thirdly, that the arbitrators were guilty of misconduct.

Although the reference to arbitration, as stated above, is dated the 28th July 1905, the award is dated the 1st March 1910, but from the statement of Mubarik Ali Shah it is doubtful whether the award, though purporting to have been written on the 1st of March 1910, was announced to the parties before the 17th March 1910. We have been through the proceedings of the arbitrators and find that by January 1906 the arbitrators had practically concluded their inquiry. After that date the parties resorted to litigation and the arbitrators did nothing more till December 1908, when in the absence of the respondents, who refused to attend the proceedings, they recorded two further statements and closed the proceedings. Even then they issued no award. In March 1909 they purchased a stamp paper, evidently at the instance of the appellant, but even then they failed to make their award and no further step was taken by them till apparently the 17th March 1910, when the award was issued, and it is a significant fact that the arbitrators were aroused to action just at the time when proceedings of a criminal nature were taking place between the plaintiffs' arbitrator, Mubarik Ali Shah, and Sardar Khan, the respondents' attorney, and it is a striking circumstance that the date on which the award was promulgated was the very date on which one Maula Bakhsh, with whom was associated Sardar Khan, brought a criminal complaint against Mubarik Ali Shah.

With regard to the District Judge's finding that the minor defendants were not properly represented in the reference to arbitration, one only of them, *Musammat* Kamar-un-nisa, has raised this objection through a guardian *ad litem*, Jahangir. Although her mother was not a natural guardian according to Muhammadan Law, it appears that at the time no such natural guardian was in existence and the action of the mother on behalf of her minor child, we should hold in such circumstances, bound the minor, for it is obviously and manifestly to the advantage of the minor that a claim in which she was interested should be decided by an honest arbitration rather than by resort to the Courts.

With regard to the finding that the reference was not acted upon, we have no doubt that for sometime, at any rate, the reference was acted upon. The parties were represented before the arbitrators and a certain amount of inquiry was made by the latter, but it seems that after January 1906 neither the arbitrators nor the respondents were anxious to proceed with the arbitration. What period of time should be allowed to arbitrators for issuing their award is a matter which must be decided with reference to the facts of each case, and it is always open to either party to call upon the arbitrators either to give their award or to renounce their appointment In this case it appears to us there has been an unreasonable amount of delay and that the arbitrators at one time were not anxious to complete their proceedings, and we must regard with great suspicion the circumstance that the issue of the award after a long period of inactivity on the part of the arbitrators synchronized with a dispute between Mubarik Ali Shah and Sardar Khan, the attorney of *Musammat* Sardar Begam. In such circumstances we cannot but hold that the interests of *Musammat* Sardar Begam were likely to be prejudiced by the quarrel between Mubarik Ali Shah and Sardar Khan, and taking all the circumstances into consideration we cannot regard Mubarik Ali Shah as a fair and disinterested arbitrator in the case.

For these reasons we do not think that it would be in consonance with either equity or the law to direct the filing of the award and we dismiss the appeal with costs.

Appeal dismissed.

BAJRANGA LAL *v.* BRAHMA DAT.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 320 OF 1918.

March 21, 1919.

Present:—Mr. Daniels, A. J. C.

BAJRANG LAL AND ANOTHER—DEFENDANTS —APPELLANTS

versus

BRAHMA DAT—PLAINTIFF—RESPONDENT.

Arbitration—Award—Decree on award—Person not party to decree, whether can enforce it—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Appeal, second—Amendment of pleadings, whether can be allowed.

Plaintiff was a party to an arbitration award but was not a party to the decree which followed upon the award. He now sued to enforce his rights under the decree:

Held, that the suit was not entertainable as the decree could only be enforced by those persons who were parties to it. [p. 850, col. 1.]

Where parties elect to go to trial on a particular cause of action, and the issues and the evidence, in consequence, are limited to those which are relevant to that cause of action, the Court, in second appeal, will not permit an amendment of the pleadings with a view to a remand for re-trial, as that would practically be starting a new trial on a cause of action deliberately abandoned. [p. 850, col. 1.]

Appeal from the decree of the District Judge, Gonda, dated the 24th April 1918, confirming that of the Subordinate Judge, Gonda, dated the 28th February 1918.

Babu *Bisheshwar Nath Srivastava*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—This is an appeal in a suit by the respondent Brahma Dat to recover Rs. 4,004 on the basis of a compromise decree which was passed with some modifications on an arbitration award. The plaintiff was a party to the award but was not a party to the compromise or the decree. The plaint as originally framed failed to make it clear what exactly the basis of his claim was, but the matter was settled by a statement of his Pleader made on the date of issues in which he stated definitely that he confined his cause of action to the decree.

The appeal as argued is based on two points only:—

1. The right of the plaintiff to enforce the decree to which he was not a party, and

2. the effect of Debi Prasad defendant having attained majority during the pendency of the suit in which the decree was made without any application having been made to discharge his guardian *ad litem*.

The facts are not in dispute. The various members of the family on 24th July 1911 agreed to get a partition of the family property made by arbitrators. No suit was pending at the time. The arbitrators made an award on 1st April 1913. Subsequently two suits were filed, one by one of the present appellants Debi Prasad, who was then a minor, to have the award set aside and the other by Durga Prasad to have it enforced. An abortive attempt at a compromise was made in August 1916, the matter falling through because Debi Prasad's guardian refused to agree to it. On the 30th January 1917 a compromise in similar terms was accepted by all the parties except the plaintiff Brahma Dat. He was thereupon discharged from the suits and a compromise decree passed as between the remaining parties.

The Courts below skated very lightly over the difficulty caused by the fact that the plaintiff was no party to the decree which merely afforded judicial recognition to the award and could not deprive the plaintiff of his rights under the latter. The answer to this is twofold. In the first place, the plaintiff elected to base his claim solely on the decree and, therefore, any rights which he might have under the award apart from the decree do not come in question. Secondly, the defendants-appellants had in their written statement challenged the validity of the award on various grounds. Owing to the position taken up by the plaintiff they refrained from entering into evidence on these grounds. This is apparent from the proceedings of 8th January 1918, in which both parties agreed on the examination of a witness by commission that no question relative to the validity of the award should be asked of him. It also appears from the fact that no issue touching the validity of the award was framed in the trial Court.

Another plea urged by the plaintiff-respondent is that though he was not a party to the compromise and decree, he had agreed previously to a petition of compromise identical in its terms. On that occasion the defendants did not agree. It is stated on behalf of the latter that the reason why they did not agree was that the plaintiff wanted to retain everything that the award gave him,

while accepting concessions from the opposite party and that when the plaintiff ceased to be a party the reason for their objections was removed. The reason why the defendants refused to sign does not appear on the record, but in any case no argument can be based on a transaction which admittedly came to nothing.

It is a rule of general, if not universal, application that the only persons who can enforce a decree are the parties to it. It may be possible to imagine exceptions to this rule, but if so the present case is certainly not one of them. The case of *Rani Dil Afza Begam* v. *The Nanpara Estate* (1) relied on by the Courts below is not in point, as may be seen from the description of the position of Mohammad Kazim on page 572* of the report. The point actually decided in the case, namely, that Mohammad Kazim not being a party to the suit could not apply for execution of the decree, is directly in favour of the appellants. On this issue alone the appeal must succeed and the suit fail.

It was suggested by the learned Counsel for the respondent that if the Court accepted the appellants' view on this issue, it should amend the pleadings and remand the case for re-trial by the Court of first instance on the question of the validity of the award. I am not prepared to do this. Where parties elect to go to trial on a particular cause of action and the issues and evidence have been in consequence limited to those which were relevant to that cause of action, it would not be right for this Court in second appeal to start what would practically be a new trial on a cause of action deliberately abandoned.

It is unnecessary to go into the second issue. For the reasons already given, I allow the appeal and dismiss the suit with costs in all Courts.

Appeal allowed.

(1) 37 Ind. Cas. 133; 3 O. L. J. 570.

*Page of 3 O. L. J.—*Ed.*

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2309 OF 1918.

December 13, 1918.

Present:—Mr. Justice Shadi Lal.

AMRITSAR NATIONAL BANKING COMPANY, LTD. (IN LIQUIDATION) —DEFENDANT—APPELLANT

versus

FAZL ILAHI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. VIII, r. 6—Res judicata—*Defendant failing to claim set-off—Suit, subsequent, to recover amount due, whether maintainable.*

Where the defendant to a suit for the recovery of a sum of money sets up a defence of non-liability until certain goods deposited by him with the plaintiff as security are returned to him, and his defence is accepted, he is not precluded from instituting a suit to recover the goods, or the price thereof. The fact that he omitted to claim a set-off in the regular suit brought against him would not bar his claim, as he was under no obligation to avail himself of the right to claim set-off conferred by Order VIII, rule 6, of the Civil Procedure Code.

Miscellaneous first appeal from the order of the Liquidation Judge, Lahore, dated the 20th May 1918.

Mr. *S. K. Mukerji*, Official Liquidator, for the Appellant.

Mr. *Abdul Rashid*, for the Respondent

JUDGMENT.—The respondent Fazl Ilahi, in answer to a suit brought against him by the Liquidator of the Amritsar National Banking Company, Limited, for the recovery of Rs. 2,060, set up the defence that he was not liable to pay the money until the Bank had returned to him 12 boxes of goods placed by him in deposit with the Bank by way of security, and valued the goods at Rs. 5,574. This defence was accepted by the Court of the Subordinate Judge, Allahabad, before whom the suit came up for final adjudication, and the claim of the Bank was rejected. It is to be observed that Fazl Ilahi did not claim a set off, and consequently no decree could be passed in his favour.

He has now asked the Liquidation Judge to adjudicate upon his claim for the recovery of the goods or of the price thereof; and the question for determination is whether his omission to claim set-off in the regular suit instituted against him at Allahabad operates as a bar to his present claim. Now, Explanation IV to section 11, Civil Procedure Code, lays down that any matter which might and

ought to have been made the ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit. A reference to the provisions of Order VIII, rule 6, which deal with set-off, leaves no doubt that the defendant *may* claim a set-off, and in that case his written statement shall be treated as a plaint. But he was under no obligation to avail himself of the right to claim set-off conferred by that rule, and I cannot, therefore, hold that he is precluded by any law from claiming the amount due to him. The judgment in *Sri Gopal* v. *Pirthi Singh* (1) deals with a different set of facts and has no relevancy to the point before me. In that case, a mortgagee brought an action upon his mortgage-deed and impleaded a prior mortgagee as a defendant to the suit. The latter made no defence and did not claim to have his prior charge redeemed. In a subsequent suit brought by him to enforce the prior charge their Lordships of the Privy Council held that the suit was barred by Explanation II of section 13 of the old Civil Procedure Code. It seems to me clear that it was the duty of the prior mortgagee to put forward his mortgage as a defence to the action brought by the puisne mortgage and I do not see how the decision in that case can be cited to defeat the claim of the present respondent.

I accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 24 A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I. A. 118; 8 Sar. P. C. J. 293 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 58 OF 1917.

July 4, 1919.

Present:—Mr. Lyle, A. J. C., and Mr. Ashworth, A. J. C.

BALMAKUND, DEAD, AND ON HIS DEATH JUGAL KISHORE AND OTHERS—DEFENDANTS Nos. 2 AND 3—APPELLANTS

versus

BISHWA NATH SINGH AND OTHERS—PLAINTIFFS, BARYAR SINGH—DEFENDANT No. 1—RESPONDENTS.

Wajib-ul-arz, *entry in, construction of—Hindu widow, power of, to make adoption—District Gazetteer, evidentiary value of.*

An entry in a *wajib-ul-arz* empowered a Hindu widow to adopt a son, but was silent on the point of the authority of her husband:

Held, that the proper construction of the entry was that the widow was given the ordinary power to adopt with the authority of her husband. [p. 854, col. 2.]

A passage in a District Gazetteer describing the lineage of one of the leading families of the district cannot supply the want of a pedigree showing the family and the members of it. [p. 856, col. 2.]

Appeal from the decree of the First Subordinate Judge, Sitapur, dated the 10th April 1917.

The Hon'ble Syed *Wazir Hasan*, for Appellants Nos. 1 and 3.

The Hon'ble Pandit *Gokaran Nath Misra* and Pandit *Chand Narain Harkauli*, for Respondent No. 1.

Babu *Hari Kishan Dhaon*, for Respondent No. 2.

Babu *Bisheshwar Nath Srivastava*, for Respondent No. 3.

Mr. *H. K. Ghosh*, for Respondent No. 4.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for possession of a two-thirds share of the village of Pakauri, Pargana Kundri, in the Sitapur District and for recovery of mesne profits. The circumstances in which the suit was brought are as follows:—

The original proprietor of the village Pakauri was one Baldeo Bakhsh Singh who resided at Bambhnawan. He died sonless 25 or 26 years before the institution of the suit and was succeeded by his widow *Musammat* Gulab Kunwar, plaintiff No. 2. She has died since the filing of this appeal and it is a question, which will have to be decided, whether respondents Nos. 2 and 3 are entitled to be entered as her representatives. On the 10th September 1894 she executed a deed of mortgage, which is printed at page 30 of the appellants' paper book, for Rs. 3,000 in favour of Kalka Singh whose son Baryar Singh is respondent No. 4. Under this deed the entire village Pakauri was mortgaged. Kalka Singh obtained a decree for sale of the village in satisfaction of this mortgage. In the sale proclamation by mistake village Kundri was advertised and not Pakauri, but it was Pakauri which was actually put up for sale. The property was put up for sale in three lots and it was only found necessary to sell two-thirds of the property. Balmakund purchased one-third and Kurban Ali the other third

Since the filing of this appeal Balmakund has died and his legal representatives as appellants are Jugal Kishore and Babu Mahadeo Prasad. The property was sold on the 20th April 1915. *Musammat* Gulab Kunwar, judgment-debtor, objected to the sale on the ground of the wrong name of the village being advertised, but her objection was rejected as time barred by the Deputy Commissioner of Sitapur on the 11th August 1915, and the dismissal of her objection was upheld by the Commissioner on the 22nd October 1915. Between these two dates it is alleged by the respondents that *Musammat* Gulab Kunwar adopted the respondent Bishwa Nath Singh. The act of adoption is said to have been accompanied by a deed of adoption, which is printed as Exhibit 1 on page 81 of the respondents' paper book. Having failed to get the sale set aside by the Court executing it, Bishwa Nath Singh, the alleged adopted son of *Musammat* Gulab Kunwar, and *Musammat* Gulab Kunwar brought this suit on the 13th March 1916 for possession of the village on the following grounds:—

(*a*) that the village of Pakauri was never sold at the auction sale,

(*b*) that even if it were sold, the rights of the purchasers ceased to exist from the date of the adoption of Bishwa Nath Singh.

The alleged adoption was stated in paragraph 2 of the plaint to be in accordance with the verbal authority of Baldeo Bakhsh Singh husband of Gulab Kunwar and also in accordance with a family custom under which the widow had power to make an adoption without her husband's permission. The defendants denied the allegation that the sale was ineffectual by reason of the village Kundri and not the village Pakauri having been entered in the advertisement. They denied the adoption and they denied the widow's power to adopt. They also pleaded that, even if the adoption were proved, it could not affect the interest acquired by the purchasers before the adoption. On this last pleading no issue was framed and nothing has been said in argument in appeal. It must, therefore, be held to have been dropped. The Subordinate Judge of Sitapur found that the mistake in the advertisement did not vitiate the sale of the village Pakauri. The respondents have not attempted to appeal to uphold the Subordinate Judge's decree in their favour by contesting this decision, for reasons that will be mentioned later. The Subordinate Judge also found that the plaintiffs had failed to prove that oral permission to adopt was given to *Musammat* Gulab Kunwar by Baldeo Bakhsh Singh, a finding which is contested in appeal by the respondents but with little vigour. He found that if the adoption were held valid, the adopted son would be entitled to the possession of the property at once and would not have to wait for the death of the widow. The finding has ceased to be of any effect, as *Musammat* Gulab Kunwar has died and so we are not concerned with it. He found that there was a custom in the family of Baldeo Bakhsh Singh whereby widows might adopt without any authority given to them by their husbands. He also found that the adoption did in fact take place. The appellants have not in this appeal attempted to argue that, even if the widow had power to adopt, the adoption did not take place. We are not, therefore, concerned with this matter. The Subordinate Judge in conclusion gave a decree for possession to the respondents Bishwa Nath Singh and *Musammat* Gulab Kunwar, the widow.

It appears desirable to decide first the question as to who should have been brought on the record as respondents in the place of the deceased *Musammat* Gulab Kunwar. Now Bishwa Nath Singh, the other plaintiff, has no interest in the suit except as the adopted son of Baldeo Bakhsh Singh. If he is the adopted son, then *Musammat* Gulab Kunwar should not have been made a party to the suit. If he is not the adopted son, *Musammat* Gulab Kunwar's representatives could have resisted this appeal on the ground that the alleged sale of Pakauri was invalid and that the Subordinate Judge was wrong in holding it to be valid. In this case Bishwa Nath Singh could not possibly be her representative, nor has he any interest in the matter of her representatives. We cannot, therefore, listen to his Counsel when he affirms that the persons whom the appellants desired to be impleaded as representatives of *Musammat* Gulab Kunwar are not her representatives because they

are related through females, whereas agnate relations are said to be in existence. The case, therefore, stands as follows. The appellants have named some persons as *Musammat* Gulab Kunwar's representatives and in spite of notice these persons have not objected to being impleaded as representatives. We accordingly allow their names to stand. It is the appellants' business if they have entered the wrong persons.

There are thus two points for decision in this appeal, namely, whether *Musammat* Gulab Kunwar had authority from her husband to adopt, and, secondly, whether failing such authority she had a right of custom to adopt without authority from her husband.

As to the first point little need be said. The deed of adoption, purporting to be by *Musammat* Gulab Kunwar, is given on page 81 of the respondents' paper book. It states that the adoption is "according to the Hindu Law and after performing all religious ceremonies with the consent of my husband. Thakur Baldeo Bakhsh Singh, Talnqdar of Bambhnawan, as expressed in his Will." Paragraph 2 of the plaint runs as follows:—"That on the 17th of October 1915, according to the oral Will made by Thakur Baldeo Bakhsh Singh deceased and the family custom under which a widow has power to make an adoption without her husband's permission, I formally adopted plaintiff No. 1 and have executed the deed of adoption." This vague statement as to oral authority was corrected in the pleadings. We find on page 3 of the appellants' paper book that on the 19th August 1916 the plaintiffs' Pleader stated as follows:—"Four or five days before his death Thakur Baldeo Bakhsh Singh made the oral Will referred to in the second paragraph of the plaint. The Will was that if he died without making an adoption plaintiff No. 2 should adopt a son, and in case the son so adopted by her died without leaving a male child she could make another adoption." What the Pleader must be deemed to have said was that the authority in words to adopt was given by Baldeo Bakhsh Singh four days before his death. The learned Subordinate Judge has stated that neither *Musammat* Gulab Kunwar nor any of her four witnesses produced to support the giving of this oral authority four or five days before the death of Baldeo Bakhsh Singh speak of any such Will on either such day. This does not appear to be quite correct in the case of *Musammat* Gulab Kunwar. She states that six days before his death her husband told her to make an adoption and that he told her again on the day of his death, and that he had mentioned it constantly during these six days. Her evidence does not support the Pleader's allegation that Baldeo Bakhsh Singh said she might adopt a second time if the boy first adopted were to die. On page 36 of the appellants' paper book there is an earlier deed of adoption, dated the 28th May 1902, by *Musammat* Gulab Kunwar. By this deed she adopted a boy named Narain who has died. The deed states that the adoption was according to the old custom and practice prevailing in the family, but does not state any word about permission having been given. We concur with the Subordinate Judge that the plaintiffs must be deemed to have failed to prove the giving of the oral authority specified by their Pleader.

We now come to the question of custom which has been argued at great length. The Subordinate Judge states that eight *wajib ul-arzes* have been produced by the plaintiffs-respondents in support of the alleged custom, and goes on to say that "it will appear from the evidence of certain witnesses of the plaintiffs that the aforesaid eight villages relate to the family of the Raghubansis to which Thakur Baldeo Bakhsh Singh belonged." The appellants object that the evidence of these witnesses is not sufficient to prove that all the eight *wajib-ul-arzes* belonged to the family of the Raghubansis inasmuch as these witnesses are not proved to have themselves belonged to that family. It is not denied by the appellants that the members of the family owned Bambhnawan and Supauli. There is also documentary evidence to prove that members of the family owned Kathora. On page 59 of the respondents' paper book is an extract from the copy of the *wajib ul-arz* of that village and among the proprietors are entered Ganga Bakhsh, Suraj Bali and Jagan Nath, sons of Balwant Singh. These three names appear on the pedigree A on page 44 of the appellants' paper book, a pedigree which is part of Exhibit

B22 admitted by the appellants. This pedigree B shows that these three persons are of the same family as Sheo Bakhsh Singh husband of Lachhmin Kunwar. The *wajib-ul-arz* in respect of the village of Supauli shows *Musammat* Lachhmin Kunwar, wife of Sheo Bakhsh Singh, as the owner. It is, therefore, clear that these three owners of Kathora are related to the owner of Supauli and as stated above, it is admitted that Supauli belongs to a branch of the family. As regards the other villages we find that the plaintiffs' witnesses depose to their belonging to Raghubansis. For instance, Harpal Singh Zemindar of Kundi says: "The Raghubansis of my family residing in this district are in", and then he mentions twelve villages. Again Arjun Singh of Kathora says: "People of my family reside in", and then he mentions seven villages. But these villages mentioned by these persons include some of the eight and exclude some of the eight. It is impossible to rely much on this sort of oral evidence. One would expect that a genealogical tree of the Raghubansi family would be produced to show that the owners of these villages were members of the family. Anrudh Singh, a son of Sheo Bakhsh Singh the owner of Supauli, states: "There is a written pedigree in my own house and it is also filed in Courts." Yet this pedigree was never produced in this Court. It has to be remembered that what he pleaded is a family custom and not a tribal custom. On page 55 of the District Gazetteer of Sitapur, United Provinces, edited by Mr. Nevill, the Raghubansis are mentioned as a tribe. It is not pretended that all the Raghubansis have a custom that widows might adopt without authority. When, therefore, the custom is set up on behalf of one family of the Raghubansis, it is very necessary to have evidence that the *wajib-ul-arzes* relied on are in respect of villages owned by members of the family and not merely by the members of the tribe. We are unable to hold that the *wajib-ul-arzes* of any of the eight villages except those of Bambhnawan, Supauli and Kathora have been proved to be relevant. Of these three *wajib ul arzes* that of Bambhnawan states that a widow can adopt with or without authority, that of Supauli states nothing about any authority and so it must be presumed that the ordinary provision of the Hindu Law in these provinces, where under the husband's authority is necessary, prevails there. That of Kathora mentions that the widow can adopt irrespective of any authority. Of the five *wajib-ul-arzes* which we have excluded, those of Mandila and Rasulpur say that the widow can adopt with or without authority, while those of Ismailpur, Deotapur and Kundi do not refer to the matter of authority. There is, therefore, variance in the three which we think relevant as well as in the five which we think irrelevant. We fail to understand how the *wajib-ul arzes* which make no reference to the husband's authority can assist the respondents. They must, in our opinion, be construed to mean that they give the ordinary power of adoption, that is, adoption with the authority of the husband. Whether then we accept the three *wajib-ul-arzes* as relevant of the whole eight, it is apparent that they are discrepant as to the power of the widow. This being so, no one in particular of them can be relied on as an accurate record of the custom of the family. The learned Subordinate Judge has stated, "to sum up, the custom recorded in the *wajib-ul-arzes* of all the aforesaid villages (here he mentions the eight) is unanimous and invariable so far as the unrestricted power of a Hindu widow to make the adoption is concerned, though there is some variation on other points relating to the general subject of adoption." This statement of fact can only be called correct if we interpret a power of the widow to adopt as meaning the same thing as a power to adopt with or without the authority of the husband. This it does not seem possible to do. Where the matter of authority is not mentioned, it must be presumed that the power to adopt was the ordinary power of a Hindu widow to adopt with authority. The respondents' Counsel argues that if the statement of the *wajib-ul-arz* that the widow had power to adopt merely meant that she had the ordinary power under Hindu Law, namely, to adopt with the husband's permission, then it would have been superfluous to enter the fact. The *wajib ul arzes*, however, do contain such superfluous statements. For instance the Supauli *wajib ul-arz* states that every co-sharer can adopt and that an after-born son shares with the adopted son, and

states that a daughter and a daughter's son inherit in the absence of a son. The Ismailpur *wajib-ul-orz* states that if a natural son is born after adoption both share equally. Other instances might also be given. The learned Subordinate Judge has also stated that the divergence in these *wajib ul-arzes* on many other questions of family custom will not affect their validity as records of the peculiar custom of adoption set up. We are unable to agree with this finding. If the *wajib-ul-arzes* are not consistent, they cannot be relied on as correctly stating the custom of the family. The variation is indeed very great. In Bambhnawan and Supauli the *jethansi* right is said to exist. In Kathora it does not exist. In Bambhnawan a sonless widow inherits without power of transfer. In Supauli she has the power of transfer. Kathora mentions nothing about it. If we refer to the whole eight *wajib-ul-arzes* the variety is ever greater. It states that there is no restriction of caste or family in adoption. This is a very peculiar provision and the appellants' Counsel relies on it as indicating that the *wajib-ul-arz* was merely a record of what Baldeo Bakhsh Singh and Sheoratan Singh sons of Gopal Singh, the Zemindars, wished to be recorded. Their father Gopal Singh was adopted by Raghunath Singh. One of the appellants' witnesses Raghubar Singh, an under-proprietor in Bambhnawan says that Gopal Singh was the natural and not the adopted son of Raghunath Singh, Gopal Singh's mother was a Brahman woman who was the mistress of Raghunath Singh and she bore Gopal Singh to him. Now this is a witness for the defendants-appellants, but Gulab Kunwar plaintiff has herself stated as follows:—"I heard from my mother-in-law along with others that Gopal Singh was adopted, but I cannot say whether he was the son of a Brahman or Rajput. I do not know the name of the natural father of Gopal Singh." There appears, therefore, to be some justification for the suggestion that Baldeo Bakhsh Singh and Sheoratan Singh, when they stated that a son could be adopted from any caste, were influenced by the fact that their own father could only have had title to the estate validly if this were the case. In conclusion we are of the opinion that the *wajib-ul arzes* are not reliable evidences of the village custom set up.

As to the witnesses who depose to the custom, their evidence is vitiated in the main by their failure to prove in a satisfactory manner that they belong to the family on behalf of which the custom is set up. The names of these witnesses are given in the judgment of the Subordinate Judge The first Anrudh Singh was himself adopted into the family. He is not a person, within the meaning of section 48 of the Evidence Act, who would be particularly likely to know of the customs of the family. The witness Guman Singh says: "I am also Raghubansi and so was Baldeo Bakhsh Singh. I cannot say if he and I belong to one and the same family. To my knowledge I was never on shaving terms with Baldeo Bakhsh Singh on occasions of deaths." Hardeo Singh says: "I belong to the same family as Baldeo Bakhsh Singh," but in cross-examination he says: "I do not remember the pedigree showing my connection with Baldeo Bakhsh Singh." Arjun Singh says again: "I belong to one and the same family as Baldeo Bakhsh Singh," but in cross examination he says: "I cannot give the pedigree connecting me with Baldeo Singh." Gokaran Bakhsh says: "Among us Raghubansis of Kathora (and six other villages) there is no separate family. I mean that all these Raghubansis belong to one and the same family." Raghuraj Singh says: "The Raghubansis of my family reside in this district in the following villages (mentions them)." But in cross-examination he states, "I cannot tell the pedigree showing my relationship with the Raghubansis of those villages." Harpal Singh says, "the Raghubansis of my family reside in such and such villages." The remaining witnesses use exactly the same form of words.

The learned Subordinate Judge has also relied on four alleged instances of adoption in the family. The weakness of this evidence consists in the failure of the respondents to prove that these adoptions were made without the authority of the husband. They one and all say that they heard from other people that no authority was given. This evidence in our opinion is not admissible. Section 18 of the Evidence Act will not cover an opinion on a fact

other than the existence of a custom. It may be almost impossible for the respondents to prove the negative, namely, that permission was not given, but this will not justify us in presuming that permission was not given or in accepting hearsay as evidence of the fact.

It must be admitted that this is a peculiar case. If the plaintiffs-respondents had come into Court not setting up a custom but alleging permission given orally on many occasions, it would have been very difficult to hold that such permission was not given. Unfortunately for the plaintiffs before this case arose, *Musammat* Gulab Kunwar in the first adoption of Narain had set up a custom in the family. If, therefore, she had in this case relied only on the authority of her husband, she would have had to reconcile such a case with her previous conduct in respect of the adoption of Narain. She, therefore, chose to plead in the alternative. The setting up of the custom has necessarily weakened the credibility of her case that permission was given. If there was a well established custom no permission was required. We hold that the *wajib ul arzes* and the oral evidence relied on by the respondents are insufficient to prove a custom so radically opposed to the ordinary Hindu Law prevailing in these provinces. In taking a different view to the Subordinate Judge we are not so much taking a different view as to the credibility of the witnesses as a different view to the effect of what those witnesses say. Those witnesses, with very few exceptions, have failed to state definitely (much less prove) that they belong to the same family as Baldeo Bakhsh Singh. If a tribal custom had been set up, their evidence might have been of some value. But no tribal custom has been set up and if it had been set up, it is probable that it could have been easily disproved by the production of other *wajib-ul-arzes* of villages belonging to the members of the tribe. We cannot but consider extremely significant the fact that no genealogical tree of the family of the plaintiffs is produced. Anrudh Singh, an adopted son of the family, says that "Sathan Rai was the original ancestor of the family of the Raghubansis. From the perusal of the family pedigree I came to know of the said ancestor." In cross examination he states: "There is a written pedigree in my own house and it is also filed in Courts." Yet no attempt has been made to produce this pedigree or to show that the witnesses produced by the plaintiffs have any authority as members of that family to depose to the custom of that family. Some reliance appears to have been placed on a passage in the District Gazetteer of the Sitapur District, edited by Mr. Nevill, on page 87. The passage runs as follows:—

"Two large properties are still held by the Raghubansis, the ancient owners of the eastern portion of the district before the rise of the Raikwars. Both claim descent from Sathan Rai, a resident of Ajodhiya, who in 1072 A. D. settled in the Mallanpur neighbourhood. In the third generation the estates were divided, one brother taking Bambhnawan in Kundri, and the other Sikri Sipauli in Tambaur. The former was held before annexation by Anup Singh, and settlement was made with his son, Raghunath Singh, who died leaving his property to his widow. She adopted one Gopal Singh, from whom the estate descended to the present owner, Thakur Sheoratan Singh, who holds five Mahals and one Patti in Kundri North and one Mahal and two Pattis in Biswan, paying a revenue of Rs. 5,051. Sikri Sipauli descended to Umed Singh, and then to his son, Sheo Bakhsh Singh, with whom the Summary Settlement was made. His estate passed in 1863 to his widow, Lachhmin Kunwar, who adopted Anrudh Singh, the present owner, and died in 1898. This property comprises nine Mahals in Tambaur and five in Kundri North, together assessed at Rs. 9,265."

In our opinion this passage will not supply the want of a pedigree showing the family in respect of which the custom is claimed and the members of it.

For the above reasons we allow this appeal with costs.

Appeal allowed.

MAHNU *v.* SHIHAN SINGH.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 716 OF 1915.
December 19, 1918.
Present:—Mr. Justice LeRossignol and
Mr. Justice Wilberforce.
MAHNU—PLAINTIFF—APPELLANT
versus
SHIHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Adverse possession—Trespasser, possession of, whether adverse to collaterals.

R., prior to 1865, adopted *M.*, who predeceased him leaving an adopted son *J.* On *R.'s* death *J.* succeeded to the estate and a suit by certain collaterals of *R.* against him for possession was dismissed. On *J.'s* death his two sons succeeded. The plaintiff, another collateral of *R.'s*, brought the present suit for possession of *R.'s* land, but his suit was dismissed as barred by limitation. On appeal:

Held, that even if *J.* was not the rightful heir of *R.* and his possession was that of a trespasser, it was, nevertheless, adverse to all the collaterals among whom was the plaintiff's father, and as plaintiff derived his title through his father, *J.'s* possession was adverse to him and his suit was barred by limitation.

Second appeal from the decree of the Additional District Judge, Amritsar at Gurdaspur, dated the 14th December 1914.

Mr. *Badr-ud-Din Kureshi*, for the Appellant.

The Hon'ble Mr. *Fazl-i-Husain*, for the Respondents.

JUDGMENT.—Plaintiff in this case is a collateral of one Ratna, who before 1865 adopted his sister's son Mehar Singh. Mehar Singh, however, predeceased Ratna and on Ratna's death, which occurred more than forty years ago, Mehar Singh's son Jhanda Singh succeeded to the estate. Jhanda Singh died about a year before the present suit and was succeeded by his two sons. In this suit plaintiff claims possession of Ratna's land, but the suit has been dismissed on the ground that it is barred by limitation.

In 1870 two of Ratna's collaterals, who were not, however, ancestors of the plaintiff, sued Jhanda Singh for possession of the land, but the suit was dismissed, the Courts deciding that Jhanda Singh by reason of his and his father's services to Ratna was entitled to possession of the land, and the Court quite unnecessarily made a suggestion that the collaterals could sue on the death of Jhanda Singh. This suggestion was quite uncalled for and was based probably on the circumstance that at that time Jhanda Singh had no male issue.

The learned Additional Divisional Judge holds that the suit is time barred under Article 144 of the Limitation Act, and before us it is urged that the decision of the Court below is in conflict with the principles of *Sundar* v. *Salig Ram* (1), and that the Court below has wrongly distinguished that case from the present. Reference has been made by learned Counsel to certain judgments of this Court in which it was held that though a person governed by customary law derived his right to possession through his father, he did not so derive his right to sue for that possession through him. On the other hand, there are judgments of this Court that the result of litigation *bona fide* sustained by such a person's father or ancestor is binding upon that person. Now this Court in the litigation of 1870 held that Mehar Singh had been rightly adopted by Ratna, and there can be no doubt as to the *bona fides* of that litigation. If then the decree obtained by one of the collaterals enures for the benefit of other collaterals, it is hard to see why a decree obtained against a collateral should not affect all other collaterals similarly interested. However that may be, Jhanda Singh has been in possession since the death of Ratna which took place over forty years ago. If Mehar Singh was adopted by Ratna, his descendants are entitled to possession. If he was not adopted by Ratna, Jhanda Singh since the death of Ratna has been in possession as a trespasser. His possession was adverse to all the collaterals, included among whom was the plaintiff's father, and we hold that as plaintiff derived his title through his father, Jhanda Singh's possession has been adverse to him, and the suit was rightly dismissed as barred by limitation.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 9 Ind. Cas. 300; 26 P. R. 1911; 34 P. L. R. 1911; 33 P. W. R. 1911.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 270 OF 1918.

April 9, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

BADAL—DEFENDANT—APPELLANT

versus

Babu NAGESHWAR BAKHSH SINGH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 120—Trees, removal of, suit for—Limitation.

The period of limitation prescribed for a suit by a landlord for the removal of trees newly planted by a person who had no right to plant them, is contained in Article 120 of Schedule I to the Limitation Act, and the suit must be confined to those trees which were planted within the six years immediately preceding the institution of the suit.

Appeal from the decree of the Subordinate Judge, Sultanpur, dated 25th March 1918, modifying that of the Munsif, Musafirkhana (Sultanpur), dated the 14th September 1917.

Syed *Ali Mohammad*, for the Appellant.

Mr. *S. N. Roy* holding brief of Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—The dispute in this case relates to certain trees standing on plot No. 363, new Khasra. The allegation of the plaintiff was that he was in proprietary possession of the said land and that the defendant took wrongful possession thereof and planted trees on the same in August 1914. The defendant admitted that the land on which the trees stood belonged to the plaintiff. He merely claimed a title to the trees, alleging that the trees formed a grove which was his ancestral property and that except a few trees all of them existed from more than six years.

The Court of first instance dismissed the claim, holding that the trees in question had been in the adverse possession of the defendant from more than 12 years prior to the suit and that the plaintiff had no right to claim the removal of the 6 trees which had been planted within six years prior to the suit. The lower Appellate Court, however, modified that decree and directed the removal of certain trees which, it held, had been planted within the last 12 years.

Article 120 of the Indian Limitation Act (IX of 1908) allows a period of six years for a relief for which no specific limitation is provided elsewhere. A suit by the landlord for the removal of trees, newly planted by a person who had no right to plant the same, is, as pointed out in *Musharf Ali* v. *Iftkhar Husain* (1), governed by the above article. If any trees were planted more than six years prior to the suit, the right of the plaintiff to have those trees removed cannot now be enforced. The question is, therefore, confined to the trees which, according to the report of the Commissioner accepted by the lower Appellate Court, were planted within the last six years. It does not appear how the Court of first instance came to the conclusion that only six trees were less than six years old. The report of the Commissioner appointed by the lower Appellate Court shows that no less than 28 trees, bearing Nos. 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 20, 21, 22, 25, 26, 27, 28, 29, 31, 34, 35, 36, 37, 38 and 39 in his map, are less than six years old. It is not established that the defendant had any right to plant those trees. He does not possess the rights of a grove-holder because his title is based on adverse possession of the trees planted by him. He cannot, however, be allowed to extend his adverse possession by planting new trees.

The appeal is allowed in so far that the decree passed by the lower Appellate Court will be confined to the removal of the 28 trees above mentioned. The parties will, in the circumstances, bear their own costs of this appeal.

Appeal partly allowed.

(1) 10 A. 634; A. W. N. (1888) 257; 6 Ind. Dec. (N. S.) 427.

GAURI SHANKAR *v.* GANGA RAM.

PUNJAB CHIEF COURT.
CIVIL REVISION NO. 624 OF 1918.
January 7, 1919.
Present:—Mr. Justice Wilberforce.
GAURI SHANKAR AND OTHERS—
PETITIONERS
versus
GANGA RAM AND OTHERS—
RESPONDENTS.

Arbitration, reference to—Party not joining in written application but accepting arbitration orally and taking active part in proceedings, position of—Objection that application was not signed, maintainability of—Estoppel—Revision—Interlocutory order—High Court, power of interference of.

Where one of the parties to a suit did not join in a written application for the case to be referred to arbitration but made an oral application accepting the arbitration, and took an active part in the proceedings:

Held, that he was estopped from objecting to the legality of the proceedings on the ground that he did not sign the application for reference to arbitration.

Ordinarily, an interlocutory order is not liable to be interfered with in revision: Where, however, great or irremediable injury might result, the High Court will interfere with such an order.

Revision from the order of the Munsif, 1st Class, Hoshiarpur, dated the 25th June 1918.

Mr. *Fakir Chand*, for the Petitioners.

Shaikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—In this case there are two plaintiffs and one defendant. A written application was made to the Court by one plaintiff and the defendant for the case to be referred to arbitration. On the following day the other plaintiff Ganga Ram, who had not joined in the written application, made an oral application before the Court to the effect that he accepted the arbitrator. The arbitration proceedings lasted for over a year and on behalf of the plaintiffs Ganga Ram conducted the proceedings throughout. An award was duly filed, but objected to by Ganga Ram on the ground that he had not signed the original application to the Court for an order of reference. The Court has held that this omission vitiated the whole of the proceedings and has set aside the award. Against this order the defendant has put in an application for revision.

Even if it be admitted that the whole proceedings of the arbitrator were without jurisdiction on the ground that a mandatory provision of the law had not been complied with, I do not think that the lower Court should have set aside the award. The objecting plaintiff was clearly estopped, by his own actions in agreeing verbally in the Court to the arbitration and in taking an active part in the proceedings, from raising any objection as to the legality of these proceedings on account of the want of his application in writing, and the lower Court clearly committed a material irregularity in not giving effect to a provision of law contained in the Evidence Act.

It is objected that against an interlocutory order of this description no application for revision can lie, and I agree with this proposition in ordinary cases. There is no doubt, however, that this Court has a power of interference in the case of an interlocutory order, though such power is only exercised in cases where great or irremediable injury might result. In the present case the waste of time, money and trouble involved by the re-opening of the whole proceedings could never be repaired. Moreover, there are other objections to the award which have not been decided by the Munsif and if it became necessary on some future occasion, after an appeal, to decide these objections, their correct decision might be rendered difficult owing to the lapse of time. I, therefore, consider that this is a fit case for the interference of this Court and accepting the application for revision I remand the case to the lower Court for decision of the remaining objections to the award.

Revision accepted.

JHARI SINGH *v.* TOKHARRM MARWARI.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 919 OF 1918.

August 6, 1919.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

JHARI SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

TOKHARAM MARWARI AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Burden of proof—Evidence an both sides—Court, duty of.

The question of onus of proof only arises when there is a question of fact to be determined and there is no evidence one way or the other which will enable the Judge to come to a conclusion. In such a case, the Court has to decide whether the burden of proving that fact lies upon the plaintiff or the defendant. If the burden of proof lies upon the plaintiff, and the proof of that fact is essential to his case, then the plaintiff must fail because he has not discharged the burden which lay upon him. On the other hand, if the onus of proving that fact was upon the defendant, and its proof is essential to the defendant's success in the case, then the defendant must fail because he failed to discharge the burden which was upon him. [p. 861, col 2.]

But, where there is a fact which is essential to the determination of the case, whether the burden, in the first instance, be upon the plaintiff or upon the defendant, if there is evidence adduced by both parties, then the question of the burden of proof becomes immaterial and the Court has to determine that question upon the evidence before it. [p. 861, col. 2.]

Second appeal from a decision of the District Judge, Dumka, dated the 3rd May 1918, reversing that of the Subordinate Judge, Raj Mahal, dated the 25th January 1918.

Mr. *Rajendra Prasad*, for the Appellants.

Messrs. *S. K. Bhattacharji* and *B. C. De*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal by the defendants from a decision of the District Judge of Dumka, dated the 3rd May 1918, reversing a decision of the Subordinate Judge of Raj Mahal, dated the 25th January 1918.

The plaintiffs brought a suit to enforce a mortgage executed by the principal defendants on the 23rd July 1910 as security for an advance of Rs. 700. At the date of the suit a sum of Rs. 1,400 was due as principal and interest and that was the amount claimed. The defence was that no consideration had passed for the execution of the bond and that it was merely a *benami* transaction, and the question which had to be decided at the trial was mainly whether consideration had in fact passed. It is not disputed that the plaintiffs in such a case have to make out the execution of the bond and the fact that consideration was paid, unless it is admitted. In most cases there is a recital in the bond that the consideration money has been paid and when execution is proved, this admission by the mortgagor is sufficient to satisfy the burden of proof as to the passing of consideration and if the mortgagor denies the passing of consideration, then it is for him to make out such a case. In the present case the bond admitted the payment of consideration by the mortgagee and it was further proved that at the registration proceedings, which took place shortly after the execution of the bond, payment of the consideration was again admitted by the mortgagor. Had the plaintiffs upon this question rested their case there, undoubtedly they would have discharged the burden of proof and it would have been for the defendants to satisfy the Court that notwithstanding this admission no consideration had, in fact, passed. The plaintiffs, however, in the course of the evidence produced by them in support of their case, admitted that the consideration money had not, in fact, been paid up to the time when the registration took place and, therefore, in so far as there was a recital in the bond and in so far as the registration proceedings in themselves afforded evidence of payment of the consideration money, it was quite clear that they could no longer be relied upon in view of the admission that those statements were not accurate. The plaintiffs, however, endeavoured to prove that although the consideration had not been paid up to the time of registration it was, in fact, paid some days later, and they gave evidence in support of that case. The defendants, on the other hand, called evidence to show that no consideration of any sort was paid at any time and, therefore, the only question which the trial Court had to decide was which of these two sets of witnesses it should believe. The learned Subordinate Judge after considering and weighing the evidence came to the conclusion that the defendants' case was the right one and that no consideration had, in fact, passed and he dismissed the suit.

The plaintiffs thereupon appealed to the District Judge and the District Judge, as it appears to me, fell into a serious error in regarding the case as one in which the onus of proving that no consideration passed lay upon the defendants. He deals with the case in this way. He says that one of the main points in the appeal was that the onus of proving that the consideration money was paid had been put wrongly upon the appellants before him (that is to say, the plaintiffs), whereas it should have lain heavily on the respondents to show that it was not paid. Then he says: "As to the onus I consider that it lies very heavily on the defendants to show that the consideration money was not paid. It was expressly admitted at the time of registration that it had been paid, and I do not think the onus is shifted because it is admitted by the plaintiffs that it was paid afterwards." Now there the learned Judge, in my opinion, clearly went wrong. Once it is admitted that the evidence of the registration proceedings as to payment of consideration is wrong and cannot be supported, it is quite clear that no value can be attached to evidence of that sort. Then the learned Judge says a little lower down: "As the lower Court's judgment shows, the decision of this point" (which we have just been considering as to whether the consideration had passed or not) "was difficult, because there was only a slight balance of evidence in favour of the defendants. I do not consider this balance is sufficient to discharge the onus placed upon them." It is quite clear reading that passage that the learned Judge was under the impression that notwithstanding that there was an admission by the plaintiffs that the evidence of the registration proceedings was not accurate, still there was by the mere fact of registration having taken place some sort of presumption that consideration had passed. It is, to my mind, clear that no such presumption can arise when there is a distinct admission that no consideration had passed at that time. Then again in a later passage of his judgment the Judge proceeds in this way: "The main fact in the case, which there is no getting away from, is that at the final registration of the document the defendants admitted receipt of the consideration money, and to allow them to deny this now without the clearest possible proof would be to render inoperative the provisions of the Registration Act for certifying the execution of contracts." There again the learned Judge seems to have forgotten that the evidence of payment of consideration, which is admittedly inaccurate according to the plaintiffs' own case, cannot be relied upon as any evidence at all. Nevertheless in spite of this the learned Judge based his whole decision upon evidence of this nature. The truth is that this case is not a case which had to be decided upon any question of onus of proof at all. The question of onus of proof only arises when there is a question of fact to be determined and there is no evidence one way or the other which will enable the Judge to come to a conclusion. In such a case the Court has to decide whether the burden of proving that fact lies upon the plaintiff or the defendant. If the burden of proof lies upon the plaintiff and the proof of that fact is essential to his case, then the plaintiff must fail because he has not discharged the burden which lay upon him. On the other hand if the onus of proving that fact was upon the defendant and its proof is essential to the defendant's success in the case, then the defendant must fail because he failed to discharge the burden which was upon him. But where there is a fact which is essential to the determination of the case, whether the burden, in the first instance, be upon the plaintiff or the defendant, if there is evidence of both parties, then the question of the burden of proof becomes immaterial and the Court has to determine that question upon the evidence before it. In the present case there was evidence both ways and the learned Judge should have applied his mind to the question which side ought to be believed, that is whether the evidence given by the plaintiffs as to the passing of consideration was more worthy of credit than the evidence given by the defendants to the contrary. Instead of that he dealt with the case as if there was some heavy burden upon the defendants in the first instance the moment that the registration proceedings had been proved. Although he seems to have realised that the

lower Court thought the balance of evidence was in favour of the defendants, he says that having regard to this burden which lay upon the defendants that balance was not sufficient to discharge it. There, in my opinion, he was clearly wrong.

The only question is whether we should reverse this decision and restore the findings of the Subordinate Judge. I think the proper course is to remand the case for re-hearing by the learned District Judge with the directions already given, that is to say, he must disregard the question of onus altogether and deal with this question whether consideration passed or not merely upon the evidence actually before him, disregarding the admission made on registration which on the plaintiffs' own showing cannot be accepted as evidence of payment of the consideration money at or before registration. He must decide whether there was a subsequent passing of consideration. There was evidence both ways and he will have to consider that evidence for himself and judge whether the weight of evidence is, as the Subordinate Judge decided, in favour of the defendants or whether after considering it himself he is satisfied, notwithstanding the findings of the Subordinate Judge, that the weight of evidence is in favour of the plaintiffs and whether he is, therefore, entitled, in that state of things, to reverse the judgment of the trial Court.

In the result the decree appealed from will be set aside and the case will be remanded to be dealt with by the District Judge in accordance with law and the directions given above. The costs of this appeal will abide the result of the District Judge's decision.

FOSTER, J.—I agree.

Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2008 OF 1917.

January 13, 1919.

Present:—Mr. Justice Scott Smith.

RIKHI KESH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JWALA SAHAI AND OTHERS—DEFENDANT—RESPONDENTS.

Mortgage—Redemption—Mortgagee in possession, improvements effected by—Cost of improvements, whether can be allowed.

Where a mortgagee in possession expends money on permanent works on the property which enhance the value thereof, and the cost of such works does not make it difficult to redeem the property, he is entitled to be repaid his expenditure on redemption. [p. 863, cols 1 & 2.]

Second appeal from the decree of the District Judge, Lahore, dated the 10th April 1917.

Mr. *Brij Lal*, Bakhshi *Tek Chand* and Lala *Moti Lal*, for the Appellants.

Messrs. *C. Bevan Petman* and *Daulat Ram*, for the Respondents.

JUDGMENT.—The facts of the case out of which the present appeal arises are fully stated in the judgments of the lower Courts and need not be repeated here. The only point upon which the plaintiffs' second appeal to this Court was admitted was whether the mortgagees in possession were entitled to compensation for improvements made by them on the mortgaged property without the consent of the mortgagor. The lower Courts have held that the defendants are entitled to Rs. 190 on account of annual repairs and Rs. 324 on account of additions to the mortgaged property. The lower Appellate Court in discussing the point says:—

"It has to be remembered in connection with the additions that Pandit Janardhan was not merely mortgagee, but part owner, and entitled to add."

These remarks appear to have been made under a misunderstanding of the facts. The original mortgage was made on the 3rd November 1883 and an additional mortgage was made on the 15th April 1884. The mortgagee rights were transferred to *Musammat* Jawandi, wife of Pandit Janardhan, on the 3rd of June 1892. Sarb Sukh, the father of Janardhan and the grandfather of the plaintiffs, died in 1892. It is found that the additions to the property were made in the years 1885-87 at which time Pandit Janar-

dhan was not a part owner. The additions were, therefore, made by him and his wife in the capacity of mortgagee and not that of part owner.

Bakhshi Tek Chand on behalf of the plaintiffs relies upon *Sher Singh* v. *Nihalu* (1), *Rupan Singh* v. *Champa Lal* (2) and section 72 of the Transfer of Property Act. In *Sher Singh* v. *Nihalu* (1) it was held that upon the facts proved the mortgagees were not entitled to claim compensation for the alleged improvements which, though they might bring in a profit, had unnecessarily diverted the land from its original uses, without the consent of the mortgagor and for the benefit of the mortgagees while in possession. In that case the improvement made was that a plantain garden had been planted on agricultural land and the mortgaged property had, therefore, been diverted from its original use and undergone a complete change. It was accordingly held that the expenditure, whether it brought a profit or not, could not be said to have been a reasonable one. In my opinion that case is clearly distinguishable from the present one. In *Rupan Singh* v. *Champa Lal* (2) it was held that the mortgagees' claim could not be allowed except in so far as it fell within the terms of section 72 of the Transfer of Property Act. The decision in that case was based entirely upon the section in question, and the Transfer of Property Act is not in force in the Punjab and I am, therefore, not bound to follow it.

Mr. Petman on behalf of the respondents relies upon *Prab Dial Shah* v. *Bhai Sawaya Singh* (3) and the English case of *Shepard* v. *Jones* (4), in which it was held that if a mortgagee in possession has reasonably expended money in permanent works on the property, he is entitled, on *prima facie* evidence to that effect, to an inquiry whether the outlay has increased the value of the property, and if it has done so, he is entitled to be repaid his expenditure so far as it has increased such value. And in such case it is immaterial whether the mortgagor had notice of the expenditure. Notice to the mortgagor is only material when the expenditure is unreasonable, for the purpose of showing that he acquiesced in it. This case was discussed and the decision therein was followed in *Prab Dial Shah* v. *Bhai Sawaya Singh* (3), wherein it was held that upon a consideration of all the circumstances the defendants were entitled to the whole of the money spent by them upon permanent improvements to the mortgaged property, the value of which had increased at least to the extent of the sum expended. At page 303* of the Report the following passage occurs:—

"This is a case in which it would be clearly inequitable upon general principles of justice to allow the plaintiff the benefit of the defendants' outlay, without making him recoup the defendants for at least their actual expenditure, especially as this does not appear to be a case in which there is any danger, if no more than the actual sum spent is allowed, of the plaintiff being 'improved out of his estate.'"

Now in applying the above remarks to the facts of the present case, it is necessary to see what are the additions which were made to the mortgaged property. Rs. 114-5-0 was spent on completion and setting right certain portions of the house; Rs. 205-9-0 was spent upon a *dalan* which was added over the first floor; and Rs. 67-1-6 was spent on roofing a *tawela*. Now the first and third items appear to have been necessary expenditure; and it is argued by Mr. Petman that the second was certainly not unreasonable and that it has improved the value of the property. The house is situate in the city of Lahore, and it is urged that a room on the roof in which people can sleep in the hot weather is almost a necessity and certainly very greatly enhances the value of the property. I agree with Counsel that none of the additions can be said to be unreasonable within the meaning of the authorities relied upon by him. It is also admitted that the plaintiffs are persons of means, who can easily afford to pay their share of the cost of the improvements. It is not alleged, and it is quite clear, that the cost of the improvements has not made it difficult for them to redeem the property. I am, therefore, of opinion that the plaintiffs

(1) 67 P. P. 1896.
(2) 26 Ind. Cas. 521; 37 A. 81; 13 A. L. J. 14.
(3) 67 P. R. 1893.
(4) (1882) 21 Ch. D. 469; 47 L. T. 604; 31 W. R. 308.

*Page of P. R. 1893.—*Ed.*

KUNGOMAL *v.* THADHOMAL.

must pay their share of the costs of these improvements as well as costs of the annual repairs which were effected by the mortgagees.

The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 40 OF 1915.

August 2, 1918.

Present:—Mr. Pratt, J. C., and Mr Fawcett, A. J. C.

KUNGOMAL AND OTHERS—DEFENDANTS—APPLICANTS

versus

THADHOMAL AND OTHERS—PLAINTIFFS—OPPONENTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Error of law, whether ground for interference—High Court, power of interference of.

A High Court cannot interfere in revision on grounds of alleged error in law or fact, in which the question of jurisdiction is not involved. The fact that a Court has taken, in the exercise of its jurisdiction, a mistaken view as to what does or does not constitute misconduct in an arbitrator, is not a ground upon which the High Court will interfere under section 115, Civil Procedure Code. [p. 864, col. 2.]

Application for revision against the order of the Subordinate Judge, Naushahro.

Mr. *Gopaldas Jhamatmal*, for the Applicants.

Mr. *Hirdaram Mewaram*, for the Opponents.

JUDGMENT.—The applicants are defendants in a suit brought against them by opponents. It was referred to arbitration and an award was made in favour of plaintiffs. This award was, however, remitted for reconsideration as being beyond the arbitrators' authority. Therefore, the arbitrators submitted a fresh award, dismissing the plaintiffs' suit with costs. The Sub-Judge, after hearing the parties regarding objections taken to this award by the plaintiffs, has set it aside on the ground of misconduct of the arbitrators and ordered the suit to proceed in Court. Applicants ask this Court to revise the Sub-Judge's order in revision under section 115, Civil Procedure Code.

Mr. Gopaldas for applicants contends that the Sub-Judge is clearly wrong in holding that there has been any misconduct on the part of the arbitrators and that the decision is so palpably erroneous in law that the case is one falling under clause (*a*) of section 115. He points out that paragraph 15 of Schedule II of the Code provides that "No award shall be set aside except" on certain grounds, which include "misconduct of the arbitrator," and he argues that when a Court holds certain conduct to be misconduct which is clearly not misconduct, it assumes and exercises a jurisdiction which is not vested in it by law. The Sub-Judge, however, had jurisdiction to determine whether or not the conduct of the arbitrators amounted to "misconduct" or not; and the mere fact that he took an erroneous view of what amounted to misconduct does not deprive him of the jurisdiction vested in him by paragraph 15. His jurisdiction is not affected, for, as stated by the Privy Council in *Malkarjun v. Narhari* (1), a Court has jurisdiction to decide wrong as well as right. We see no good reason, therefore, to differ from the view taken by the Calcutta High Court in *Kali Charan Sirdar* v. *Sarat Chunder Choudhry* (2) that the High Court cannot interfere in revision merely because a Court has taken in the exercise of its jurisdiction a mistaken view as to what does or does not constitute misconduct. The error may be a gross or palpable one, but this will not bring the case out of the Privy Council decisions that a High Court cannot interfere on grounds of alleged error in law or fact, in which the question of jurisdiction is not involved, see *Amir Hassan Khan* v. *Sheo Baksh Singh* (3), *Balakrishna Udayar* v. *Vasudeva Aiyar* (4) and *Shew Prosad Bungshidhur* v. *Ram*

(1) 25 B. 337 at p. 347; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

(2) 30 C. 397; 7 C. W. N. 545.

(3) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P.C.)

(4) 40 Ind. Cas. 650; 19 Bom. L. R. 715; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

Chunder Haribux (5). Without, therefore, deciding the application on its merits, it must be rejected with costs.

Application rejected.

(5) 23 Ind. Cas. 977. 41 C. 323 at p. 340.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEALS NOS. 21, 22, 23, 24 AND 28 OF 1916.

July 14, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

RAJ KUMAR LAL UMANATH BAKHSH SINGH—PLAINTIFF—APPELLANT IN ALL

versus

DARSHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS IN NO 21.

SHEOPAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS IN NO. 22.

Musammat DHIRAJ KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS IN NO. 23.

Thakur GAURI SHANKAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS IN NO. 24.

GIRJA CHARAN AND OTHERS—DEFENDANTS—RESPONDENTS IN NO. 28

Civil Procedure Code (Act V of 1908), s. 34—Oudh Rent Act (XXII of 1886), s. 141—Rent, suit for, against under-proprietor—Interest, future, whether can be awarded.

The liability to pay future interest under section 34 of the Civil Procedure Code, if the Court decides to adjudge it, is not controlled by section 141 of the Oudh Rent Act, and it is within the competence of the trial Court, in a suit for arrears of rent, against an under-proprietor to award future interest at such rate as it may consider reasonable. [p. 865, col. 2]

Appeals from the decrees of the District Judge, Rai Bareli, dated the 24th February 1916, upholding those of the Assistant Collector, First Class, Rai Bareli, dated the 27th July 1915.

The Hon'ble Syed *Wazir Hasan* and Syed *Ali Mohammad*, for the Appellant.

JUDGMENT.—These appeals arise out of suits brought by the superior proprietor against under-proprietors for arrears of rent. The Courts below disallowed the claim for interest for the period antecedent to the suits and also refused to award future interest.

It is now stated that in four of these cases, the decree-holder has been able to realize the decretal moneys and in one it still remains unrealized. The plaintiff-appellant in these appeals asserts his right to claim future interest and relies on section 34 of the Code of Civil Procedure read with section 135 of the Oudh Rent Act (XXII of 1886), which renders that section applicable to such suits.

Section 141 of the Oudh Rent Act allows interest to be claimed on arrears of rent at the rate of one per cent. per mensem, but that provision does not apply to future interest, for under section 34 of the Code of Civil Procedure the Court can award such interest on the decretal money as it may consider reasonable from the date of the suit to the date of payment. In *Thakur Ganesh Bakhsh* v. *Thakur Harihar Bakhsh* (1) their Lordships of the Privy Council held that a person who held under-proprietary rights under a compromise was not liable to pay interest on the arrears of rent. Their Lordships, however, observed that though an under-proprietor was not a tenant within the meaning of section 141 of the Oudh Rent Act (XXII of 1886), liable to pay interest on the arrears of rent, there was nothing in that Act which excluded any liability for payment of interest, which the under-proprietor might be under apart from the Act. The liability to pay future interest under section 34 of the Code of Civil Procedure, if the Court decides to adjudge it, is not controlled by section 141 of the Oudh Rent Act; and it was within the competence of the Court below to have awarded future interest at such rate as it may have considered reasonable.

It does not, however, appear desirable in these appeals that such an order should now be passed, because four of the decrees have already been satisfied and in the fifth sale proceedings are stated to be pending.

(1) 7 O. C. 116; 26 A. 299; 8 C. W. N. 521; 6 Bom. L. R. 505; 14 M. L. J. 190; 31 I. A. 116; 8 Sar. P. C. J. 628 (P. C.).

If there has been any delay in the realization, the decree-holder himself must be deemed to be responsible for it.

The appeals are, therefore, dismissed and as such respondents as have been served are not present and others have not been served, no order as to costs is necessary.

Appeal dismissed.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 524 OF 1918.
August 9, 1919.
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.
Sheikh AHMED HUSAIN *alias* MUHAMMAD YEHYA AND OTHERS— DEFENDANTS —APPELLANTS
versus
Sheikh GHULAM ALI ASHGAR—PLAINTIFF—RESPONDENT.

Benami *transaction—Fraudulent intention to defeat creditors—Fraud not carried out—Real owner, whether can recover property.*

A transfer which is merely colourable and made with the intention of defrauding creditors can always be set aside by the transferor at any time before the fraud has actually taken place. But if the fraudulent intention has succeeded, the Courts will not assist either party claiming under such a transaction. [p. 869, col. 1.]

Second appeal from a decision of the Officiating District Judge, Muzaffarpur, dated the 24th September 1917.

Mr. *Muhammad Hasan Jan*, for the Appellants.

Messrs. *K. Sahai*, *G. D. Singh* and *Ragho Prasad*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal by the defendants from the decision of the Officiating District Judge of Muzaffarpur, dated the 24th September 1917, reversing a decision of the Additional Subordinate Judge, dated the 24th February 1917.

The suit was instituted by the plaintiff on the 10th June 1915 claiming a declaration of title to a 4-annas 13-*gandas* 1-*cowrie* 1-*krant* share of Mauza Chak Kazi Nizam bearing Touzi No. 10005 recorded in the name of the defendants as proprietors, and confirmation of his possession. He further claimed a declaration that he was entitled to get his name registered in the mutation department in respect of the disputed share and the removal of the names of the defendants and an injunction restraining them from proceeding with a partition suit before the Collector in respect to the share in dispute. The plaintiff is admittedly the proprietor of the remaining 11 annas odd comprising 16 annas of the Touzi number in question. The entire property was originally an 8-annas *pucca* share of the said village and belonged to one Sheikh Kutubuddin, the ancestor of both the plaintiff and the defendants. Kutubuddin left three sons and one daughter, who upon his death succeeded to his 8-annas share of the property, each of the sons taking 2 annas 6 *gandas* 2 cowries 2 *krants* and the daughter 1 anna. One of the sons, Kasim Ali, is the grandfather of the present plaintiff. Another of the sons, Zahur Hussain, is the grandfather of the defendant No. 1. The third son Athar Ali transferred his share to his widow Bibi Rahiman by a *benamkasa* deed in the year 1842. The plaintiff's case is that Bibi Rahiman acquired in addition to the share of her husband the 1-anna share of Bibi Bahorun, the daughter of Kutubuddin as well as the 2-annas 6-*gandas* odd share of Zahur Hussain by transfer from his son Bande Ali, the father of the defendant No. 1, that Kasim Ali's share passed to Muhammad Haji and Muhammad Makbul, his two sons, the father and uncle of the plaintiff, and the latter having died his share as well as that of Muhammad Haji devolved upon him, the plaintiff, that Bibi Rahiman transferred the whole share which she had acquired from her husband, her sister-in-law Bibi Bahorun and Bande Ali, amounting to 5 annas 13 *gandas* odd, to Muhammad Haji and Muhammad Makbul, the father and uncle of the plaintiff, in the year 1855. The uncle died childless and consequently in due course the whole 8-annas share originally held by Sheikh Kutubuddin thus came into the possession of the plaintiff on the death of his father Muhammad Haji. This 8-annas share, which was part of Touzi No. 1162 of the village in question

was in the year 1863 formed into a separate *patti* bearing Touzi No. 10005. This partition was made at the instance of the plaintiff's father Muhammad Haji, and the plaintiff's case is that his father and uncle remained in undisturbed possession of the whole property down to the year 1876. In that year the entire *patti* was brought to sale in execution of a decree obtained by one Mathura Das against the plaintiff's father and uncle and was purchased by one Nandan Lal. Before the sale objections were taken to the attachment of the property in the name of Bande Ali, claiming as proprietor of the 2-annas 6-*gandas* odd share which he had inherited from his father, and by two sisters of the plaintiff's father under section 278 of the old Code of Civil Procedure. These objections were disallowed and two regular suits were instituted on behalf of the respective objectors setting up a claim to portions of the property. Notwithstanding these suits, however, the sale proceedings were continued and the property was sold and purchased by Nandan Lal. The decree-holder Mathura Das was originally the principal defendant in these suits, but after the sale the auction-purchaser Nandan Lal was made the principal defendant. The judgment-debtors, the plaintiff's father and uncle, were also defendants in the suit. The suit brought in the name of Bande Ali was subsequently settled by the auction-purchaser confessing judgment in favour of the plaintiff Bande Ali and it was ordered that according to the confession of judgment by Nandan Lal, a decree for declaration of title in favour of Bande Ali should be passed. The plaintiff's case with regard to this suit and the circumstances attending it is that it was in the first instance an attempt instigated by his father and uncle to endeavour to save their property from attachment by setting up Bande Ali as a claimant to the 2 annas 6 *gandas* odd share which still remained recorded in his name, that the auction-purchaser Nandan Lal was under an obligation to the plaintiff's father who was a *hakim* and in the habit of attending Nandan Lal in that capacity, and that in order to discharge his obligation he consented to transfer the purchased property back to the plaintiff's father but that instead of executing a *kobala* in favour of the plaintiff's father for that purpose, he confessed judgment in the suits brought both by Bande Ali and the two sisters of the plaintiff's father in respect of the shares claimed by them and with regard to the remaining shares he executed a *kobala* in favour of one Akbar Ali, a friend of his, as *benamidar* for the plaintiff's father. The object of this was according to the plaintiff's case, that Muhammad Haji the plaintiff's father was desirous of keeping this particular property out of the hands of his creditors. The evidence shows, however, that there was in fact no fraud perpetrated on any of the creditors of Muhammad Haji as they were all paid off, and subsequently Akbar Ali transferred his share by a *ladavi* deed to the plaintiff in 1897 and about the same time the shares of the two aunts of the plaintiff were also recorded in the name of the plaintiff's wife. The share of Bande Ali, however, remained recorded in his own name, although it is the plaintiff's case that both he and his father before him were in sole possession and control of the property and that Bande Ali was merely their *benamidar*, and it was not until the year 1914 when ill-feeling arose between the plaintiff and the defendants that the latter endeavoured to get possession of the share recorded in their name by filing a petition for partition before the Collector. Hence the present suit claiming a declaration of the plaintiff's title.

Before the Subordinate Judge the main issues were, first, whether the 5-annas 13-*gandas* odd share transferred by Bibi Rahiman to the plaintiff's father and uncle in 1855 included the 2-annas 6-*gandas* odd share of Bande Ali and, secondly, whether the compromise in the suit of 1875 made between Nandan Lal and Bande Ali was really part and parcel of a *benami* transaction wherein Bande Ali was acting merely as the *benamidar* of the plaintiff's father. With regard to the first point there was no direct documentary evidence showing a transfer of Bande Ali's share to Bibi Rahiman before 1855, and the only documentary evidence in support of this was a petition in 1861 whereby the plaintiff's father applied for registration of his name in respect of the 5-annas

13-*gandas* odd share purchased from Bibi Rahiman, in which he recites that this covered, in addition to the 2 annas 6 *gandas* odd which she received from her husband, the 2 annas 6 *gandas* transferred by Bande Ali as well as the 1-anna share transferred to her by Bibi Baharun. As the whole share of the family was an 8-annas share and as Bibi Rahiman admittedly acquired 3 annas 6 *gandas* odd from her husband and Bibi Baharun, there was no other source from which she could have acquired the other 2 annas 6 *gandas*, odd making up the 5 annas 13 *gandas*, except from Bande Ali unless she acquired Kasim Ali's share, and there was no evidence to show that Kasim Ali ever parted with his interest. On the other hand, the oral evidence went to show that Kasim Ali's share descended by inheritance to the plaintiff's father and uncle and ultimately to the plaintiff. The Subordinate Judge found all issues in favour of the defendants and dismissed the suit.

The District Judge took a different view of the facts and came to the conclusion that the plaintiff had made out his title to the whole 8-annas share including that originally held by Bande Ali, and that the transaction which took place at the date of the suit brought by Mathura Das in 1876 was a *benami* transaction in which Bande Ali merely represented the plaintiff's father.

It has been urged before us on behalf of the appellants that there is no real evidence to support these findings. It is contended that the recitals in the petition of 1861, when the plaintiff's father applied for registration of his name, are not admissible in evidence against Bande Ali and as no deed of transfer by Bande Ali to Bibi Rahiman has been produced, there is nothing from which it can be inferred that Bandi Ali ever did in fact part with his share. The plaintiff's case was that the deed of transfer had been lost but that nevertheless from all the circumstances of the case a legitimate inference might be drawn that his father had in fact acquired from Bibi Rahiman the share which originally belonged to Bande Ali and as the transfer of a 5-annas 13 *gandas* odd share from Bibi Rahiman had undoubtedly been proved and as he acquired by inheritance the 2-annas 6-*gandas* odd share of his grandfather Kasim Ali, this accounted for the whole 8-annas share. The further fact that Muhammad Haji in 1853 without any intervention on the part of Bande Ali had applied for and obtained a *bitwara rubakar* whereby the whole 8-annas share was divided into a separate *patti* supported this view. The learned District Judge did not come to any definite finding on this part of the case but based his decision upon the fact that when Mathura Das obtained his decree against the plaintiff's father and uncle in 1876 and got an attachment of the whole 8 annas share which was purchased by Nandan Lal, the arrangement then come to whereby Nandan Lal confessed judgment in the suits brought against him was an arrangement whereby it was intended to transfer the property to the plaintiff's father in the *benami* name of Bande Ali and others.

It is unnecessary to deal in detail with the evidence relied upon in support of this conclusion. There was undoubtedly evidence to support it to which the learned Judge refers. The only real attack made by the appellants against this part of the judgment was first that it was not competent to the plaintiff to contend that Bande Ali was acting as his *benamidar*, as the plaintiff's father admittedly lent himself to this transaction with a view to defeating his creditors, and secondly, that the decree in the suit brought by Bande Ali against Nandan Lal and the plaintiff's father and uncle in 1876 was *res judicata* and binding on all parties to that suit including the plaintiff's predecessors-in-title. In support of the first contention the appellants rely upon the case of *Yaramati Krishnayya* v. *Chundru Papayya* (1), where it was held under circumstances somewhat similar to the present that a plaintiff who had transferred his land to another in order to defeat an attaching creditor, the creditor subsequently consenting to a decree upholding the title of the transferee, was not entitled to a declaration that his name should be retained on the register as owner when the transferee had applied to be registered in his place. The authority of this case has been questioned and dissented from in the later case of *Jadu Nath Poddar*

(1) 20 M. 326; 7 Ind. Dec. (N. S.) 231.

v. *Rup Lal Poddar* (2), where Rampini and Mookerjee, JJ., held that where the mere intention to commit a fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him was merely a *benami* transaction. Although there has been some diversity of opinion upon the question, I think the decision in the later case expressed the true view. A transfer which is merely colourable and made with the intention of defrauding creditors can always be set aside by the transferor at any time before the fraud has actually taken place. But if the fraudulent intention has succeeded, the Courts will not assist either party claiming under such a transaction. In the present case it is shown that nobody in fact was defrauded and that the creditors of the plaintiff's father were all paid off. In my opinion the principle relied upon by the appellants on this part of the case has no application to the present circumstances.

With regard to the second point the question whether Bande Ali was acting as *benamidar* for the plaintiff's father was not raised or decided in that suit. The decree was merely passed in favour of the plaintiff upon the confession of judgment by Nandan Lal, the principal defendant. There seems to be no reason why the present plaintiff should be estopped from contending that Bande Ali was merely his *benamidar*. In my opinion this appeal fails and must be dismissed with costs.

Appeal dismissed.

(2) 33 C. 967; 4 C. L. J. 22; 10 C. W. N. 650.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 45 TO 48 OF 1919.

June 24, 1919.

Present:—Mr. Ashworth, A. J. C.

Musammat HAMID FATIMA—PLAINTIFF—APPELLANT IN ALL

versus

BHOLA AND ANOTHER—DEFENDANTS—RESPONDENTS IN No. 45.

BAIJU AND ANOTHER—DEFENDANTS—RESPONDENTS IN No. 46.

MADARI AND ANOTHER—DEFENDANTS—RESPONDENTS IN No. 47.

NANDA AND OTHERS—DEFENDANTS—RESPONDENTS IN No. 48.

Custom, extinguishment of—Non-user, effect of— Wajib-ul-arz, *entry in, whether binding on tenants.*

If a custom has been in existence for a long series of years, it cannot be extinguished by non-user. The fact that it has not been exercised for a long period may be a reason for doubting its existence, but that fact cannot be said to have put an end to it [p. 870, col. 1.]

Although a tenant may be bound by an entry in the *wajib-ul-arz* which was made in his absence, such entry is not necessarily conclusive proof against the tenant [p. 870, col. 1.]

Appeals from the decree of the Subordinate Judge, Unao, dated the 23rd November 1918, upholding those of the Munsif, North Unao, dated the 23rd March 1918.

Pandit *Harkaran Nath Misra*, for the Appellant.

Syed *Shahenshah Husain Rizvi*, for the Respondents.

JUDGMENT.—These are four cases in which the plaintiff claims a right to two annas a year ground rent from persons occupying plots in the *abadi* on the basis of a customary right. The Court of first instance found that the plaintiff had not proved her title to the houses occupied by the defendants and secondly that she had not proved the alleged custom. It may be mentioned that the plaintiff attempted to prove the custom by an entry in the *wajib-ul-arz* made forty years ago and also by oral evidence. This oral evidence, which was disbelieved by the learned Munsif, consisted *inter alia* of the evidence of Aulad Ali, a mortgagee from the plaintiff, who had been in possession from 1888 to 1907. He stated that he had used the

alleged right of the Zemindar to this ground rent to make the tenants work for him at a favourable rate and in consequence had not collected the ground rent. The learned Subordinate Judge of Urao in appeal, without going into the question of title, held that the custom was not proved and that in any case on the plaintiff's own evidence, if the custom had existed at the date of the *wajib-ul-arz*, it had ceased to exist by discontinuance. This latter finding of the Subordinate Judge cannot be supported. Aulad Ali's evidence, if believed, proves the subsistence of the custom, inasmuch as without the existence of that custom he could not have exacted labour from the tenants at a favourable rate The custom was the lever for such exaction. Apart from this if the custom was in existence at the date of the *wajib-ul-arz* it could not be extinguished by non-user. What the Court was asked to hold was that in 1840 a usage having the force of law, that is to say a custom, existed. The fact that an alleged custom has not been exercised for a long period may be a reason for doubting the existence of the custom, but the fact cannot be said to have put an end to the custom. There is a difference between a discontinuance of the right and a discontinuance of the use of the right. The lower Appellate Court was also wrong in law in stating that the tenants could not be bound by an entry in the *wajib-ul-arz* which was made in their absence. Settlement Officers were entitled to record custom and it must be presumed that they took the proper means to ascertain the existence of any custom recorded by them. See *Riasat Ali* v. *Gokul* (1). This does not mean, however, that the *wajib-ul arz* was necessarily conclusive proof against the tenants. See the Privy Council case, *Thakur Anant Singh* v. *Thakur Durga Singh* (2). Whether, however, the *wajib-ul-arz* alone was sufficient proof of custom is a question of fact. See *Tilak Ram* v. *Sita Ram* (3). The lower Court has stated that the *wajib-ul-arz* must have been recorded at the instance of the proprietors and consequently ought to be read with some reservation and hesitation where they recorded a custom against the interest of *riaya*. The lower Appellate Court, amongst the other reasons given for dismissing the appeals, appears to me to have adopted this reason also. There is, therefore, in my opinion, a concurrent finding of fact by both the Courts that the evidence of the *wajib-ul-arz* was not sufficient in this particular case to prove the custom and in second appeal I hold that I am bound by this finding. See *Basdeo Singh* v. *Ram Phal Singh* (4).

For the above reasons I dismiss these appeals with costs.

Appeals dismissed.

(1) Jwala Prasad's Oudh Rulings, Appendix, Page 7.

(2) 6 Ind. Cas. 787; 14 C. W. N. 770 (P. C.); 7 A. L. J. 704; 32 A. 363; 12 C. L. J. 36; 12 Bom. L. R. 504; 8 M. L. T. 79; 20 M. L. J. 604; 13 O. C. 163; 37 I. A. 191; (1910) M. W. N. 327.

(3) 30 Ind. Cas 503; 2 O. L. J. 388.

(4) 32 Ind. Cas. 748; 2 O. L. J. 607.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 25 OF 1916.

July 25, 1918.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

BAHROOMAL KHUSHIRAM—APPLICANT

versus

MAZAR—OPPONENT.

Contract Act (IX of 1872), s. 134—Principal and surety—Suit against surety without impleading principal, maintainability of—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit as against one defendant, effect of.

A suit against a surety is maintainable, although no suit is instituted against the principal [p. 871, col. 1.]

Where a plaintiff withdraws a suit against one of two defendants, and elects to proceed against the other, such withdrawal is not the withdrawal contemplated by Order XXIII, rule 1, Civil Procedure Code. [p. 871, col. 1.]

Revision application from the order of the Cantonment Small Cause Court Judge, Karachi.

Mr. *Tahilram Maniram*, for the Applicant.

JUDGMENT.

PRATT, J. C.—This is an application for revision of an order made by the Cantonment Small Cause Court Judge, Karachi, dismissing the applicant's suit against the opponent Mazar.

DOOD MEHAR BIBI v. ASRUB ALI.

The applicant sued on a bond which was executed by the defendant No. 1 Mubarak as principal and defendant No. 2 Mazar as surety. The 1st defendant objected that the Court could not entertain the suit against him, because he resided beyond the local limits of its jurisdiction. The plaintiff then asked for leave under section 20 (*b*) of the Civil Procedure Code and on that leave being refused, the Court ordered that the plaint be returned f r presentation to the proper Court. The plaintiff then applied to drop the 1st defendant from the suit and to continue the suit against Mazar the surety. This was allowed, but the Court then dismissed the suit against the surety, holding that plaintiff had withdrawn the suit against the principal debtor and that the surety was discharged under section 134, Indian Contract Act.

No doubt, the order made by the Cantonment Small Cause Court Judge on plaintiff's applicati n to drop the 1st defendant was that the plaintiff withdraws the suit against 1st defendant. But we do not think that it was a withdrawal under Order XXIII, rule 1, Civil Procedure Code, to which the consequence is attached that the plaintiff is precluded from instituting a fresh suit in respect of the same subject-matter. At the time when the Court made this order, there was no suit before the Court, for the Court had ordered that the plaint be returned. There could be no withdrawal of the suit, for the suit had not been entertained. The plaintiff's application amounts, in our opinion, only to this, that he desired his plaint to be restored to file as a suit against defendant No. 2 alone and the order allowing him to do so does not, in any way, affect his rights as against the principal debtor. The suit is maintainable against the surety, although no suit has been filed against the principal. *Sankana Kalana* v. *Viru Pakshapa*(1), and that is the position here.

We accordingly reverse the decree of the Cantonment Small Cause Court Judge and remand the suit for disposal on the merits. Costs to be costs in the cause.

Decree reversed and suit remanded.

(1) 7 B. 146; 7 Ind. Jur. 317; 4 Ind. Dec. (N. S.) 99.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 955 OF 1918.

June 13, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt.

DOOD MEHAR BIBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ASRUB ALI AND OTHERS—DEFENDANTS AND AFTABUDDIN—*Pro forma* DEFENDANT—RESPONDENTS.

Muhammadan Law—Minor—Guardian, de facto, *of person and property of minor, powers of—Alienation by* de facto *guardian of minor's property, validity of—Ejectment, suit for, by purchaser, maintainability of.*

Under the Muhammadan Law a person who has charge of the person and property of a minor without being his legal guardian and who may be called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property belonging to the minor which the transferee can enforce against the minor; nor can such transferee, if let into possession of property under such unauthorized transfer, resist an action in ejectment on behalf of the minor as a trespasser. It follows, therefore, that, being himself without title, such person cannot seek to recover property purchased by him from the *de facto* guardian in possession of another equally without title. [p 873, col. 1.]

Imambandi v. *Mutsaddi*, 47 Ind. Cas. 513; 23 C. W. N. 50; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 5 P. L. W. 276; 20 Bom. L. R. 1022; 45 I. A. 73; 45 C. 878; (1919) M. W. N. 91; 9 L. W. 518 (P. C.) and *Hyderman Kutti* v. *Syed Ali*, 15 Ind. Cas. 576; 37 M. 514; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 244, relied on.

Appeal against the decree of the Subordinate Judge, 3rd Court, Tipperah, dated the 6th February 1918, reversing that of the Munsif, 1st Court, Comilla, dated the 6th February 1917.

FACTS appear from the judgment.

Babu *Upendra Kumar Roy*, for the Appellants, submitted that the plaintiffs were entitled to recover possession of the 8-annas share in the disputed property. No doubt Aftabuddin was the *de facto* guardian of the minors, but sale by Aftabuddin on behalf of the minors would not be binding on the minors and could not affect their interests in the property, because under the Muhammadan Law a *de facto* guardian as such could not alienate any interest in the minor's property, and if any such transfer were made it would be void. *Imambandi* v. *Mutsaddi* (1) referred to.

(1) 47 Ind. Cas. 513; 23 C. W. N. 50; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C L. J. 409; 5 P. L. W. 276; 20 Bom. L. R. 1022; 45 I. A. 73 (P. C.); 45 C. 878; (1919) M. W. N. 91; 9 L. W. 518,

The sale by the *de facto* guardian could not bind the minor under any circumstances. *Hyderman Kutti* v. *Syed Ali* (2) referred to. The rulings relied on by the lower Appellate Court, namely, the cases of *Ram Charan Sanyal* v. *Anukul Chandra Acharya* (3) and *Hasan Ali* v. *Mehdi Husain* (4), have been considered by their Lordships of the Judicial Committee in the case of *Imambandi* v. *Mutsaddi* (1). So far as the widow's share was concerned, it has not been transferred at all. The question of acquiescence or ratification by the minors after they attained majority did not and could not arise under the circumstances of the case. The shares of the plaintiffs could not be affected by the transfer made by Aftabuddin.

Babu *Birendra Chandra Das*, for the Respondents, urged that the lower Appellate Court had rightly held that the alienation made by Aftabuddin for legal necessity and for the benefit of the minors was binding on the minors. The Privy Council case in *Imambandi* v. *Mutsaddi* (1) was distinguishable, because the questions of legal necessity and benefit to the minors did not arise in that case. The decision of the Court below was right, because the finding was that the transfer had been made to meet unavoidable family necessities. So far as the widow's share was concerned, she acquiesced in the transfer and so could not avoid the alienation. Lastly, what was sold by Aftabuddin was sold by him on his own behalf and not on behalf of the plaintiffs and so the minors were not affected by the sale. Aftabuddin was competent to transfer the specific portion of the property of which he was in possession.

Babu *Upendra Kumar Roy* briefly replied.

JUDGMENT.—It is admitted on both sides that the property in this suit belonged to two brothers, Gobardi and Aftabuddin, and that on the death of the former which took place fourteen years ago, his heirs, the plaintiffs, lived with Aftabuddin. They were minors at the time excepting plaintiff No. 1, who is the widow of Gobardi. After his brother's death Aftabuddin sold the land in question which is $2\frac{1}{2}$ *kanis* out of 12 *kanis* of their *ijmali jote* to the principal defendants by a *kobala* (Exhibit A) dated the 5th Falgoon 1311. The sale purports to be on Aftabuddin's own behalf upon the allegation that the land belonged to him. The reason for the sale is stated to have been to pay off certain creditors and the landlord's dues.

The plaintiffs sought a declaration of title and recovery of possession with regard to 8 annas of the land in dispute. A case was set up on behalf of the purchaser from Aftabuddin that although the sale purported to be a sale of Aftabuddin's own land, yet as the sale took place and the infants benefited by the sale, it ought to be held that the plaintiffs, although then minors, were bound by the sale. So far as the widow is concerned, defence was taken that although the sale did not purport to be on her behalf, yet she ought to be held to be bound on the ground that she had acquiesced in the sale and had taken no steps to set it aside. A further ground was taken that after the sale Aftabuddin relinquished the land and, therefore, inasmuch as the plaintiffs had not paid rent after such relinquishment, it ought to be considered that their tenancy was at an end and they were not entitled to maintain a suit in ejectment.

As regards the first point the learned Subordinate Judge in appeal held that the Privy Council ruling in *Mata Din* v. *Ahmad Ali* (5) left the question open, whether a sale by a *de facto* guardian, if shown to be for the benefit of the infants, was void or voidable. He followed the ruling in *Ram Charan Sanyal* v. *Anukul Chandra Acharya* (3) and *Hasan Ali* v. *Mehdi Husain* (4) that such a sale bound the minors under the Muhammadan Law. The matter, however, has been put at rest by the case of *Imambandi* v. *Mutsaddi* (1). Their Lordships said that there was a conflict of opinion in the different High Courts with regard to the matter, one set of

(2) 15 Ind. Cas. 576; 37 M. 514; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 244.
(3) 11 C. W. N. 160; 34 C. 65; 4 C. L. J. 578.
(4) 1 A. 533; 1 Ind. Dec. (N. S.) 368.

(5) 13 Ind. Cas. 976: 16 C. W. N. 338: 34 A. 213; 23 M. L. J. 6: 14 M. L. T. 145: (1912) M. W. N. 183: 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 39 I. A. 49 (P. C.).

decisions purported to give such dealings a qualified force the other declared them wholly void and ineffective. In the former class of cases the main test for determining the validity of the particular transaction had been the benefit resulting from it to the minor, in the latter the admitted absence of authority or power on the part of the guardian to alienate or to encumber the minor's property. They say, the time has now come to lay down a definite rule, if possible. They then refer to the decision of the Calcutta High Court and say that in sustaining transactions entered into by *de facto* guardians this Court has proceeded mainly on considerations of necessity for and benefit to the infant. The other High Courts, generally speaking, have cut the Gordian knot by holding that all such dealings with a minor's property were void. They then discuss the Madras High Court case, *Hyderman Kutti* v. *Syed Ali* (2), and hold that, under the Muhammadan Law, a person who has charge of the person and property of a minor without being his legal guardian and who may, therefore, be conveniently called a *de facto* guardian, has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title. I think that that finally disposes of the first point.

The next point is about the widow. The *kobala* did not purport to sell her share. There is no defence that Aftabuddin claimed any authority on her behalf to sell her share or that he could in any manner whatever give any title to the purchaser so far as her share was concerned. The suggestion of acquiescence, so far as the lady is concerned, is absolutely of no value. The relinquishment, if any, was by Aftabuddin. He purported to deal with his own land and such relinquishment cannot possibly bind the infants or the widow. The learned Subordinate Judge has dealt with this point on the ground of acquiescence or ratification so far as the plaintiff No. 2, the minor son of Gobardi who has now attained majority, is concerned. There is no question of ratification that arises in this case so far as he is concerned. We do not think it can be said that there has been any effective relinquishment so far as the plaintiffs are concerned.

The last point which has been urged is that the entire *jote* being 12 *kanis*, the plaintiffs are only entitled to 1/6th. They may have 1/6th out of the remainder of the land; and as Aftabuddin purported to deal with his own land the plaintiffs had no cause of action. That overlooks the fact that the defendant purchaser himself based his case alleging that Aftabuddin dealt with the land which belonged to himself and his brother Gobardi and that by such sale the shares of Gobardi's heirs had been affected. It is undivided land and the plaintiffs are entitled to the declaration and relief that they pray for. It will still be open to the purchaser to get his remedies as against Aftabuddin for the quantity of land which has now been declared to belong to the plaintiffs.

The appeal is decreed. The decree of the lower Appellate Court is set aside and that of the Munsif restored with costs of this Court and of the lower Appellate Court.

Appeal decreed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 681 OF 1918.

August 13, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Sheikh MUHAMMAD KABIR AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

SHAHDEO SUKUL AND OTHERS— DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Transfer pendente lite, *validity of—Delaying or defeating creditors—Intention.*

There is nothing in section 53 of the Transfer of Property Act or in any other provision of the law to prevent a defendant in a suit from transferring either for consideration or voluntarily his property to another, unless the effect is shown to be that his creditors are defeated or delayed. Such a transfer made during the pendency of a suit, when obviously the defendant was in possession of ample funds with which to pay off his creditors, is not a

fraudulent transaction nor a transaction entered into with the object of defeating his creditors. [p. 874, col. 2; p. 875, col. 1.]

Second appeal from a decision of the District Judge, Saran.

Messrs. *Rajendra Prasad* and *S. Saran*, for the Appellants.

JUDGMENT.

MILLER, C. J.—In my opinion this appeal must be allowed. The plaintiffs brought this suit to have it declared that the defendants Nos. 4 to 11, against whom the defendants Nos. 1 to 3 had obtained a money decree, had no right, title or interest in certain property which was attached by the defendants Nos. 1 to 3 as decree-holders in execution of that decree. The facts of the case are shortly these, that the defendant No. 11, who was one of the judgment-debtors in the suit brought by the defendants Nos. 1 to 3, owned certain properties and amongst others the property in suit in this case. After the suit was instituted which was in September 1911 but before any decree had been made in that suit, the defendant No. 11, an old lady and grandmother of the plaintiffs, executed a deed of gift in favour of the plaintiffs, in respect to the property now in suit. It is not suggested that the defendant No. 11 was in straitened circumstances or that she was not able either at that time or at any time subsequently to pay off such creditors as she may have had, including the defendants Nos. 1 to 3. According to the findings of the Subordinate Judge it appears that in addition to the property in question she had a 5 annas 4 pies share in village Narainpur, a *zarpeshgi* right in village Fanusra, various sale certificates showing her right to certain *kasht* lands and decrees standing in her name, and it does not appear that there is a word of evidence throughout the case to show that she was in any way unable to meet all her liabilities at the date when this decree was passed and when the property in question was attached, or at the time when she transferred the property by deed of gift to the plaintiffs in the year 1912. In these circumstances the learned Subordinate Judge came to the conclusion that in the present suit the plaintiffs had made out their case and were entitled to judgment. There is another matter which I ought also to mention and that is this, that out of the total decretal amount of Rs. 1,092 the defendants Nos. 1 to 3 had already realised a sum of Rs. 768, leaving a balance of something less than one third of the total decretal amount still due.

When the matter came before the District Judge, he seems to have thought that the fact that the defendant No. 11 had plenty of other property out of which her creditors could be satisfied, was not a material matter to be taken into consideration in arriving at a conclusion as to whether the transfer was in fact one made with intent to delay or defeat creditors. He says that because the Subordinate Judge had based his decision upon a consideration of this question, he had entirely missed the whole point of the case and that the Judge of the trial Court had omitted to consider what the learned District Judge said were the relevant dates in the case and that once you consider the relevant dates, it must at once in his opinion put the plaintiffs out of Court. Then he gives the dates which he considers relevant in this case. They are these, the suit out of which the decree arose was instituted on the 20th September 1911, that is the suit by the defendants Nos. 1 to 3 against the remaining defendants. The defendant No. 11 filed her written statement on the 8th March 1912. The judgment was delivered on the 30th July 1912, the decree was made on the 31st July and the deed of gift is dated the 9th May 1912, that is after the filing of the written statement and before delivery of judgment. The Judge says when we consider these facts and also the fact that the father of the donees signed the written statement for the lady, it is impossible to hold that the deed was *bona fide*. He added: "No Court could look at a deed executed in such circumstances, and I am surprised to find an experienced Judicial Officer doing so."

It is difficult to see how the learned District Judge could possibly have come to the conclusion that this transfer in the circumstances of this case, where the lady was obviously in possession of ample funds out of which to pay off her creditors, must be taken to have been a fraudulent transaction or a transaction entered into with the object of defeating her creditors, merely because it took place at a date when a suit was pending against her. There is absolute,

ly nothing in the provisions of section 53 of the Transfer of Property Act, nor indeed in any other Statute or law that I am aware of, which prevents a defendant in a suit from transferring either for consideration or voluntarily his property to another, unless the effect is shown to be that the creditors are defeated or delayed. The only evidence upon which the learned Judge has come to the conclusion that this is a transfer in order to defeat creditors is the fact that the transfer took place when a suit unconnected with the transferred property was pending, and it almost looks as if the learned Judge in considering the effect of section 53 of the Transfer of Property Act, if indeed he did consider it, was mixing it up in his own mind with the preceding section, *viz.*, section 52, but however that may be, it is quite clear that he based his decision upon evidence which was clearly no ground for arriving at the conclusion to which he came. He even goes to the length of saying that it makes no difference that the lady may have had other property. To my mind it makes all the difference in the world because if it is shown that the defendant in suit is well off, that is a very material circumstance in considering whether the transfer was governed by section 53. In the present case there is clearly no evidence at all to support the conclusion arrived at by the District Judge and, in my opinion, this appeal must be allowed, the decree of the District Judge must be set aside, and that of the Subordinate Judge restored. The respondents have not appeared and the appeal is, therefore, allowed without costs.

FOSTER, J —I agree.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 75 OF 1918.

April 7, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C.

Thakur SHEO GANGA BAKHSH SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RANJIT SINGH AND OTHERS—PLAINTIFFS, SHEORAJ KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1903), *Sch. I, Art.* 144—*Mortgage—Co-mortgagor redeeming entire mortgage—Possession, suit for, by other co-mortgagors—Limitation.*

Where one of several co-mortgagors redeems the entire mortgage and obtains possession of the mortgaged property, Article 144 of Schedule I to the Limitation Act applies to suits by the other co-mortgagors for recovery of possession of their shares from him. [p. 877, col. 2.]

Ashfaq Ahmad v. *Wazir Ali*, 14 A. 1 (F. B.); A. W. N. (1891) 211; 11 A. 423; 7 Ind. Dec. (N. S.) 373, *Khiali Ram* v. *Taik Ram*, 36 Ind. Cas. 452; 38 A. 540; 14 A. L. J. 834, and *Wazir Ali* v. *Ali Islam*, 47 Ind. Cas. 833; 40 A. 683; 16 A. L. J. 740, doubted.

Appeal from the decree of the District Judge, Sitapur, dated the 26th November 1917, upholding that of the Subordinate Judge, Sitapur, dated the 2nd April 1917.

Mr. *St. George Jackson*, for the Appellants.

Mr. *Satyanand Roy*, for Respondents Nos. 1 to 3.

Babu *Bisheshwar Nath Srivastava*, for Respondent No. 5

Mr. *A. P. Sen* and Babu *Chottey Lal*, for Respondent No. 6.

JUDGMENT.—This appeal arises out of a suit for redemption. It appears that Jaskaran Singh was the Talukdar of Bajehra and owned among other villages the three villages now in suit. He had two brothers, Balbhaddar Singh and Ratan Singh, who were living jointly with him, but the Kabuliyat of the Taluqa stood in the name of Jaskaran Singh.

Jaskaran Singh was killed in 1838 A. D. He left a widow, *Musammat* Gulab Kuar, and a daughter by her, *Musammat* Fateh Kuar, who was married to Bisheshar Bakhsh Singh. After the death of Jaskaran Singh, Balbhadhar Singh held the estate up to 1256 Fasli. In that year there was some arrangement by which *Musammat* Gulab Kuar was put in possession of fifteen villages including the three villages now in suit and Ratan Singh was put in possession of fifteen other villages, while the remainder remained in the possession of Balbhaddar Singh (Exhibit 2). On the 5th Zilhijja 1262 Fasli, corresponding with the 19th August 1855 A. D., Gulab Kuar, Sheodan Singh (son of Balbhaddar Singh) and Ratan Singh jointly executed a mortgage-deed of the three villages now in suit along with five other villages in favour of Guman Singh for Rs. 2,401. The property mortgaged was the right, title and interest of *Musammat* Gulab Kuar alone in the said villages. Sheodan Singh appears to have

signed the mortgage deed on behalf of his father, Balbhaddar Singh, who was then in confinement for non-payment of revenue. Ratan Singh affixed his own seal. None of the villages assigned to Balbhaddar Singh or Ratan Singh was included in the mortgage. No effort appears to have been made by Guman Singh to obtain possession under the mortgage till 1863, when he filed a suit for possession of the village Sheorakhi not now in suit, alleging that by virtue of a compromise filed at the time of the summary settlement he was entitled to proprietary possession of that village in full satisfaction of his mortgagee rights in that and other villages. During the pendency of that suit *Musammat* Gulab Kuar sold her rights in the three villages now in dispute to her son-in-law Bisheshar Bakhsh Singh. The Settlement Officer upheld the right of Guman Singh to obtain possession of the village Sheorakhi, but on appeal the Financial Commissioner set aside that decision and allowed Guman Singh a decree for possession as mortgagee of the eight villages mortgaged with him.

Before Guman Singh could, however, obtain possession of the mortgaged property, *Musammat* Gulab Kuar filed a suit for redemption of the mortgage which was compromised on the 4th October 1866; the effect of the compromise being that Guman Singh was granted the village Sheorakhi in proprietary right in consideration of his surrendering his mortgagee rights in the other villages mortgaged and *Musammat* Gulab Kuar was allowed to retain possession over the latter. Two days later *Musammat* Gulab Kuar died. Her son-in-law Bisheshar Bakhsh Singh had died in the previous year. The villages in dispute remained in possession of *Musammat* Fateh Kuar after the death of her mother.

In 1867 Balbhaddar Singh sued *Musammat* Fateh Kuar for possession of the villages now in suit along with some other villages, claiming the same as the reversionary heir of Jaskaran Singh. He excluded from the claim the village Sheorakhi which had already been given to Guman Singh in satisfaction of his mortgage. On the death of Balbhaddar Singh, Ratan Singh continued the suit but he was unsuccessful, the decision being that the villages claimed had been validly sold by *Musammat* Gulab Kuar to Bisheshar Bakhsh Singh and that *Musammat* Fateh Kuar was entitled to hold possession of the said villages as the heir of Bisheshar Bakhsh Singh in her own right (Exhibit F-15). From *Musammat* Fateh Kuar the villages in dispute passed by virtue of a gift to her step-daughter, *Musammat* Muna Kuar, who was succeeded by her husband, Gandharap Singh.

In 1883 Uman Prasad sued Gandharap Singh for possession of the said villages, claiming that he was entitled to succeed to the property left by Bisheshar Bakhsh Singh on the death of *Musammat* Fateh Kuar, inasmuch as *Musammat* Muna Kuar was excluded by custom and *Musammat* Feteh Kuar had no right to make a gift in her favour. That suit was decreed by their Lordships of the Privy Council in *Uman Parshad* v. *Gandharp Singh* (1). The villages in dispute have since then been in the possession of Uman Prasad and after him in that of his sons, Gajadhar Bakhsh Singh and Ganesh Bakhsh Singh, now represented by defendants Nos. 4 to 7.

The plaintiffs-appellants are the legal representatives of Sheodan Singh and Ratan Singh. Their contention is that *Musammat* Gulab Kuar had no right to sell the villages in dispute to Bisheshar Bakhsh Singh and the plaintiffs-appellants are entitled to the possession of the said villages on payment of the money due on the mortgage of the 19th August 1855, which *Musammat* Gulab Kuar redeemed by transferring one of the villages mortgaged to the mortgagee in proprietary right in consideration of his surrendering his mortgagee rights in the other villages mortgaged. The Courts below dismissed the claim.

The first question for consideration is whether *Musammat* Gulab Kuar had any proprietary right in the villages in question which she could have sold to Bisheshar Bakhsh Singh. The decree of the Settlement Officer dated the 31st August 1866 (Exhibit F-9) is conclusive on the point. It was upheld on appeal (Exhibit F-12). By virtue of that decree *Musammat* Gulab Kuar and her heirs were awarded absolute proprietary rights in the villages in suit and other villages. Balbhaddar Singh was

(1) 15 C. 20 (P. C.); 14 I. A. 127; 11 Ind. Jur. 474; 5 Sar. P. C. J 71; Rafique & Jackson's P. C. No. 98; 7 Ind. Dec. (N. S.) 599.

a party to that decree and he and his successors-in-interest are bound by it. The attempt made by Balbhaddar Singh on the death of *Musammat* Gulab Kuar to obtain possession of the said villages as the reversionary heir of Jaskaran Singh, the husband of *Musammat* Gulab Kuar, in 1867 (Exhibit F-13) was equally unsuccessful, the finding in that suit, which was continued after the death of Balbhaddar Singh by his brother, Ratan Singh, having been that *Musammat* Gulab Kuar held an absolute right which she could have sold to Bisheshar Bakhsh Singh (Exhibit F-15). In 1904 there was another litigation arising out of a claim made by the descendants of Balbhaddar Singh for possession of some of the villages in dispute against Gajadhar Bakhsh and Ganesh Baksh, the sons of Uman Prasad. That suit was dismissed on the ground that *Musummat* Fateh Kuar was excluded from inheritance by a tribal custom and that the claim was barred by limitation. There was a further finding that the mental unsoundness of Sheodan Singh, son of Balbhaddar Singh, was not shown to have continued till his death in 1889 and the claim was in that view of the case too barred by time (Exhibits F-31 to F-33). In face of those judgments it cannot be said that the plaintiffs have any subsisting title left to the property which *Musammat* Gulab Kuar redeemed in her own right.

The next question is whether as a representative in-interest of the other co-mortgagors they have a right to redeem the property from the hands of the successors in interest of *Musammat* Gulab Kuar. It appears from the mortgage deed that no portion of the mortgaged property belonged to Sheodan Singh and Ratan Singh, the co-mortgagors of *Musammat* Gulab Kuar. The property mortgaged belonged solely to the latter. Sheodan Singh and Ratan Singh were probably joined as co mortgagors in order to protect the rights of the mortgagee from any possible claim by them to the property mortgaged by *Musammat* Gulab Kuar. On *Musammat* Gulab Kuar redeeming the mortgage of the villages in question by transferring the village Sheorakhi to Guman Singh in lieu of the mortgage money in absolute right, the mortgage became extinguished; and if Sheodan Singh and Ratan Singh or their legal representatives had any right in the property after its redemption by *Musammat* Gulab Kuar, the adverse possession held by *Musammat* Gulab Kuar and her successors-in-interest has lasted long enough to extinguish that right, which is no longer enforceable. In *Makhdum Khan* v. *Musammat Jadi* (2) which has been followed in *Muhammad Taqi* v. *Muhammad Bagir* (3), it was held that when one of several co mortgagors redeemed the entire mortgage and obtained possession of the mortgaged property, Article 144 of the Indian Limitation Act (IX of 1908) applied to suits by the other co-mortgagors for the recovery of possession of their shares from him. The same view was taken in *Sambu* v. *Nama* (4). The decisions in *Moidin* v. *Osthumangani* (5) and *Ramchandra Yashvant Sirpotdar* v. *Sadashiv Abaji Sirpotdar* (6) recognise that an adverse title can be set up by the redeeming co-mortgagor under certain circumstances. A different view was taken in *Ashfaq Ahmad* v. *Wazir Ali* (7), *Khiali Ram* v. *Tulk Ram* (8) and *Wazir Ali* v. *Ali Islam* (9). But it may be doubted whether a charge, such as is created by section 95 of the Transfer of Property Act, can remain alive after twelve years so as to stop the acquisition of an adverse title, and whether Article 148 of the Indian Limitation Act can be applied to the redemption of such a charge as against a co-mortgagor.

The circumstances proved in this case moreover preclude the idea that Sheodan Singh and Ratan Singh, through whom the plaintiffs claim to have derived their title, had an interest in the mortgaged property and if they have no interest, there is nothing which the plaintiffs can redeem from the successors-in-interest of *Musammat* Gulab Kuar. They have no right to claim through *Musammat* Gulab Kuar or her husband.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(2) 9 O. C. 91.
(3) 20 Ind. Cas. 580; 16 O. C. 163.
(4) 12 Ind. Cas. 362; 35 B. 438; 13 Bom. L. R. 867.
(5) 11 M. 416; 4 Ind. Dec. (N. S.) 291.
(6) 11 B. 422; 6 Ind. Dec. (N. S.) 276.
(7) 14 A. 1 (F. B.); A. W. N. (1891) 211; 11 A. 423; 7 Ind. Dec. (N. S.) 373.
(8) 36 Ind. Cas. 452; 38 A. 540; 14 A. L. J. 834.
(9) 47 Ind. Cas. 833; 40 A. 683; 16 A. L. J. 740.

LOUIS DREYFUS & CO. *v.* FIRM OF GHANDAMAL & CO.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 40 OF 1915.

September 27, 1918.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

MESSRS. LOUIS DREYFUS AND CO.—APPELLANTS

versus

FIRM OF GHANDAMAL AND CO.—RESPONDENTS.

Tort—Conversion of goods—Damages, assessment of —Admission by Pleader, whether binding on client.

In an action for conversion the Court, in assessing the damages, is not limited to the value of the property at the time of conversion, but may find as damages the value at a subsequent time, even up to the date of trial, and in assessing damages it may take into account the conduct of the defendant. [p. 878, col. 2.]

An erroneous admission on a point of law made by the Pleader of a party prior to the filing of a suit is not binding on that party. [p. 878, col. 2; p. 879, col. 1.]

Appeal from the decision of the Additional Judicial Commissioner, Sind.

Mr. *Gulabrai Nihalchand*, for the Appellants.

Mr. *Kimatrai Bhojrai*, for the Respondents.

JUDGMENT.—It has been held by the lower Court that appellants, Messrs. Louis Dreyfus & Co., misappropriated a large quantity of wheat belonging to the respondents, in spite of the fact of their having previously rejected the goods and cancelled the contract under which they were tendered; also that this was done without justification, in order to benefit by a sensational rise in the market after the war started in August 1914. Appellants' Pleader has not questioned these findings before us, but has confined himself to contending that the damages awarded should be reduced. The price of wheat rose from rate of Rs. 31-6 0 on 4th August 1914 to one of Rs. 49 9-0 on the 7th February 1915. On the 28th August, the actual date of conversion, it was Rs. 33-12-0. On the 17th December, after which date the goods were shipped to England by appellants, it was Rs. 42. Respondents claimed damages at the latter rate. The learned Additional Judicial Commissioner awarded Rs. 4,500 as damages, which sum works out to a rate of about Rs. 40. Appellants' Pleader contends that the rate should be reduced to one of Rs. 33-12-0, which was that of the date of conversion. If the damages were for breach of contract, then no doubt his contention would be correct, for the measure of damages in such a case is the difference between the contract price and the market price at the date of the breach, and is unaffected by a subsequent rise in prices, see *Jamal* v. *Moolla Dawood, Sons & Co.* (1). But this is an action in tort for conversion, and in such a case, according to the recognised law in England, the Court or Jury, in assessing the damages, is not limited to the value of the property at the time of conversion, but may find as damages the value at a subsequent time, even up to the date of trial, see Halsbury's Laws of England, Volume X, Article 633 at page 344, and Volume XXVII, Article 1602 at page 903; Mayne on Damages, 9th Edition, page 410; Addison on Torts, 7th Edition, page 511. There is also a further difference between the two cases. In actions of contract, as a rule, the motives or conduct of the defendant are not to be taken into account in assessing damages whereas in actions of tort which affect property, the conduct of the defendant may be so taken into account (Halsbury's Laws of England, Volume X, Articles 593 and 598 at pages 323, 325).

On both these grounds we think there is no sufficient reason for an interference with the damages actually awarded. There is also, as pointed out in the judgment of the Court below, reason to believe that appellants actually realised more than the amount for which they have been made liable; and if the sale price had been disclosed, the Court might have held this to be a proper measure of damages, *cf. Bansidhar* v. *Sant Lal* (2).

It is true that on the 31st August 1914 respondents' Pleaders wrote threatening to hold appellants responsible at the rate prevailing on the 27th to 29th August. But appellants in replying denied all liability and told respondents' Pleaders they might take whatever steps they deemed necessary. At the most the claim put forward on 31st August amounts to an erroneous admission on a point of law made by re-

(1) 31 Ind. Cas. 949; 43 C. 493; 30 M. L. J. 73; 19 M. L. T. 80; 3 L. W. 131; 23 C. L. J. 137; (1916) 1 M. W. N. 70; 20 C. W. N. 105; 18 Bom. L. R. 315; 14 A. L. J. 89; 9 Bur. L. T. 8 (P. C.).

(2) 10 A. 133; A. W. N. (1888) 35; 6 Ind. Dec. (N. S.) 90.

spondents' Pleaders, which does not bind the respondents, *cf. Hassomal* v. *Sheikh Ghulam Mahomed* (3). Appellants did not alter their position in consequence of it, so as to make it a case of estoppel, nor do they appear to have relied on this admission in the lower Court.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(3) 27 Ind. Cas. 357; 8 S. L. R. 156.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 34 OF 1918.

December 15, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Napier.

C. CUNNIAH, PROPRIETOR OF THE SRI KRISHNA VINODHA SABHA DRAMATIC COMPANY—DEFENDANT—APPELLANT

versus

K. GOPAL CHETTIAR—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 8, 9, 54—Promissory note secured by deposit of title-deeds—Assignment of pro-note for collection, whether passes security—Registration, whether necessary.

The general provisions of section 54 of the Transfer of Property Act as to sales by act of parties cannot be construed as affecting the express provisions of section 8 as to the transfer of securities being attendant on the transfer of the debt. [p. 880, col. 1.]

The transfer of a promissory note secured by deposit of title-deeds passes the equitable mortgage with it and no separate registered document is necessary to evidence the latter. [p. 880, col. 1.]

Dwarka Doss v. *Danakoti Ammal*, 23 Ind. Cas. 129; 15 M. L. T. 198 and *Subramaniam* v. *Perumal Reddi*, 18 M. 454; 5 M. L. J. 92; 6 Ind. Dec. (N. S.) 666, followed.

Ramasami Pattar v. *Chinnan Asari*, 24 M. 449 at 463, dissented from.

Per *Napier, J.*—Where the assignment is not for consideration but for collection, section 9 of the Transfer of Property Act applies and the title-deeds having been delivered with an intention to transfer, there is a legal transfer and title passes along with the assignment. [p. 880, col. 2.]

Appeal against the judgment and decree of Mr. Justice Bakewell passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 317 of 1917.

Messrs. *T. V. Venkatrama Aiyar* and *G. Krishnaswamy Aiyar*, for the Appellant.

Messrs. *Venkatasubba Row* and *Radakrishnaya*, for the Respondent.

JUDGMENT.

WALLIS, C. J.—In this case the defendant borrowed money from a Chetty on a promissory note secured by a deposit of title deeds. The Chetty endorsed the promissory note to the plaintiff for collection and at the same time gave him the title-deeds, and the plaintiff sued on the equitable mortgage. Bakewell, J., has given him a decree holding that, under section 8 of the Transfer of Property Act, the security passed to the plaintiff with the debt and that the objection that the transfer of the mortgage interest was a sale and required registration under section 54 of the Transfer of Property Act did not arise. In this he was clearly right. He also referred to my decision in *Dwarka Doss* v. *Danakoti Ammal* (1), following *Subramaniam* v. *Perumal Reddi* (2), that even if there had been consideration for the transfer of the debt, the mortgage security would have passed with it, although that decision had been questioned *obiter* by Bhashyam Aiyangar, J., in *Ramasami Pattar* v. *Chinnan Asari* (3). As this last decision has been dissented from in Allahabad, with reference to Bhashyam Aiyangar, J.'s *dictum*, and as this provision of the section has received very little consideration, it may be as well to point out that in that *dictum* the learned Judge makes no reference to the provisions of section 8. Having pointed out that the transfer of an equity of redemption for consideration was the sale of an intangible thing within the meaning of section 54, he said the same thing about the transfer of the mortgagee's interest and expressed his dissent, without further discussion, from *Subramaniam* v. *Perumal Reddi* (2). It seems to me, with great respect, that the learned Judge gave too little weight to the provisions of section 8, if indeed he considered them at all. Those provisions of the section, which are new and were not, like the earlier part of the section, taken from

(1) 23 Ind. Cas. 129; 15 M. L. T. 198.
(2) 18 M. 454; 5 M. L. J. 92; 6 Ind. Dec. (N. S.) 666.
(3) 24 M. 449 at p. 463.

the Conveyancing Act, 1881, are an application of a general rule of jurisprudence taken from the civil law and variously expressed in such maxims, as *res accessoria sequitur rem principalem* or *accessorium non ducit, sed sequitur suum principalum* Co. Litt 152 a. Though in *Walker* v. *Jones* (4) the Privy Council declined to say that in England the mortgage security could never be separated from the mortgage debt, Lindley, L. J., in *Patrick, In re* (5) was inclined to hold that a transfer of the security might be implied from a transfer of the debt; and in the note to this section in Mr. Ghose's Law of Mortgage it is stated that this is the law in America. It is clearly inconvenient that the security should be separated from the debt, and should remain in the hands of the transferor who has no further interest in it. The Legislature has, therefore, seen fit to enact that, unless a contrary intention is expressed or necessarily implied, the transfer of the debt shall pass forthwith the securities therefor, that is to say, by a statutory transfer without further act of the parties. Securities in the section must obviously include mortgages of immoveable property which are the most valuable class of securities, and the operation of this beneficial Statute cannot, in my opinion, be cut down and practically nullified by the provisions of section 54, which require transfers of immoveable property or intangible things by way of sale to be in a particular form.

Section 54 applies to transfers by act of parties and does not cover statutory transfer such as that provided in section 8 on grounds of policy and convenience. In any case the rule of construction contained in the maxim *generalia specialibus non derogant* is sufficient to show that the general provisions of section 54 as to sales by act of parties cannot be construed as affecting the express provisions of section 8 as to the transfer of the securities being attendant on the transfer of the debt. Section 8 speaks of a "debt or other actionable claim", and it has been argued that its operation has been affected by the definition of 'actionable claim' inserted in the Act in 1900, which excludes debts secured by the mortgage of immoveable or moveable property. The section, however, applies in terms to secured debts, whether they are actionable claims or not, and if the Legislature had desired to repeal this provision entirely, it would have done so. Full effect must, no doubt, be given to the legislative provisions which make registration essential to the validity of certain transactions in India, or render unregistered documents inadmissible in evidence in proving such transactions. The ordinary rules of statutory construction must nonetheless be applied to the provisions of section 8, even if the result should be to permit unregistered transfer of mortgages. In the present case the debt has been transferred by the endorsement of the promissory note and the equitable mortgage passed with it. Seeing that the equitable mortgage was created by deposit of title-deeds without registration, the anomaly would be if the transfer required registration.

The appeal is dismissed with costs.

NAPIER, J.—The assignment in this case was admittedly not for consideration but for collection. It is not, therefore, covered by any of the chapters special to certain classes of transfer in the Transfer of Property Act. Section 9 accordingly applies and the documents having been delivered with an intention to transfer, there is a legal transfer and title passed. I, therefore, agree that this appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

(4) (1866) 1 P. C. 50; 35 L. J. P. C. 30; 12 Jur. (N. S.) 381; 14 L. T. 686; 14 W. R. 484.
(5) (1891) 1 Ch. 82; 60 L. J. Ch. 111; 63 L. T. 752; 39 W R. 1

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 460 OF 1919.
August 8, 1919.
Present:—Mr. Justice Stuart and
Mr. Justice Wallach.
EMPEROR—PETITIONER
versus
DHANI AND ANOTHER—OPPOSITE PARTIES.

Confession, value of—Corroboration, whether necessary—Court, duty of.

The law does not require that the confession of an accused person should be corroborated before it can be acted upon. It is for the Court to decide whether it believes a confession or not.

Criminal revision by the Local Government against the order of the 1st Additional Sessions Judge, Aligarh, dated the 23rd May 1919.

The Government Pleader, for the Crown.

JUDGMENT.—The learned Additional Sessions Judge has tried this case carefully and has taken into consideration every point that can be taken in favour of the accused persons. We wish to point out to him that he is in error in referring to the principle of law "that an accused person should not be convicted merely upon a retracted confession unless there is corroboration of the confession by other evidence.' There is no such principle of law. The proper rule is laid down in the case which he quotes, namely, *Emperor* v. *Kehri* (1). It is for the Court to decide whether it believes a confession or not. That is all. The law does not require any corroboration. Naturally a Court is more likely to believe a confession if it is corroborated, but the learned Additional Sessions Judge should disabuse his mind of the erroneous impression that the law requires any corroboration. It does not. However, the fact that the learned Additional Sessions Judge has strained points in favour of the accused persons whom he has acquitted, makes his conviction of those whom he has convicted even stronger, and we are satisfied that he rightly convicted the two appellants Dhani and Diwan of complicity in this serious dacoity. But the learned Additional Sessions Judge must understand that in cases of this nature the sentences should be substantial. Here we have a dacoity in which Lachman, the owner of the house attacked who was a lame man, was stabbed and in which Lachman's aged mother was severely beaten The sentence of three years' rigorous imprisonment for men concerned in such a dastardly outrage is obviously insufficient. We enhance the sentences passed on both Dhani and Diwan to a sentence of ten (10) years' rigorous imprisonment.

Sentence enhanced.

(1) 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 2 OF 1919.
March 10, 1919.
Present:—Mr. Justice Richardson and
Justice Sir Syed Shamsul Huda, KT.
PANCHANON BOSE AND OTHERS
—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 147, 148—Rioting with common object of causing obstruction to measurement of khas mahal land—Burden of proof—Possession of disputed land not affirmatively proved, effect of.

In a criminal case the burden of proving the charge substantially as drawn lies on the prosecution. [p. 884, col. 1.]

The common object of the unlawful assembly of which the petitioners were said to have been members and for which they were convicted by the lower Court under sections 147 and 148, Indian Penal Code was to cause obstruction to measurement and demarcation of *khas mahal* land by a *kanungo* and a *khas mahal tahsildar*. The land in question had lain fallow up to the date of the occurrence, and there was considerable doubt whether the prosecution had established that on the date of the occurrence actual possession of the land was with the Government:

Held, that having regard to the condition of the land and the nature of the acts of possession on which the parties relied, it was not established affirmatively that the land on which the alleged riot took place was in the actual possession of the Government, and that, therefore, the charge as alleged was not proved, and the petitioners were not guilty of rioting with the common object stated in the charge. [p. 884, col. 2.]

PANCHANON BOSE *v.* EMPEROR.

Rule against the order of the Sub-Division Magistrate, Goalundo, dated the 20th August 1918.

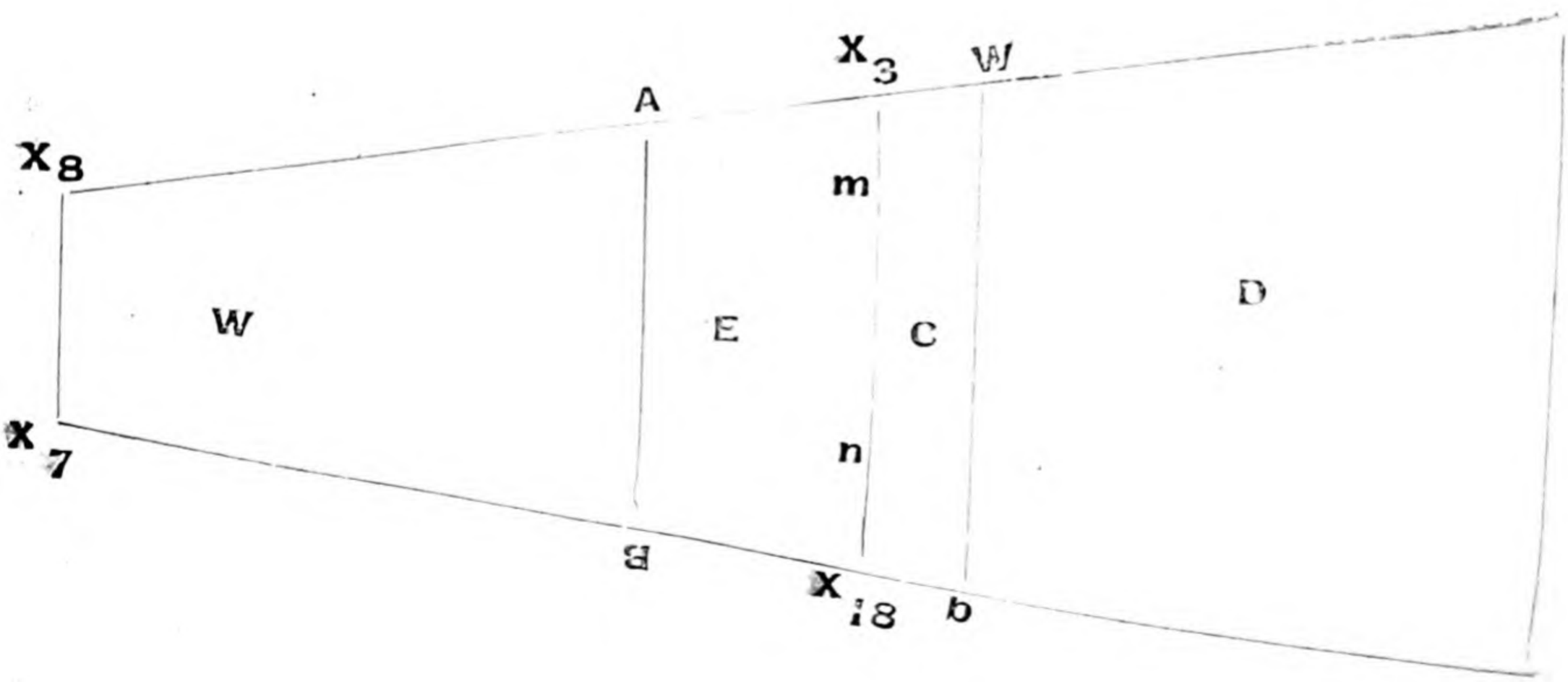
Sir *B. C. Mitter*, Babus *Dasarathi Sanyal*, *Debendra Narain Bhattacharjee* and *Parmanand Lahiri*, for the Petitioners.

Mr. *Orr*, for the Crown.

JUDGMENT.

RICHARDSON, J.—The petitioner Umed Ali has been convicted under section 148, Indian Penal Code, and sentenced to undergo three months' rigorous imprisonment and to pay a fine of Rs. 400 or in default to undergo a further period of six months' rigorous imprisonment; the remaining six petitioners have been convicted under section 147, Indian Penal Code: the sentences passed upon three of them are the same as the sentence passed upon Umed Ali. The remaining three have been sentenced each to undergo three months' rigorous imprisonment and to pay a fine of Rs. 200 or in default to undergo a further period of three months' rigorous imprisonment. The Rule called upon the District Magistrate of Faridpore to show cause why the convictions and sentences should not be set aside on the ground that regard being had to the facts found and the circumstances in evidence, the Sessions Judge erred in law in coming to the conclusion that possession of the land in question was with the Khas Mahal authorities and that in consequence the conviction of the petitioners on the charge of rioting as framed could not in law be sustained or why such other or further order should not be made as might seem fit to this Court.

The common object of the unlawful assembly of which the petitioners are said to have been members is stated in the charge to have been to cause obstruction to measurement and demarcation of Khas Mehal land by Kanongo Babu Asutosh Das Gupta and Khas Mahal Tahsildar Babu Lalit Mohan Acharjee. The charge assumes as a fact that the land on which the alleged riot took place is land belonging to the Government as a Khas Mahal. The land no doubt forms part of an area shown in the Thak map of 1857 as Government Estate No. 380, Bhattichar Baludhun. The estate is surrounded by lands belonging to the Patpasar Zemindars, of whom the principal present representative appears to be Maijuddin Biswas. The following rough sketch map shows the portion of the land to which the dispute relates.



The plot marked D is admittedly a portion of the Government estate. The next strip of land to the west (C) is also now admitted to be a part of the Government estate. C is bounded on the east by the line W*b* and on the west by the line X3, X18. To the west of C there are two plots marked E and W and the occurrence took place on W.

Formerly the Government estate appears to have been leased out to the Patpasur Zemindars as Ijaradars. In the year 1878 and the following years some attempt apparently was made to assess revenue under Act IX of 1847 on the western portion of the land; that is on plots C, E and W. Finally, however, that attempt was abandoned and that portion of the land, C, E and W, remained in the possession of the Patpasur Zemindars, who apparently claimed that it was a part of their own estate Char Durgapur. They even laid claim to the plot marked D and litigated that claim in the Civil Courts. They did not, however, succeed in establishing their title to D.

As I have said, they remained in possession of C, E and W and when the Government estate was settled or resettled in 1895, that portion, C, E and W, was excluded from the settlement.

In 1907, the whole of the land including plot D was diluviated. In 1911 the land began to re form and an island appeared extending, it is said, from a point in D to a point in E of which the Khas Mahal authorities took possession. By 1913 or at the latest by February 1914 the whole of the land had reformed.

It is alleged on the side of the prosecution that in the year 1913 possession was taken on behalf of the Government with the consent of the Patpasur Maliks or of Maijuddin Biswas of an area which included lands in E and W. It is further stated that in the years 1912, 1913, 1914 and 1915 the grass growing on the whole of the reformed area was sold by auction by the Khas Mahal authorities and purchased by Maijuddin Biswas.

In July 1915 settlement proceedings were commenced by the Khas Mahal Officer, Babu Profulla Chandra Gupta, and the settlement was concluded in April 1916. It is not disputed that this officer excluded the lands in plots E and W from the area which he settled as forming the Government estate.

I should also mention that between the years 1904 and 1910 a survey was made of the whole district on the basis of which a Record of Rights was published in 1912-1913. The maps including Exhibit XI prepared by the Settlement Authorities in these years appear to show that the western boundary of the Government estate was the line marked on the sketch map X3, X18. The Records of Right therefore, so far as it goes is in favour of the claim made by Maijuddin Biswas to the lands in E and W. During the period of the Record of Rights, however, the lands had for the most part been under water.

In the years 1916 and 1917 there was no sale by the Khas Mahal authorities of the grass grown on E and W. It is not very clear by whom the grass was taken.

In September 1916 Babu Profulla Chandra Gupta, the Khas Mehal Officer, was transferred and was succeeded in that post by Babu Brojendra Kumar Gupta. In March 1917 Brojendra Babu discovered that the lands in E and W had been excluded from the settlement made by Profulla Babu. On the 1st April 1917 he reported the matter to the Collector, Mr. Dunlop, who on the 3rd April ordered possession to be taken. Possession was taken on the following day, *i.e.*, the 4th April, by an Amin who perambulated the boundaries, posted bamboos and had a drum beaten. This was done without notice to the Patpasur Zemindars. In June of the same year the Khas Mahal authorities seem to have taken effective possession of the land in E. In July, Brojendra Babu is said to have selected tenants for the lands in W and to have allotted holdings to those tenants; at the time, however, the land in W was more or less under water. On the 11th November an Amin went to plot W to point out the plots allocated by Brojendra Babu to the different tenants. There was another visit paid on the 12th. The riot took place on the 13th. The lands in W had lain fallow up to then and the question is who was in actual possession of it on the day of the riot.

PANCHANON BOSE *v.* EMPEROR.

If we assume, without deciding, that at the time of the Thak Survey in 1857 the true title was with the Government, the possession of the Patpasur Zemindars from sometime before 1895 to 1907 would be that of trespassers. When the land was submerged, according to well-settled principles of law, the constructive possession would revert to the true title and it may be that on the re appearance of the land in the year 1913 or a little later actual possession was also with the Government. It is not easy, however, to say who was in actual possession in the years 1916 and 1917. Apparently possession was during these years recovered by or on behalf of the Patpasur Zemindars, and there is at least a doubt whether in the then state of the land they were deprived of the possession so obtained by anything which was done on the 3rd April 1917. The error into which the learned Sessions Judge appears to have fallen in this connection is that he failed sufficiently to appreciate that in a criminal case the burden of proving the charge substantially as drawn lay on the prosecution. He seems to have thought that he had to decide, as in a civil case, on the balance of the evidence whether on the day of the occurrence actual possession lay with the Government or with the Patpasur Zemindars.

Regard being had to the condition of the land and the nature of the acts of possession on which the parties rely, the question of possession may on the principle already adverted to depend on the further question in which side the true title resides. That question is not one upon which a definite opinion can be expressed on the materials on the present record. It is eminently a question for the Civil Court to determine with reference to the whole history of the land. That being the position, it appears to me that there is at least considerable doubt whether the prosecution has established that on the date of the occurrence actual possession of the land in plot W lay with the Government.

In this connection I may add that no doubt, when it comes to a scramble for land, the Government may be at a disadvantage as compared with a private Zemindar because the representative of the Government cannot, or ought not to, condescend to the undignified and unprincipled methods which ordinary landowners or their agents sometimes employ. It must be remembered that if the Government is at a disadvantage in this respect, in other respects the Government have advantages which the private Zemindar does not possess. For instance, it is not a very easy thing to prescribe against the Government. In order to make a good title to land against the Government by prescription it is necessary that adverse possession of the land should be held for a period of 60 years.

If it is not established affirmatively that the land on which the alleged riot took place (the land in plot W) was in the actual possession of the Government, the charge as alleged is not proved and the petitioners are not guilty of rioting with the common object stated in the charge. It is to that question that the Rule was directed and it is to that question that we confined the arguments before us. In the view we take the petitioners are entitled to an acquittal on the charge as framed. The amount of actual force and violence used by the petitioners appear not to have been great. In the circumstances, therefore, we have not thought it necessary to consider whether any offence other than the offence stated in the charge was committed by them.

The result is that the Rule is made absolute and the conviction of the petitioners and the sentences passed upon them are set aside. The fines or so much of them as may have been paid must be refunded.

The petitioners will be discharged from their bail bonds.

SHAMSUL HUDA, J.—I agree.

Rule made absolute

EMPEROR *v.* NATHU RAM.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 116 OF 1919.
March 27, 1919.
Present:—Mr. Justice Chevis and
Mr. Justice Broadway.
EMPEROR—APPELLANT
versus
NATHU RAM AND OTHERS—RESPONDENTS.

Companies Act (VII of 1913), s. 104—Return of allotment of shares, failure to furnish—Ignorance of provision of law, whether excuse.

Under section 104 (1) (*a*) of the Companies Act, the Directors and Manager of a Company are bound to furnish to the Registrar the return of allotment of shares; and their failure to do so renders them liable to the penalties provided by sub-section (3) of that section. A plea of ignorance of the provisions of the law in this respect cannot be accepted as an excuse for failing to comply therewith. Where, however, the default is not intentional, but is due to negligence alone, the full or a heavy penalty ought not to be exacted. [p. 886, cols. 1 & 2.]

Appeal from the order of the Magistrate, 1st Class, Gurdaspur, dated the 15th January 1919.

Mr. *Herbert*, Officiating Government Advocate, for the Appellant.

Dr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—Nathu Ram Varma, Managing Director of the Batala Bank, Limited, Munshi Ram Sharma, Manager, and Megh Raj, Pleader, Halas Rai, Merchant, and Rai Sahib Karam Chand, Directors of the said Bank, were proceeded against under section 104 (3) of the Indian Companies Act (VII of 1913) for having failed to comply with the provisions of section 104 (1) (*a*) of the said Act. Rai Sahib Karam Chand died and the remaining persons were acquitted by the trying Magistrate on the 15th January 1919.

Against this order of acquittal the Local Government has preferred this appeal, and we have heard the learned Government Advocate in support while Mr. Gokal Chand Narang has addressed us on behalf of the four respondents.

The Bank of Batala, Limited, was registered under the Indian Companies Act, 1882, on the 7th May 1913, as a Company having a share capital and the four respondents were the officers of the said Bank.

Its first Balance Sheet was issued for the year ending on the 31st December 1913, and showed that 550 shares had been allotted.

On the 1st April 1914 the present Indian Companies Act, VII of 1913, came into force and by section 104 (1) (*a*) of this Act it was enacted that:—

Section 104 (1): "Whenever a Company having a share capital makes any allotment of its shares, the Company shall, within one month thereafter,

(*a*) "file with the Registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; . . . . . "

A Balance Sheet was issued by the Bank for the half year ending on the 30th June 1914, in which the number of shares that had been allotted was shown as 555. The provisions of section 104 (1) (*a*) of Act VII of 1913 had, however, not been complied with.

For the year ending on the 30th June 1915 the Bank issued another Balance Sheet in which the number of shares allotted was given as 558. Here again section 104 (1) (*a*) of Act VII of 1913 has been ignored.

The Registrar, however, took no action in the matter.

Subsequently Balance Sheets were issued for the years ending on the 30th June 1916 and on the 30th June 1917, the number of shares allotted being entered in each case as 558.

In the Balance Sheet that was issued for the year ending on the 30th June 1918, however, the number of shares allotted was shown as 735, an increase of 177 shares within the year under reference.

These 177 shares were allotted as under:—

On the 30th October 1917	...	17
On the 13th January 1918	...	152
On the 19th February 1918	...	8
Total	...	177

but the returns of these allotments were not filed with the Registrar till the 25th October 1918, when they had been requisitioned by that officer. There had thus been a default in complying with the requirements of section 104 (1) (*a*) of Act VII of 1913,

The case for the Crown was, and is, that by reason of their default the respondents had rendered themselves liable to the penalties imposed by section 104 (3) of Act VII of 1913, which runs as follows:—

"(3) If default is made in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues."

The respondents while admitting that the provisions of section 104 (1) (*a*) of Act VII of 1913 had not been complied with, pleaded (1) that the Directors were not responsible for the default inasmuch as it was not their duty but the duty of the manager to furnish the said returns, and (2) that in any event the default was not an intentional one and was due only to their ignorance of the provisions of the new Act, the former Act of 1882 not having any corresponding provision in it.

The trying Magistrate held, rightly, that the "default and negligence" were "quite patent," but acquitted the respondents, holding that the use of the word "knowingly" in section 104 (3) of the Act excused not only ignorance on matters of fact but ignorance of law as well.

Mr. Herbert for the Crown contended that this view was incorrect and that ignorance of law, could not be pleaded by the respondents as an excuse. He argued that as the respondents must be presumed to know the law, they must be held to have knowingly taken part in the omission to comply with it. He further contended that the Directors and Managers of the Bank were bound to see that the provisions of the law were complied with and were bound, therefore, to see that the necessary returns were submitted. In support of this latter contention he referred to *Tota Ram* v. *Emperor* (1) and *Tota Ram* v. *Emperor* (2). There can be no doubt that it is the duty of the Directors and the Managers of a Company to furnish the returns that are necessary under section 104 (1) (*a*) of the present Act. The first contention, therefore, of the respondents is untenable, and they must be held liable unless they are able to show that they are excused by their ignorance of the law. Seeing that the Act had been in force since the 1st April 1914 and further having regard to the fact that one of the respondents is a Pleader, it is obvious that the plea of ignorance of the law cannot be accepted. The respondents must be held to have known that on the allotment of the shares in question the law required a return of the allotment to be forwarded to the Registrar. Doubtless if they or any one of them could show as a matter of fact that they or he were or was not aware of the default and could show circumstances to justify the conclusion that as a matter of fact they or he believed that the returns required had been sent, the penalty could not be exacted. In the present case the only real plea is that they were unaware of the provisions of the law on this subject, and this excuse cannot be accepted [*Chhabil Das* v. *Emperor* (3)]. In these circumstances it must be held that the respondents were knowingly parties to the default and have, therefore, rendered themselves liable to the penalties provided by section 104 (3) of Act VII of 1913. At the same time it is not necessary to exact the full or any heavy penalty. The default was not an intentional one but due to negligence alone and had the respondents thought fit to move the proper Court under the proviso to sub-clause 3 of section 104, they might have had the time extended.

We, therefore, think that a fine of Rs. 25 in all payable by each of the respondents will meet the case and accepting this appeal, we convict the respondents under section 104 (3) of Act VII of 1913 and sentence each of them to pay a fine of Rs. 25.

Appeal accepted.

(1) 34 Ind. Cas 962; 14 P. R. 1916 Cr.; 17 Cr. L. J. 242; 38 P. W. R. 1916 Cr.

(2) 35 Ind. Cas 482; 18 P. R. 1916 Cr.; 17 Cr. L. J. 306; 143 P. L. R. 1916.

(3) 23 Ind. Cas. 508; 164 P. L. R. 1914; 15 Cr. L. J. 300; 17 P. R. 1914 Cr.; 38 P. W. R. 1914 Cr.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 13 OF 1919.

April 9, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

PANCHAM—ACCUSED—APPLICANT

versus

EMPEROR THROUGH SITAL KAHAR—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 97—Person impressed for service against his will—Private defence, right of.

A person is perfectly justified, under section 97 of the Penal Code, in offering resistance to his being taken away against his will with the object of being impressed for service or employment.

Case reported by the Officiating Sessions Judge, Rae Bareli, under section 438 of the Criminal Procedure Code.

Mr. *F. Hasan*, for the Accused.

Syed *Ali Mohammad*, holding brief of the Government Pleader, for the Crown.

JUDGMENT.—The complainant had no right to impress the accused, who is a Kahar, for service or employment. The accused refused to accompany him, when the complainant told him that he was required to work with a certain Government official. When pressed to go for the work mentioned, he started by abusing and followed it up by attacking the complainant with a shoe. The complainant does not say that he used any force; but there can be no doubt that he tried to send the accused with the Tahsil peons who had come to him, whether he was willing to go or not, and the accused was justified under section 97 of the Indian Penal Code in offering resistance to his being taken away against his will. The accused was not deprived of the right of defence by reason of the fact that the complainant was acting in pursuance of a direction given by the Tahsildar that a Kahar should be supplied.

As pointed out in *Bisu Halder* v. *Emperor* (1), the exceptions referred to in section 99 of the Indian Penal Code apply to cases where a thing is done which is not strictly justifiable or, in other words, where the official has done wrongly what he may have done rightly, but not to

(1) 11 C. W. N. 836; 6 C. L. J. 127; 6 Cr. L. J. 38.

cases where the act could not possibly have been done lawfully or where the act was done without jurisdiction. In *Emperor* v. *Bahal* (2), where a vaccinator attempted to vaccinate a child against the wishes of his father and the father and some of his relations intervened and assaulted the vaccinator, it was held that they were perfectly justified in interfering with what the vaccinator was doing and preventing him from vaccinating the child against their wishes. In *Queen-Empress* v. *Jogendra Nath Mukerjee* (3) a similar view was taken under somewhat different circumstances. Section 323 of the Indian Penal Code cannot, therefore, be applied to the present case.

It has been suggested that section 160 of the Code might be applied, but it does not appear where the quarrel took place and no charge under that section was framed.

The accused will be acquitted of the offence charged and the sentence passed on him will be set aside. The fine, if realized, will be refunded.

Revision accepted.

(2) A.W. N. (1903) 93; 3 A. L. J. 327; 3 Cr. L. J. 338; 28 A. 481.

(3) 24 C. 320 at p. 324; 1 C. W. N. 154; 12 Ind. Dec. (N. S.) 881.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 405 OF 1919.

July 28, 1919.

Present:—Mr Justice Wallach.

BADLU—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Proceeding under s. 110—Previous acquittal—Magistrate, whether can question legality of acquittal.

Where an accused person is being tried by a Magistrate under section 110 of the Criminal Procedure Code and it is found that in a previous case of dacoity he was acquitted by the Court of Session, it is not for the Magistrate to question in his judgment the decision of the Sessions Judge. [p. 887, cols. 1 & 2.]

MAHADEI *v.* RAM SAHAI.

Criminal revision from an order of the District Magistrate, Fatehpur, dated the 5th June 1919.

Mr. *A. P. Dube*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Badlu applies in revision seeking to have an order passed against him under section 110 of the Code of Criminal Procedure set aside. This order was passed by a Magistrate of the First Class on the 13th May 1919 and was upheld in appeal by the District Magistrate of Fatehpur on the 5th June 1919. Ordinarily, I would not interfere in revision with findings of fact but this case presents some peculiar features. It is argued on behalf of the petitioner that he has been greatly prejudiced by the Court of first instance having been influenced adversely to the petitioner by a judgment of the Additional Sessions Judge of Cawnpore acquitting him (the petitioner) in a dacoity case on the 29th September 1918. That the petitioner's view in this respect is correct would appear from the following paragraph from the first Court's judgment:—"It would be better to say something regarding the dacoity which occurred at Chak Jahanpur, Police Circle Budki, on the 31st May 1918. The dacoits carried away property to the value of Rs. 750, a part of the property was recovered from the possession of three of the accused and one of them, Bansi Singh, was made King's witness. The case resulted in an acquittal on the 29th September 1918 from the Court of the Additional Sessions Judge of Cawnpore, Khan Bahadar Muhammad Husain Sahib. The evidence on the record appears to be free from bias and mostly consisted of disinterested persons who had no motive to fabricate a false case, but the learned Judge came to the conclusion that no dacoity actually occurred and that the case for the prosecution was the result of a conspiracy. An appeal against the order of acquittal of the learned Judge could not be preferred on behalf of the Government, as the period of three months laid down by the Government of India for appeals against acquittals had expired." The Magistrate was not justified in importing this sentence into his judgment. It was not for him to question in his judgment the decision of the Court of Session which had come to the conclusion that the case then brought against the petitioner was false and the result of a conspiracy. His remarks that the appeal could not be brought by the Local Government within the time prescribed by law are futile. If the district authorities had moved in time and the Government had desired to file an appeal, they would have found no difficulty in carrying out their intention. I have gone through the evidence on the record, and I find that several of the witnesses against him in this case were witnesses against him in the Sessions case, in which their evidence was disregarded by the Sessions Judge. This has led me to go through the further evidence against the applicant on the record which, in my opinion, is clearly insufficient to establish the case against him, a great deal of it consisting of inadmissible evidence. The first Court said in its judgment that it cannot act on the evidence of the Sub Inspector. The reasons he has given for not doing so are sound. In my opinion the evidence on the record does not justify the orders passed by the Courts below. For the above reasons this revision must be allowed and the orders of the Court below directing the applicant to enter into a personal bond and to give sureties must be set aside. I am informed by the learned Counsel for the applicant that the applicant is in custody. He must be released forthwith.

Revision allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 43 OF 1919.

May 2, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

Musammat MAHADEI —APPLICANT

versus

RAM SAHAI AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 202—Police enquiry, scope of—Magistrate, duty of—Accused member of Police force—Procedure.

CHAGAN RAJ *v.* HERA LAL.

The Police enquiry contemplated by section 202 of the Code of Criminal Procedure cannot take the place of such evidence as the complainant may desire to produce before an adjudication is made of his or her complaint. Such an enquiry can be ordered before evidence is recorded to enable the Magistrate to determine how far the complaint was *prima facie* well-founded. When the Magistrate decides to record the evidence himself, he should complete the enquiry and determine upon the evidence adduced how far the complaint is borne out.

Where a person accused of a criminal offence is a member of the Police force, it is desirable that the inquiry should be conducted by the Magistrate himself.

Revision against the order of the District Magistrate, Lucknow, dated the 21st March 1919, confirming that of the City Magistrate, Lucknow, dated the 12th February 1919.

Mr. *R. F. Bahadurji*, for the Applicant.

Pandit *Harkaran Nath Misra*, for the Opposite Party.

The Government Pleader, for the Crown.

JUDGMENT.—The complainant charged Ram Sahai, a Police constable, and Fakire, a goldsmith, with having embezzled her jewellery. Her allegation was that she had entrusted her jewellery to them when she took her husband, who was unwell, to the house of a relation at another place, so that she might receive from him such assistance as might be necessary. The Magistrate, after examining the complainant, ordered the Police to make an enquiry. The Police sent up a report which was inconclusive, because the complainant had refused to produce her witnesses before the Police. The Magistrate then examined some of the witnesses produced by the complainant. Their evidence was recorded in the vernacular but no English memorandum appears to have been kept. The Magistrate subsequently directed another Police Officer to make an enquiry. The report of that officer was that there was some truth in the allegation made by the complainant but the evidence produced by her was insufficient. The learned Magistrate thereupon rejected the complaint.

The Police enquiry contemplated by section 202 of the Code of Criminal Procedure cannot take the place of such evidence as the complainant may desire to produce before an adjudication is made of his or her complaint. Such an enquiry can be ordered before evidence is recorded to enable the Magistrate to determine how far the complaint was *prima facie* well-founded. When the Magistrate decides to record the evidence himself, he should complete the enquiry and determine upon the evidence adduced how far the complaint is borne out.

In *Queen-Empress* v. *Kanappa Pillai* (1) it was pointed out that where the accused is a member of the Police force, it is generally better that the enquiry should be conducted by the Magistrate himself. Here one of the accused is a Police constable. The complainant states that she has not been given an opportunity to produce all her witnesses. The report of the Police is not altogether against her and a further enquiry seems desirable.

The application is, therefore, allowed and the case sent back to the Court by which it was originally tried for further enquiry and disposal in the manner required by law.

Revision accepted.

(1) 20 M. 387; 2 Weir 240; 7 Ind. Dec. (N. S.) 275.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO 318 OF 1919.

May 2, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, Kt.

CHAGAN RAJ—PETITIONER

versus

HERA LAL DOOSAJ—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 100, applicability of—Order for removal of child from custody of accused if no steps are taken to move higher Court for getting rid of order, propriety of.

On a complaint made to the effect that the adopted son of the complainant's daughter-in-law living with her was removed from her house by his natural father without her consent and was not brought back, the accused produced the boy in Court before any search warrant was issued and admitted having made a contract for giving the boy in adoption but denied any actual ceremony of adoption. Thereafter, when the complainant filed a written statement and produced the original contract, the Magistrate adjourned the case to a certain date and ordered that "if the High Court be not moved by that date he

would order the boy to be made over to the complainant:"

Held, (1) that the order directing the child to be made over to the complainant but temporarily kept in abeyance, was improper and should be set aside;

(2) that in a matter like this the health or safety of the child was the paramount consideration;

(3) that it was doubtful whether section 100 of the Criminal Procedure Code applied to a case like this.

Criminal revision against an order of the 2nd Presidency Magistrate, Calcutta, dated the 7th April 1919.

Babus *Manmatha Nath Mukherjee* and *Frobodh Chandra Chatterjee*, for the Petitioner

Mr. *Langford James*, Babus *Tarak Nath Sadhu* and *Bibhuti Bhusan Saha*, for the Opposite Party.

JUDGMENT.

SHAMSUL HUDA, J.—The facts of the case are shortly these. On the 5th of March 1919 a complaint was lodged on behalf of one Bibau Bibi also known as Gulabo Bibi (who to avoid confusion would hereafter be referred to by her last mentioned name) to the effect that Bibba Bibi, the widow of her deceased son Lala Kapurchand, had adopted a boy Basant Roy aged about 5 years in the beginning of February last, that the accused, who as the natural father of the boy had given him in adoption by a registered deed, came to live in the house of the complainant with his wife and subsequently removed the child from her house without her consent and did not bring him back. As soon as the complaint was filed, the accused produced the boy in Court and on the 21st of March filed a written statement in which he admitted having entered into a contract for giving his son in adoption, but denied that any actual ceremony of adoption had taken place. He also alleged misrepresentation and various other grounds as invalidating the contract. The complainant then filed a written statement traversing the statements made by the accused and also produced the original contract. The case was then adjourned to 7th of April and on that date the Magistrate passed the following order:—

"Adjourned to 22nd for defendant to move the High Court. If in the meantime no steps are taken, I shall order the boy to be made over to complainant on 22nd."

The present Rule obtained by the accused relates to this last order.

It is argued that there is no provision of the law upon which this order can be supported. In reply the learned Counsel for the complainant has relied on section 100 of the Criminal Procedure Code. In the present case although a warrant for production of the boy was ordered, no search warrant was issued nor was the boy brought before the Court in execution of such a warrant. No evidence has yet been recorded. Upon the materials in the record it is not clear that the confinement, if any, amounted to an offence. Under these circumstances it appears to be very doubtful if section 100, Criminal Procedure Code, applied to this case. Be that as it may, it seems to me that there is no danger to the health or safety of the child in his being allowed to live with his natural parents and this must always be the paramount consideration in matters of this kind. According to the complainants' own case it does not appear that the boy has ever lived with his adoptive mother or with Gulabo Bibi apart from his natural parents, and it is likely that he will be at least equally happy with them.

I, therefore, think that under all the circumstances of this case the order of the Magistrate, dated the 7th April 1919, which in effect is an order directing the child to be made over to the complainant but temporarily kept in abeyance, is not a proper order and I accordingly set it aside.

As the evidence in the case has not been gone into, I do not think it right to quash the proceedings but at the same time I may express the hope that the parties will see the wisdom of settling their differences amicably or of seeking their remedy in the Civil Court.

WALMSLEY, J.—I agree.

Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 50 OF 1918.

March 1, 1918.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

RAM RATANCHAND—APPLICANT

versus

PIRU KHAN MAHOMED—OPPOSITE PARTY.

Workman's Breach of Contract Act (XIII of 1859), s. 5—Notification restricting jurisdiction of Magistrates, validity of—Advance made at one place—Complaint preferred at another—Jurisdiction of Magistrate to entertain complaint.

Where a notification of the Local Government specially appoints all Magistrates of the First Class to exercise the powers vested in a Magistrate of Police under the Workman's Breach of Contract Act and where by a subsequent notification the exercise of the power so conferred is restricted to those cases only in which an advance of money was made or the work was to be performed within the local limits of the ordinary jurisdiction of such Magistrates, the latter notification does not take away any of the powers of such Magistrates: it merely forbids the exercise of the powers in a class of cases with a view to a distribution of the business, and is consequently not *ultra vires*. [p. 892, col. 1.]

A firm having its head office at Karachi made a complaint to the City Magistrate at Karachi against workmen who had received an advance for work to be done at Hala in the Hyderabad District. The City Magistrate returned the complaint for presentation to the proper Court. In an application for revision to the Judicial Commissioner it was contended that the Magistrate was wrong in returning the complaint:

Held, that the City Magistrate was right in refusing to entertain the complaint, that the complaint should have been presented to the nearest Magistrate empowered, in the local area in which the alleged offence occurred, to entertain the complaint and that that Magistrate was the First Class Magistrate at Hala and not the City Magistrate at Karachi. [p. 892, col. 1.]

Application for revision against the order of the Additional City Magistrate, Karachi.

Mr. *Suganlal Hassanand*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.

PRATT, J. C.—This is an application for revision of an order made by the Additional City Magistrate, Karachi, under section 201, Criminal Procedure Code, returning the applicant's complaint for presentation to the proper Court.

The applicant, who is the manager of a firm of forest contractors whose head office is in Karachi, made a complaint under Act XIII of 1859 against workmen who had received at the Noorketti forest in the Hala Taluka of the Hyderabad District an advance for work to be done in that forest.

The applicant contends that the Magistrate was wrong in refusing to entertain the complaint.

Act XIII of 1859 has been extended to Sind and by Notification No. 379 of the 25th January 1905 the Local Government was "pleased to specially appoint all Magistrates of the First Class to exercise the powers vested by the said Act in a Magistrate of Police:" Bombay Local Rules and Orders, Volume I, Part II, page 39. Under this Notification any Magistrate of the First Class in Sind could entertain the complaint of any resident in Sind.

But then followed another notification under section 5—Notification No. 655 of the 7th September 1917 which directed that the powers "conferred on all Magistrates" shall be exercised only in cases in which the advance of money was made or the work was to be performed within the local limits of their ordinary jurisdiction: *Sind Official Gazette*, 13th September 1917, Part I, page 1133.

Under this Notification the magisterial business under the Act is distributed among the Magistrates empowered. The distribution is territorial according to the Magistrate's local jurisdiction and the cases are classified according to the place of payment of advance or of breach of contract.

It is under this Notification that the City Magistrate, Karachi, declined to receive the complaint and Mr. Suganlal contends that the Notification is *ultra vires*.

Section 5 confers a power to appoint several officers to exercise powers in a local area, and there can be no doubt that this implies a power to distribute the business in that area between these officers. This is an application of the principle that when an Act confers a power, it impliedly confers all the powers reasonably necessary for its execution: Halsbury's Laws of England, Volume XXVII, Article 280; Maxwell (2nd

Edition), page 433, and *Shankar Ramlal Dikshit* v. *Martandrao Bhau Tipnis* (1).

Mr. Suganlal admits the implied power of distribution, but contends that the cases should be classified according to the residence of the complainant. But that is clearly a matter within the discretion of the distributory authority.

Mr. Suganlal refers to section 181 of the Criminal Procedure Code and contends that as the offence of theft is triable by a Magistrate not only where the theft is committed but also where the stolen property was retained in the local limits of his jurisdiction, the Magistrates' powers cannot be limited to the trial of theft in the one case and not in the other. But the fallacy of this argument lies in the assumption that the Notification of 1917 deprives the Magistrates of any of the powers with which they were invested by the Notification of 1905. The Notification does not take away any of the powers, it merely forbids the exercise of the powers in a class of cases with a view to a distribution of the business. So in the case of offence of theft the Magistrate might be directed to try only cases in which the theft was committed within the local limits of his jurisdiction. Such an order could be made by the District Magistrate under section 17 (1), Criminal Procedure Code, with a view to the distribution of magisterial business.

It is true that the residence in the local area gives the right of recourse to a Magistrate in that area. But the local area is not Karachi but Sind. This right is not taken away, for the complainant still has a right of recourse to a Magistrate in Sind. He would naturally go, as pointed out in *Ali Mohamed* v. *Emperor* (2), to the nearest Magistrate empowered in that area. But that nearest Magistrate must be a Magistrate authorised to entertain the complaint. In the present case that Magistrate is not the Additional City Magistrate, Karachi, but a Magistrate, First Class, at Hala.

The Notification is *intra vires* and the City Magistrate, Karachi, was right in refusing to entertain the complaint. I would reject the application.

(1) 14 B. 157; 7 Ind. Dec. (N. s.) 563.
(2) 35 Ind. Cas. 484; 10 S. L. R. 56; 17 Cr. L. J. 303.

FAWCETT, A. J. C.—I concur. Mr. Suganlal's main contention is that (1) the effect of extending the Act to Sind and appointing all First Class Magistrates in Sind to exercise the powers vested by the Act in a Magistrate of Police (as was done in 1905) is to empower each of such Magistrates with jurisdiction not only in the cases referred to in the Commissioner's Notification of 1917 but also in cases where the employer resides or carries on business within the local limits of the Magistrate's ordinary jurisdiction, irrespective of where the money was advanced to the labourer or where the work was to be performed, and (2) such powers once conferred could not in the absence of statutory authority be limited in the manner effected by the Commissioner's Notification; at the most they could only be entirely withdrawn.

The first point is in accordance with this Court's ruling in *Ali Mahomed* v. *Emperor* (2), but no authority was cited for the second statement and in my opinion it is incorrect. It is not a case of a grant of property but of jurisdiction, which is derived from the Sovereign as the source and fountain of justice (Halsbury's Laws of England, Volume VI, Article 605 at page 399); and where judicial functions have been delegated to any person, they can (subject, of course, to any statutory provisions to the contrary) be resumed by Government in exercise of its Sovereign powers. *Bir Bikram Deo* v. *Secretary of State for India* (3). And if there is such a right of resumption, it follows that there is a right of putting limitations on the exercise of the judicial powers conferred, for the principle that the greater contains the less applies, Broom's Legal Maxims, 7th Edition, page 139.

I do not think there is anything in the Act to the contrary. Mr. Suganlal argued that, when the Act was extended under section 5, the result is necessarily the same as that provided for in section 1. But this is not so. In the first place, as pointed out by the learned Judicial Commissioner, the area of extension is Sind, and, therefore, section 1 has to be

(3) 13 Ind. Cas. 965; 39 C. 615 at pp. 638, 661; 16 C.W. N. 362; 15 C. L. J. 639; 9 A. L. J. 585; (1912) M. W. N. 657; 14 Bom. L. R. 812; 39 I. A. 31 (P. C.).

read as if Sind and not any particular town or place in Sind were substituted for the words "Presidency Town." And secondly, any extension of the Act is subject to the limitation that the Magistrates exercising powers under the Act shall be specially appointed by Government. This gives an unrestricted discretion to Government as to the appointment of particular Magistrates and there is nothing rendering it obligatory on them to appoint Magistrates, having local jurisdiction and sitting in a place to which the Act may be extended. Thus this Act might be extended to the towns of Karachi and Hyderabad, and the Magistrates appointed by Government might all be Magistrates whose jurisdiction (apart from this appointment) is confined to the Hyderabad District. Similarly the Act might be extended to the towns of Sukkur and Shikarpur and only one Magistrate might be appointed to exercise the powers of a Magistrate of Police under the Act, *viz.*, one holding his Court and having jurisdiction only at Sukkur. There is, therefore, no right conferred on an employer residing or carrying on business at a town to which the Act has been extended, to insist that there shall be a Magistrate sitting at and exercising jurisdiction in that town; and even if such a Magistrate is appointed to exercise the powers of a Magistrate of Police under the Act, it is (on the general principles already mentioned) open to Government to restrict the exercise of them in the manner effected by the Notification complained of. Not only is this legitimate in the exercise of the power of Government to control the distribution of magisterial business (which is recognised and provided for in the Criminal Procedure Code), but it is also, in my opinion, covered by the terms of section 5 of this Act. The Notification of 1917 might have been framed to say that the powers in question "shall be exercised by any Magistrate of the First Class having jurisdiction under section 12 of the Code of Criminal Procedure in the place where the advance of money was made or the work was to be performed," and this would clearly be an appointment of a specified class of officers under section 5. The Notification of 1917 says exactly the same thing, only in another way.

I agree, therefore, that the application should be rejected.

Application rejected.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 698 OF 1918.

CRIMINAL REVISION PETITION No. 563 OF 1918.

March 26, 1919.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

PARAPPATI CHINNA *alias* THILLU AMMA—PETITIONER

versus

T. P. K. SHANKUNNI MENON—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 1, 488, 489—Malabar Law—Maintenance—Issue of sambandam marriage, right of, to order under s. 488—'Unable to maintain itself,' meaning of—Change of circumstances, what is—"Special law" in s. 1, meaning of.

The offspring of a Malabar *sambandam* marriage are not entitled to an order for maintenance under section 488, Criminal Procedure Code, where the *tavazhi* or *tarwad* to which their mother is attached has sufficient funds to maintain them. [p. 894, col. 1.]

Chantan v. *Chakkapayyan Mathu*, 32 Ind. Cas. 144; 39 M. 957; 19 M. L. T. 23; (1916) 1 M. W. N. 111; 17 Cr. L. J. 16, followed.

(Case-law reviewed.)

Per *Napier, J.*—The words 'unable to maintain itself' in section 488 of the Criminal Procedure Code cannot be confined to the tender age of the child but must also have reference to its financial dependency. [p. 895, col. 1.]

Where the amount available from the *tavazhi* or *tarwad* funds becomes insufficient to maintain the children, that would be a change of circumstances within the meaning of section 489 of the Code. [p. 896, col. 2.]

The expression 'special law' in section 1, Criminal Procedure Code, has reference to statutory enactments and not to local family law. [p. 894, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Malapuram, in Miscellaneous Case No. 28 of 1918.

Mr. *C. Madhavan Nair*, for the Petitioner.

Dr. *S. Swaminathan*, for the Respondent.

The Public Prosecutor, for the Crown.

PARAPPATI CHINNA *v.* SHANKUNNI MENON.

ORDER.

AYLING, J.—Petitioner and respondent in this case are both Nairs following Marumakatayam Law, and the four children in respect of whom petitioner claims maintenance are the offspring of a Sambandam between them. The Sub Divisional Magistrate, finding that petitioner's Tavazhi, from which the children admittedly had a right to maintenance, was able to maintain them, has dismissed the petition relying on the ruling in *Chantan* v *Chakkapayyan Mathu* (1).

I was a party to that decision and I after hearing the matter re-argued I see no reason to change my mind.

It seems to me that the object of including the maintenance sections (Chapter XXXVI) in the Criminal Procedure Code can only have been the prevention of destitution on public grounds; and that it should only be applied in cases where, in the absence of these provisions or the more cumbrous process of civil law, the wife or children would be destitute. Its unrestricted application to a society governed by a system of law like the Marumakatayam system is open to the peculiar objection and danger that it runs counter to the central ideas underlying the matriarchal system and should, in my opinion, only be allowed to the extent absolutely necessary to secure the object at which it is aimed.

I would, therefore, dismiss the petition.

NAPIER, J.—This petition arises out of an order passed by the Sub Divisional Magistrate of South Malabar, dismissing a petition by a certain Nair lady asking for an order for maintenance for her children against the respondent. The findings are that the petitioner is a Nair and has been observing the Marumakatayam system, that she began Sambandam with the respondent in 1908 09 and between the years 1908 to 1917 four children were born, all of whom were to the respondent. The respondent denied the paternity, but the Magistrate has found it and I certainly accept that finding. The petitioner belongs to a Tavazhi consisting of her mother, herself and her family and one Achutan Nair. The lower Court has not found what the income of the Tavazhi is, nor has it given any finding as to the income of the Tarwad. All it finds is that the Tavazhi lands are of some value and able to maintain the children, though not well. On this finding the Magistrate applies a decision of this Court in *Chantan* v. *Chakkapayyan Mathu* (1) and holds that no order can be made. *Chantan* v. *Chakkapayyan Mathu* (1) entirely holds that the words "unable to maintain itself" mean "not having a right to be maintained." It is argued before us that this decision is wrong as being in conflict with other decisions of this Court, and it is pointed out that in the last reported case no one appeared for the petitioner. The question has now been fully re-argued before us and we have examined those cases.

The first contention argued is that the section does not apply to persons following Marumakatayam Law, as that is a special law within the meaning of section 1 of the Criminal Procedure Code. This view has been directly negatived in *Ayya Patter* v. *Kaliani Ammal* (2), *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) and *Venkatakrishna Patter* v. *Chimmukutti* (4) and I have no doubt that those words in section 1 have reference to statutory enactments and not to local family law.

I have, therefore, to consider whether apart from section 1, Chapter XXXVI is applicable. In my opinion we must read the section in such a manner as to be properly applicable to the various social conditions of this country. The section is certainly old, as it is to be found in the Act of 1861. But we have to bear in mind its origin. In so far as illegitimate children are concerned, it owes its origin to the old English Act, 7 and 8 Vic. C. 101, which gave a right to a woman either before or after the birth of her illegitimate child to apply for an order against the father, and it has been held that the origin of this law is the prevention of vagrancy.

Bearing this in mind I think that we should give a meaning to the words 'unable to maintain itself' which is in keeping with the legal position of the parties who are affected. There is no doubt as to the

(1) 32 Ind. Cas. 144; 39 M. 957; 19 M. L. T. 23; (1916) 1 M. W. N. 111; 17 Cr. L. J. 16.

(2) 3 M. L. J. 281; 22 M. 247 *note*; 2 Weir 624; 8 Ind. Dec. (N. S.) 176.

(3) 19 M. 461; 2 Weir 621; 6 Ind. Dec. (N. S.) 1027.

(4) 22 M. 246; 2 Weir 625; 8 Ind. Dec. (N. S.) 175.

position of the children of a Sambandam in Malabar. That system of law is matriarchal and the children are entitled to be maintained by their Tavazhi or Tarwad. Whatever other rights they have, there can be no doubt that in this respect the Marumakatayam system differs completely from the Hindu Law in the rest of the Presidency, the Muhammadan Law and the English Law. I am, therefore, strongly inclined to think that the words "unable to maintain itself" cannot be confined, as suggested, to the tender age of the child but must also have reference to its financial dependency. This view seems to me to gain support from other words in the section. The first are the words almost directly after those words "a monthly allowance for the maintenance." That clearly points to the object of the payment which is to be ordered, and it seems to me that if the payment is not required for maintenance, it necessarily follows that the payment should not be ordered. Then there are the words in section 489 'change in the circumstances.' If the words "child unable to maintain itself" had reference only to the tender age of the child, it seems to me that so wide a word as 'circumstances' would not have been used in this latter section. If it is only a question of age a child cannot grow younger, it can only grow older, and that change can hardly be called a change of circumstances. The word is very applicable if a wider scope is intended. If, for instance, in this case the Tavazhi lost all its money and there was nothing left for the child for maintenance, that would undoubtedly be a change of circumstances. In the same way, if an order had originally been made in consequence of the poverty of the Tavazhi and it was brought to the notice of the Court that the Tavazhi had become possessed of wealth, that would be a change of circumstances.

So far for the words of the section.

Now for the cases.

The first is one of 1893 reported as *Ayya Katter* v. *Paliani Ammal* (2). That was also a case of Sambandam between a Nair woman and a Brahmin. The Magistrate found that the Tarwad was too poor to take the responsibility off the shoulders of the respondent, but he also held that the words in question had only reference to age. The revision petition was heard by Collins, C. J., and Shephard, J. The judgment, however, is very short. The Bench negatives the suggestion that the law enacted by the Code does not apply to Malabar and says that on the facts found there is no doubt that the order is right. The next case is *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3). The parties were Moplahs, but the Magistrate did not find whether they followed the Muhammadan or the Marumakatayam Law. The Magistrate found that the defendant was willing to maintain the mother and the child if they lived with him, and on that finding held that no order could be made. The petition was heard by Collins, C. J., and Parker, J., and it appears that the complainant was the Karnavan of the mother's Tarwad and was acting as *de facto* guardian of the children. The Bench negatived the proposition that section 488 did not apply to Malabar and held that section 1 was not a bar to the petition. The learned Judges then formulated two questions: (1) Are the children legitimate or illegitimate children of the defendant; and (2) has he neglected or refused to maintain them. They decided nothing but raised the following question: "If the parties follow Marumakatayam Law, the question will arise whether the father could be held to have neglected his duty to provide for his children if they were being actually maintained by the Karnavan of their mother's Tarwad who is bound by law to maintain them." It seems to me that the Bench rather assumed that the words "unable to maintain itself" were not confined to the question of the tender age of the child. The next case is *Venkatakrishna Patter* v. *Chimmukutti* (4). That was also a case of Sambandam between persons governed by the Marumakatayam Law. The Magistrate held that the petitioner, the mother, had no means of maintenance for her child and made an order against the father for Rs. 5 a month. The revision petition was heard by Collins, C. J., and Benson, J., and the judgment is as short as in *Ayya Patter's case* (2), which was expressly followed without any reference to *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3). "We have no doubt but that the Magistrate believed the woman and found that the

petitioner before the High Court was the father of the child. He is, therefore, liable" I certainly find it impossible to reconcile the wide language of this judgment with the doubts expressed in *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) and I have little doubt that the learned Chief Justice took a strong view of the matter and that Parker, J., who sat with Collins, C. J., in the case reported as *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) did not agree with him. The next case is *In re Parathy Valappil Moideen* (5). In that case the parties were Moplahs governed by Marumakatayam Law. The petitioner had been divorced and was living in her own Tarwad house with her children, and it was assumed that they were being maintained. It was also found that the father was willing to take the boy and maintain him. The father petitioned this Court and the case was heard by Sadasiva Aiyar, J. He directly held that the inability referred to in the section relates to the absence of sufficient maturity of physical and mental development in the child rendering it in consequence unable to earn its living by its own efforts, and does not refer to inability through poverty or absence of means. That this is the considered view of our learned brother has been demonstrated to us by the quotation of a decision of his as Chief Justice of the Travancore State which we have carefully considered. The last case is that reported as *Chantan* v. *Chakkapayyan Mathu* (1). There it was found that the children were in fact maintained by the Tavazhi, but the Magistrate made the order. The petitioner applied to the High Court and his case was argued by a Vakil, no one appearing for the mother. Abdur Rahim, J., in his judgment refers to the judgment of Sadasiva Aiyar, J., and says that he was unable to accept the narrow meaning of the words "unable to maintain itself" and holds that where the child is in fact maintained by some other person as of right, the section does not apply. The learned Judge also points out that the procedure is summary and does not cover the same ground as the civil liability of a father to maintain his child, and is of opinion that the Legislature did not contemplate a summary order of this sort in a case where a child is well-to-do. He points out that in the case of *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) the Bench did seem to suggest that children who were actually being maintained by their mother's Tarwad were not entitled to maintenance. My learned brother concurred in this view.

On an examination of these cases there is no doubt that there is a difference of opinion Collins, C. J., seems to have taken a very strong view in two cases, but he was a party to *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) where the opposite view was suggested. The decision of my learned brother Sadasiva Aiyar, J., is entitled to great respect, but it is the decision of a single Judge; whereas the decision in *Kariyadan Pokkar* v. *Kayat Beeran Kutti* (3) is that of a Bench If I thought the latter decision was wrong, I should have asked my learned brother to agree to its being referred to a Full Bench. But as on the policy of the provision and on the language of section 1, I concur with the latter ruling, I would follow it and dismiss the petition.

I would, however, point out that if the mother of the child can at any time show that the amount available from the Tavazhi or possibly from the Tarwad funds is insufficient to maintain the child, it is open to her to renew her application.

M. C. P.

Petition dismissed.

(5) 21 Ind. Cas. 469; 14 M. L. T. 223; 25 M. L. J. 355; 14 Cr. L. J 597; (1913) M. W. N. 997.

SUNDERBAI v. COLLECTOR OF BELGAUM.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

October 15, 1918.

Present:—Lord Shaw of Dunfermline, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

SUNDERBAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE COLLECTOR OF BELGAUM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed beyond limitation—Time spent in prosecuting remedy in wrong Court, exclusion of—Wrong advice Sufficient cause.

Where, acting upon mistaken advice as to the law, an appeal is presented to the wrong Court, and, when re-presented to the proper Court, the period of limitation has expired, the period during which the appeal was pending in the Court to which it was originally presented may be deducted from the period prescribed for appealing [p. 899, col. 1.]

Appeal from a judgment and decree of the Bombay High Court (Sir Basil Scott, C. J., and Heaton, J.), dated the 1st August 1913, and reported as 23 Ind. Cas. 221, reversing a decree of the First Class Subordinate Judge of Belgaum, dated the 16th April 1910.

FACTS.—One Linga Jayappa of Navalgund was the last of a series of Desais or Revenue Collectors created by the Bijapur Kings. Many grants of lands had been made to the holders of the office in the defendants' family, but after the advent of British rule, their services were no longer necessary, but the British Government recognised the grants and made settlements in respect thereof. A Government Resolution of 1862 sanctioned the recognition of this Navalgund's "Desai" as a personal holding, the offer of a settlement was made and accepted on a certain quit-rent, which was further validated by section 12 of the Bombay Act II of 1863. The above last Desai, by a Will and codicil, disposed of all the Vatan property to the defendants and died. It was also recited in the Will that he did not authorise his wife to adopt. The respondents applied for Probate in the District Court, and were granted the same. The present suit was by the wife of the deceased Linga Jayappa and her adopted son for declaration of the invalidity of the Will, of the validity of the adoption and for an injunction.

Messrs. *De Gruyther, K. C.*, and *E B. Raikes*, for the Appellants.—The appeal ought to have been filed in the District Court and the High Court rightly held so. See Suits Valuation Act, section 8, Court Fees Act, section 7, clause 4 (c), Bombay Civil Court Act XIV of 1870, section 7, clause 4 (c) (2). See also *Vachhani Keshabhai* v. *Vachhani Nanbha* (1), *Hari Sankar Dutt* v. *Kali Kumar Patra* (2). Time for appeal to the District Court had expired when appeal was filed therein under Article 152. The District Court did not excuse the delay. The High Court had no power to excuse the delay. There was not *sufficient cause* for excusing delay under section 5. *Brij Indar Singh* v. *Kanshi Ram* (3) does not apply, as appeal to the District Court was out of time when appeal was presented to the High Court. The Vatan lands were inalienable by law and custom: See Bombay Regulation Act XVI of 1827, section 20, and Bombay Act II of 1863, section 12 (1).

Messrs. *Dunne, K. C.* and *Kenworthy Brown*, for the Respondents, were not called upon.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated August 1, 1913*, of the High Court at Bombay, which varied a decree, dated April 16, 1910, of the First Class Subordinate Judge of Belgaum.

The suit in which this appeal has arisen was brought on February 22, 1909, in the Court of the First Class Subordinate Judge of Belgaum by the plaintiffs, who are appellants here. They allege that the property in suit was inalienable; that Lingappa Jayappa, who had purported to dispose of that property by his Will of June 6, 1906, and a codicil of August 13, 1906, had no power to alienate the property; and that the plaintiff, Jayappa Lingappa, was the validly adopted son of Lingappa Jayappa; and they claimed a declaration that Lingappa Jayapoa deceased had no power to make a Will dated June 6, 1906, and a codicil dated August 13, 1906, and that no right accrued to the defendants under the Will

(1) 1 Ind. Cas. 108; 33 B. 307; 11 Bom. L. R. 30; 5 M. L. T. 230.

(2) 32 C. 734; 9 C. W. N. 690.

(3) 42 Ind. Cas. 43; 44 I. A. 218; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 27 P. L. R. 1917; 45 C. 94 (P. C.).

*See 23 Ind. Cas. 221—*Ed.*

and codicil; a declaration that the plaintiff, Jayappa Lingappa, was the adopted son of Lingappa Jayappa deceased; and a perpetual injunction restraining the defendants from recovering the properties in suit from the plaintiffs. The claim for the injunction was valued in the plaint at Rs. 5.

In the written statement, it was alleged that the claim of the plaintiffs was groundless; that Lingappa Jayappa had full power to dispose of the property in suit, and did so dispose of it by his Will and codicil; and that the alleged adoption was not authorized and was invalid.

The widow of Lingappa Jayappa, professing to act under an authority which she alleged had been given to her by the testator in his lifetime, adopted Jayappa Lingappa as a son to her deceased husband on December 10, 1906.

Lingappa Jayappa, hereafter referred to as the testator, died on August 23, 1906, and the Court of Wards took charge of the property in dispute in this suit. In June 1907, the Collector of Belgaum, *ex officio* an executor of the Will, applied to the Court of the District Judge of Belgaum for a grant of Probate of the Will and the codicil. That application was opposed, but the Court of the District Judge granted Probate of the Will and codicil, and that grant was upheld on appeal.

The First Class Subordinate Judge of Belgaum tried the suit. He, having found that the property in suit was inalienable, that the testator had no power to alienate it and that the plaintiff Jayappa Lingappa had been validly adopted, by his decree of April 16, 1910, made the declarations and granted the injunction claimed in the plaint. From that decree the defendants appealed to the High Court at Bombay. For the necessary purposes of that appeal they applied for copies of the judgment of the trial Judge, but did not obtain them until June 11, 1910. They presented their appeal to the High Court on July 19, 1910, which, if the appeal lay to the High Court, was well within the ninety days allowed for an appeal to the High Court. On objection taken on behalf of the defendants, the High Court on March 11, 1912, rightly decided that the appeal lay to the Court of the District Judge of Belgaum and not to the High Court, and affirmed a principle, which had been previously applied by the High Court at Bombay, that "where a plaintiff sues for a declaratory decree and asks for consequential relief, and puts his own valuation upon that consequential relief, then for the purposes of Court-fee, and also for the purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both."

The High Court directed that the memorandum of appeal should be returned to the defendants for presentation to the District Judge of Belgaum, and the learned Judges intimated in this judgment that the appeal would be removed into the High Court. On March 16, 1912, the defendants presented the memorandum of appeal to the Court of the District Judge, and alleging that the appeal had been presented to the High Court of Bombay under the *bona fide* belief that the appeal lay to that Court, prayed that it might be admitted. On March 18, 1912, the District Judge made the following order: "The appeal is admitted to the file without prejudice to any objection that may be taken by the respondents as to limitation or otherwise."

The District Judge in making that order does not appear to have decided that the defendants, who were the appellants before him, had sufficient cause within the meaning of section 5 of the Indian Limitation Act, 1908 (Act IX of 1908), for not preferring the appeal to his Court within the period of limitation, which by Article 152 of the First Schedule to that Act was thirty days from the date of the decree appealed from.

It so happened that the District Judge to whom the memorandum of appeal was presented for admission had in 1910, as Legal Remembrancer to the Bombay Government, advised that the appeal from the decree of the trial Judge lay to the High Court, and on his advice the appeal had been preferred on July 19, 1910, to the High Court. The District Judge, knowing that the appeal would probably be removed into the High Court, may reasonably have preferred that the High Court should decide the question under section 5 of the Act.

It appears to their Lordships that when a memorandum of appeal is presented beyond the prescribed period of limitation,

the proper order which a Judge should endorse upon it would be to the following effect: "Presented for admission on the (date when the memorandum of appeal was handed in to the office of his Court). Let notice go to the respondents (date of the order)." The Board in *Krishnasami Panikondar* v. *Ramasami Chettiar* (4) impressed on the Courts in India the urgent expediency of adopting a procedure which should secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

After the District Judge had admitted the appeal, it was by order of the High Court removed into that Court. The learned Judges of the High Court, after hearing the parties and considering the affidavits which were filed, were rightly satisfied that the defendants had sufficient cause for not having preferred their appeal to the Court of the District Judge within the period of limitation. The fact that the defendants had acted on mistaken advice as to the law in appealing to the High Court in 1910, did not preclude them from showing that it was owing to their reliance on that advice that they had not presented the appeal to the Court of the District Judge within the prescribed period of limitation. [See *Brij Indar Singh* v. *Kanshi Ram* (3).]

The High Court, after a very full and careful consideration of the history of the title to the property in suit, of the Government Resolution of February 6, 1802, of the Bombay Act II of 1863, and of the proceedings which were affirmed or authorized by that Act and of the Will and codicil in question, came to the conclusion that some of the properties claimed by the plaintiffs in this suit were alienable and the private property of the testator and dismissed the suit as to them, and as to other of the properties claimed by the plaintiffs came to the conclusion that they were inalienable, and as to them did not interfere with the decree of the trial Judge. The High Court rightly found that the widow of the testator had no authority to adopt a son to her deceased husband, and consequently the suit, so far as it claimed a declaration that Jayappa Lingappa was an adopted son of the testator, must be treated as dismissed. The High Court made an order of remand as to some of the property in question in the suit. The return to that order of remand was accepted as correct, and the High Court, on December 11, 1914, made the necessary order upon it.

Their Lordships agree with the conclusions of the High Court and with their reasons for those conclusions, and will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Ranken, Ford, Ford* and *Chester.*

(4) 43 Ind. Cas. 493; 45 I. A. 25; 34 M. L. J. 63; 4 P. L. W. 54; 16 A. L. J. 57; 7 L. W. 156; 23 M. L. T. 101; 27 C. L. J. 253; 2 P. L. R. 1918; 22 C. W. N. 481; 1 M. 412; 20 Bom. L. R. 541; 11 Bur. L. T. 12; (1918) M. W. N. 906 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 42 OF 1918.

February 20, 1919.

Present:—Mr. Fawcett, J. C., and Mr. Kemp, A. J. C.

CHELLARAM KHIALDAS—DEFENDANT—APPELLANT

versus

Seth KIMATRAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 97, O. XXIII, r. 3—Partition suit—Preliminary decree—Appeal—Proceedings, stay of—Compromise, whether can be recorded.

Where, in a suit for partnership accounts, a preliminary decree is passed, the fact that an appeal has been preferred from that decree does not operate as a stay of proceedings under that decree, except so far as the Appellate Court may order, nor does such an appeal necessarily oust the jurisdiction of the Court to entertain an application to have a compromise between the parties recorded under Order XXIII, rule 3 of the Civil Procedure Code, and a decree passed in accordance therewith. [p. 900, cols. 1 & 2.]

Appeal from the order of the First Class Sub-Judge, Sukkur.

CHELLARAM KHIALDAS *v.* KIAMATRAM.

Mr. *Hirdaram Mewaram*, for the Appellant.

Mr. *Lalchand Hassomal*, for Respondents Nos 1 to 4.

Mr. *Kalumal Pahlumal*, for Respondent No. 6.

JUDGMENT.

FAWCETT, J. C.—This appeal arises out of a suit for settlement of partnership accounts, to which the appellant and respondents are parties. In that suit a preliminary decree had been passed by the First Class Subordinate Judge, and the present appellant filed an appeal to this Court against that decree. Subsequently, after a Commissioner had been appointed under the terms of the decree, it is alleged that the appellant Chellaram and plaintiffs-respondents Nos. 1 to 3 came to a compromise, which disposed of the dispute between them. The appellant asked the First Class Subordinate Judge to have the compromise recorded under Order XXIII, rule 3, and a decree passed in accordance therewith, but the First Class Subordinate Judge has rejected this application on the ground that the suit now being merged in the appeal against the preliminary decree, the application should be presented to this Court.

The point before us is, therefore, whether the lower Court erred in holding that it had no jurisdiction under Order XXIII, rule 3, Civil Procedure Code. That rule provides that "Where it is proved to the satisfaction of the Court that a suit has been adjusted", etc, "the Court shall order such agreement", etc., to be recorded. It, therefore, clearly contemplates that there is a suit pending before the Court in which the application to record a compromise of that suit is made. In the present case, it is admitted by respondents' Pleader that the partnership suit, in which this application is made, is still pending in the lower Court; and the only question is whether the fact of there having been an appeal to this Court from the preliminary decree prevents the lower Court from acting under Order XXIII, rule 3. The duty of passing a final decree in the suit still rests, under section 97 of the Code, on the lower Court, and under Order XLI, rule 5, the fact that an appeal has been made from the preliminary decree does not operate as a stay of proceedings under that decree, except so far as the Appellate Court may order. No order had been made for the stay of proceedings, when the application to record the compromise was before the lower Court and it had, therefore, jurisdiction to proceed with the suit with a view to the framing of a final decree. The provision in section 97 of the Code, under which a party is precluded from disputing the correctness of a preliminary decree in any appeal preferred from a final decree, is obviously one of mere procedure intended to obviate the unnecessary expenses that may otherwise be incurred in allowing proceedings to be carried to the stage of a final decree on a preliminary decision, which may be upset in the Appellate Court. Accordingly it cannot be said that an appeal from a preliminary decree is one that necessarily ousts the jurisdiction of the lower Court when the suit is still pending before it for a final decree. The case is quite a different one to that where a final decree has been passed in a suit and an appeal is made from that decree. There, of course, the suit is not pending before the Court but has been finally concluded by the decree. In view, therefore, of the express provisions of Order XLI, rule 5, and in the absence of any provision which shows that the Legislature intended the contrary, I am clearly of opinion that the lower Court had jurisdiction to entertain the application.

I would, therefore, reverse the lower Court's order and remand the case for disposal according to law. No order as to costs.

I also set aside all stay orders passed by this Court, without prejudice to any application that may be put before the lower Court for stay of the proceedings in view of the alleged compromise.

KEMP, A. J. C.—I agree with all that my learned brother has said. As to whether the compromise should be recorded in the lower Court or here, I note that the letters addressed to the Commissioner purport to inform him that the *suit* has been settled, and in one letter, dated the 23rd August, the Commissioner is informed that on Kimatram presenting his consent to this effect to the Court, "We will take

steps to withdraw the appeal pending in the Judicial Commissioner's Court" and requests the Commissioner to report to the Court.

Order reversed; Case remanded.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 16 OF 1919.

July 29, 1919.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

Chaubey BENAIK RAO AND OTHERS—OPPOSITE PARTIES—APPELLANTS

versus

PUTAIN SINGH—APPLICANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XLIII, r. 1 (a)—Ex parte decree—Application to set aside decree—Order granting application—Appeal, whether lies.

An order granting an application under Order IX, rule 13, of the Civil Procedure Code is not appealable.

Appeal from an order of the Subordinate Judge, Mainpuri, dated the 2nd January 1919.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *S. P. Ghosh*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken to the hearing of this appeal on the ground that no appeal lies. The order from which the appeal has been presented purports to be an order under Order IX, rule 13 of the Code of Civil Procedure. The application on which that order was passed was an application under the Order and rule mentioned above. From an order granting such an application no appeal lies under Order XLIII, rule 1 of the Code of Civil Procedure. We, therefore, dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 29 OF 1916.

October 29, 1918.

Present:—Mr Fawcett, J. C., and Mr Raymond, A. J. C.

MAHOMED KHAN AND OTHERS—APPELLANTS

versus

NENUMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Satisfaction of decree—Certification, mode of—Reference to satisfaction in pleadings, whether sufficient.

In order that a satisfaction of a decree may be treated as a proper satisfaction under Order XXI, rule 2 of the Civil Procedure Code, the adjustment should be notified to the Court whose duty it is to execute the decree in a form which will come before it in its execution work. A casual reference to such an adjustment in a plaint or other civil proceeding is not sufficient. [p. 902, col. 1.]

Appeal from an order of the Joint Judge, Hyderabad.

Mr. *Motiram Idanmal*, for the Appellants.

Mr. *Gopaldas Jhamatmal*, for the Respondents.

JUDGMENT.

FAWCETT, J. C.—In this appeal the appellants are judgment debtors under a decree obtained by the respondents in 1908. On 21st April 1911, some of the judgment-debtors transferred certain property to the judgment-creditors in satisfaction of the decree, but the satisfaction was not certified to the Court. Subsequently, the judgment creditors sued one of the judgment-debtors on a rent note in respect of the same property and obtained a decree. But in that suit the defendant pleaded that he had no right to transfer the property and that some others had an interest in and possession of it. Later on another person sued and obtained a share of the property and the judgment creditors never got the possession. On the 27th January 1914, the judgment-creditors filed the present execution application and the Sub-Judge of Tando dismissed it on the ground of satisfaction, holding the rent suit to be a sufficient certification and that the limitation was saved by some of the judgment-debtors being minors. On appeal the Joint Judge of Hyderabad reversed this order and directed the execution application to be restored to the file. The

judgment-debtors now come in second appeal against this decision.

One of the issues raised in the lower Courts was whether there was a satisfaction of the decree in fact, and the Joint Judge has answered this in the negative. This finding of fact is, however, really irrelevant. If a decree-holder accepts an adjustment in whole or part satisfaction of his decree, and this adjustment is certified to the Court, as required by Order XXI, rule 2, Civil Procedure Code, then such adjustment operates as an entire or partial bar (as the case may be) to the execution of the decree; and the fact that the adjustment may not be properly acted upon by the judgment-debtors or otherwise does not fructify in the manner anticipated by the decree-holder, is clearly immaterial. The only real issues in this case are: (1) whether the adjustment of 21st April 1911 has been sufficiently certified by the Court under Order XXI, rule 2, and (2) whether the period of 90 days prescribed for certification by judgment-debtor can be extended in this case under section 6 or 7 of the Limitation Act.

On both points I agree with the view taken by the Joint Judge. The plaint in the rent suit is not before this Court, so we do not know if it at all referred to the decree now sought to be executed, but even if it did, this cannot be treated as a proper certifying under Order XXI, rule 2, Civil Procedure Code. The words "the Court whose duty it is to execute the decree" clearly imply that the adjustment should be notified to the Court in a form which will come before it in its execution work. A casual refererce to such an adjustment in a plaint or other civil suit proceeding would ordinarily not be noticed at all by a Court in its execution branch. Nor can the execution application of 27th January 1914 be treated as a sufficient certifying under the rule. The application does not ask the Court to recognize the adjustment, but expressly repudiates it. In other words, the application does not certify it as an adjustment "to the satisfaction of the decree holder" as required by the rule. I agree on this point with the view taken by Mahmood, J., in *Fateh Muhammad* v. *Gopal Das* (1).

(1) 7 A. 424 at pp. 431, 432; A. W. N. (1885) 76; 4 Ind. Dec. (N. S.) 593.

It was contended that the decree-holder had elected to abide by the contract of 21st April 1911 and this election was irrevocable, so that he could not now repudiate it. But as pointed out in *Secretary of State for India* v. *Bapuji* (2), there is no room for estoppel in such a case.

On the other point I agree with the Joint Judge and have nothing to add. I would, therefore, confirm the lower Court's decree and dismiss the appeal with costs.

RAYMOND, A. J. C.—I concur.

Appeal dismissed.

(2) 31 Ind. Cas. 277; 39 B. 572; 17 Bom. L. R. 641.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 951 AND 1072 OF 1918.

May 23, 1919

Present:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Cuming.

KSHETRA NATH ADHIKARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

DURGAPADA MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Trust, resulting—Creditor put in possession of estate, position of—Purchase made in creditor's name—Real purchaser, whether can recover possession from creditor—Consideration, payment of, proof of—Oral evidence, admissibility of—Sale for arrears of rent due in respect of period prior to purchase—Creditor, position of—Transfer of Property Act (IV of 1882), s. 76 (c).

R., the father of the plaintiffs, being indebted, his properties were purchased in execution of a decree against him by *P.*, who agreed to return the properties to *R.* in consideration of a payment to him of Rs. 2,150. Defendants Nos. 1 and 2 advanced a certain sum to *R.* as a loan, and on *R.* himself paying the balance, *P.* executed a *kobala* in the names of defendants Nos. 1 and 2 in 1897. A year after, *R.*, being unable to pay interest on the sum advanced by the defendants Nos. 1 and 2, put the latter in possession of the properties to enable them to take the profits until re-payment of the debt due. After the execution of the *kobala*, some of the properties in suit, *viz.*, plots Nos. 1 to 12, were sold for arrears of rent due for a period prior to the *kobala* and were purchased by the defendants themselves. The plaintiffs then brought these suits within 12 years of the execution of the *kobala* for recovery of possession of the properties upon payment of the amount due to the defendants:

Held, (1) that the defendants Nos. 1 and 2 were in the position of creditors in possession, and there was

a resulting trust so far as these properties were concerned and that, therefore, the plaintiffs were entitled to get back the properties upon payment of the amount due to the defendants; [p. 905, col. 2; p. 906, col. 1.]

(2) that it was competent for the plaintiffs, whose father was the real purchaser, to prove the payment of the purchase-money by parol, even though it was expressed otherwise in the *kobala*; [p. 906, col. 1.]

(3) that under section 76 (*c*) of the Transfer of Property Act the defendants Nos. 1 and 2 were responsible for the sale of plots Nos. 1 to 13 in execution of decrees for arrears of rent, even though they were for a period prior to the execution of the *kobala*, and that, therefore, the plaintiffs were entitled to recover those plots also. [p. 906, col. 1]

Monappa v. *Surappa*, 11 M. 234; 4 Ind. Dec. (N. S.) 163, relied on.

Appeals against the decrees of the District Judge, Burdwan, dated the 7th February 1918, modifying those of the Subordinate Judge of that District, dated the 23rd September 1916.

FACTS appear from the judgment.

Babu *Bepin Behari Ghose* (with him Babu *Bankim Chandra Mukherjee*), for the Appellants.—The defendants are the appellants. One Ramdayal left three sons *T.*, *D.* and *K.* *D.* is plaintiff in appeal No. 951 and *K.* is plaintiff No. 2 *T.* is defendant in this appeal and plaintiff in the other. The properties of Ramdayal were sold in execution of a decree to the Hazras in 1895. The latter sold them in 1897 to defendants Nos. 1 and 2. Plaintiffs' allegation is that they and defendants Nos. 1 and 2 paid the entire money, that the defendants were mere *benamidars*. Plaintiffs arranged to pay off the defendants, but on their failure to do so the defendants were put in possession in 1304. Subsequently the defendants were paid off but possession was refused in 1307. The first Court decreed the suit in part. The Court of Appeal decreed it in full. On appeal to this Hon'ble Court it was held that it was not a case of trust or of mortgage, but of simple possession. Hence the case was remanded. On remand the learned Judge holds that we are mere *benamidars*. It is admitted that I advanced more than $\frac{2}{3}$rds of the money and that I was put in possession. These, I submit, are sufficient *indicia* of my title. The lower Court could not have converted the suit into one for redemption. A mortgage must be made by a regular deed. Plaintiffs do not come on the basis of a mortgage. The arrangement was that on payment of a certain sum of money I would give up possession. That would be a personal covenant not running with the land. In order to make such a covenant enforceable in law, there ought to be a time limit. See *Worthing Corporation* v. *Heather* (1). Therefore the contract would be void in law. Their case is that they were refused reconveyance of property. The proper frame of the suit ought to have been one for specific performance, which ought to have been brought within three years. I am not a mere *benamidar*, a mask. I am taking exception to the finding of title by the learned Judge. There is no law under which the plaintiffs can claim relief. Neither is there any equity in their favour. Title under the law is in me. The deed is in my name and I paid the money. What then is my position? They have given up the position of a trust. The onus is on them to prove that they paid the purchase-money and that I was nobody. They obtained possession of a portion by using force against my tenants, which amounts to using force against me. Otherwise I have all along been in possession. Either I must be an owner or nobody. There is no middle position left. On the strength of the deed I fought other people and protected the properties. The view of the Appellate Court below, that I was bound to save the property from being sold, I submit, is a wrong view. The defendant is not a mere creditor but he is an owner. The contract of sale had been made by a deed. You can't call a person a *benamidar* if he substantially advances the purchase-money and further when there is a contract for reconveyance. Plaintiff sued in ejectment. The Judge has made us liable for all costs. We ought to get our costs of the litigation. Issues show that the defendants were purchasers burdened with a trust in plaintiffs' favour. So the ownership of the property was not questioned at all. They can only claim on the ground of trust. It is really enforcing an agreement to reconvey the properties to plaintiffs.

Babu *Hemendra Nath Sen* (with him

(1) (1903) 2 Ch. D. 532; 75 L. J. Ch. 761; 22 T. L. R. 750; 4 L. G. R. 1179; 95 L. T. 718.

Babu *Dhirendra Nath Sen*), for the Respondents.—The plaintiffs' case has been proved to the hilt. The findings of both the Courts are concurrent and conclusive. It has been found as a fact that *K.* was in possession. There was an arrangement that the defendants would be trustees for the plaintiff. The position is this. They were in possession on the distinct understanding that they would recoup themselves with interest. This, in other words, amounts to an usufructuary mortgage. See section 76, Transfer of Property Act. The mortgagee must act like a prudent owner. The conduct of the defendants is seriously reprehensible. The lower Appellate Court is justified in deciding against the defendants. As regards the point of limitation, this is not a case of contract at all.

Babu *Bepin Behari Ghose*, in reply.—The position taken by them is that of an usufructuary mortgage. But that cannot be done by mere word of mouth. The mortgagee is not bound to save the estate from being sold for arrears of revenue accrued due before the mortgage. The mortgagor's duty is to make over possession free from all such difficulties. That has not been done. Section 76 of the Transfer of Property Act does not apply.

JUDGMENT.—These two suits have had a chequered career. They were instituted in October 1909 and the judgment of the trial Court was delivered in September 1910. On appeal to this Court a remand order was made in May 1916. The successor of the District Judge who heard the appeal on remand delivered his judgment in February 1918 upholding the decision of the trial Court, except in respect of certain properties, namely, plots Nos. 1 to 13 of schedule "*Ka*". The defendants Nos. 1 to 4, 6 to 9 and 11 to 13 are the appellants before us. The plaintiffs are the three sons of one Ramdayal Mandal. Two of them instituted one suit and the third the other. The properties in suit belonged to him. The learned Subordinate Judge who tried the original suits found that Ramdayal became indebted and in execution of a decree against him one Protap Chandra Hazra purchased these properties, but Ramdayal persuaded him and his brother, who was joint with him, to return those properties in consideration of a payment of Rs. 2,450 Ramdayal, however, had not sufficient money and approached defendant No. 1, a creditor of his, and defendant No. 2, an intimate friend, to help him. These defendants advanced Rs. 1,676-8-0 as a loan and Ramdayal himself paid Rs. 9 0, and a *kobala* was obtained from the auction purchasers, in the names of those defendants on the 16th November 1897. After the purchase Ramdayal got possession of the properties and remained in possession for about one year, but as he could not pay the interest on the sum advanced by the defendants, he put them in possession of the properties to enable them to take the profits until repayment of the debt due. The trial Court found that at the time of the hearing Rs. 1,569-11-9 were due to the defendants and gave the plaintiffs a decree for possession conditional on payment by them of the said sum within three months. He further held that the plaintiffs were not entitled to a decree for plots Nos. 1 to 13, which were sold for arrears of rent, as such arrears were for an earlier period, although the sale took place after the date of the *kobala* in dispute and the defendants were not liable to pay such arrears, and although they themselves purchased the plots upon such sale, they could not according to him be said to have purchased them, as trustees for Ramdayal or the plaintiffs.

On appeal the first District Judge held that the plaintiffs' suit must be looked upon as based, firstly, on a trust or, secondly, on a usufructuary mortgage created at or about 1304 and inasmuch as, according to him neither the trust nor the usufructuary mortgage could be proved without a deed, he dismissed the suits.

The plaintiffs then appealed to this Court, which held that the learned Judge had fallen into an error inasmuch as the plaintiffs had brought their suits on title, and not on the basis of a trust or of a mortgage and added that if the District Judge had gone into the facts and found title in favour of the plaintiffs, it was obvious that the defendants could not resist their claim to possession "unless by advancing and establishing some such plea as limitation, mortgage or other,"

They remanded the appeals that all necessary facts might be ascertained.

The appeals upon such remand were heard by a new District Judge who has practically confirmed the findings of the trial Court. He finds title in the plaintiffs and held that inasmuch as the suit was brought within 12 years of the denial of their title or within 12 years of the *kobala*, they were entitled to succeed. He has also held that the plaintiffs are entitled to plots Nos. 1 to 13, inasmuch as he finds that there are no materials to show whether any part of the arrears sued upon fell due after the defendants had entered into possession. The defendants, he held, were creditors in possession in the same way as usufructuary mortgagees and, therefore, they were in the position of trustees, and that they should have paid the arrears and could not take advantage of the situation. He found that they had paid Rs. 68 for purchasing those plots and has allowed them credit for that sum. He has further allowed the plaintiffs credit for Rs. 105 as value of some paddy which had admittedly been given by them to the defendants. Taking those two sums he found that Rs 1,522-11 9 was due to the defendants This amount, however, should be Rs. 1,532-11-9. With that modification he upheld the decree of the first Court.

It is argued before us that the learned Judge has not arrived at a proper conclusion having regard to the following facts, namely, that money was advanced by the defendants, that the conveyance was in their name, that the deed was in their possession and that admittedly at the time of the suit they were in possession of the property and that, therefore, it ought to have been held that they were the real purchasers. We are unable to take that view. It has been distinctly found by both Courts that the defendants advanced some money, no doubt the larger portion of the price, but the money was advanced by them as creditors and not by way of purchase. It has also been distinctly found that the document was taken in the names of the defendants to safeguard Ramdayal who was then heavily indebted, that Ramdayal effected sales of some of the properties covered by the *kobala* and repaid a portion of the debt due to the defendants, that he was actually in possession for about one year after the date of the purchase and that he subsequently made over possession to the defendants to repay themselves and upon such repayment to give possession back to Ramdayal. Ramdayal also was in possession of the sale certificate which had been granted to Protap Hazra; that it was an untrue suggestion made by the defendants that the plaintiffs had fraudulently obtained possession of the sale certificate Contemporaneous documents of sale show that money was obtained and applied for purposes of discharging the debt due to the defendants and that there is also an entry in Protap Hazra's book showing that Ramdayal was the real purchaser. There is no doubt from the facts found that the defendants were merely creditors to the extent of the advance made by them and when they were given possession of the properties by Ramdayal, they were in the position of usufructuary mortgagees. Reliance was also placed upon a *kabuliyat* for the homestead land which was executed by Ramdayal in favour of the defendants. Both Courts have found that the *kabuliyat* was a paper transaction and, therefore, of no value. It has also been found that no creditor was actually defeated by this *benami* transaction.

It has next been argued that if anything, the circumstances show that there was an agreement between the parties that upon repayment of the money the defendants were to reconvey the properties to Ramdayal and that inasmuch as the defendants had refused to make over possession in Magh 1308 (February 19 1) the suits were barred by limitation, as they are really, though not in name, suits for specific performance of a contract and are governed by Article 113 of the Limitation Act. We do not think they are such suits. They are merely suits to recover possession. As they were instituted within 12 years of the date of refusal on the date of the *kobala*, they are within time. Upon the facts of these cases there is no doubt whatever that the defendants are in the position of creditors in possession, and there is a resulting trust so far as these properties

are concerned, and that, therefore, the plaintiffs are entitled to get back the properties upon payment of the amount due to the defendants. It was argued that it was not open to the plaintiffs to prove that the consideration was paid in the manner above stated, as their evidence contradicted the recital of payment as contained in the *kobala*. Even the Statute of Frauds does not affect, indeed expressly excepts, trusts arising by operation or construction of law, and it has been held in England that it is quite competent for the real purchaser to prove the payment of the purchase-money by parol, even though it be otherwise expressed in the deed.

It was lastly argued that the learned Judge was wrong in respect of plots Nos. 1 to 13. We are of opinion that he was not even, if it be conceded that the arrears were for a prior period. It is only necessary to refer to section 76 (*c*) of the Transfer of Property Act. The decision in this case also finds strong support from *Monappa* v. *Surappa* (2), where a similar order was made by the learned Judges in practically similar circumstances.

The appeals, therefore, will be dismissed with costs.

Appeals dismissed.

(2) 11 M. 234; 4 Ind. Dec. (N. S.) 163.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 25 OF 1916.

March 1, 1919.

Present:—Mr. Fawcett, J. C., and Mr. Kemp, A. J. C.

KEWALRAM—APPELLANT

versus

Musammat ISARBAI AND OTHERS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *ss.* 50, 51, *O. XXI, rr.* 17, 22, 23—*Execution of decree—Death of judgment-debtor—Execution against one of several legal representatives—Objection by legal representative—Procedure—Discretion of Court.*

A judgment-creditor has a statutory right to proceed against whichever of two legal representatives of his judgment-debtor he prefers, and, if the one against whom he proceeds offers any objection to the execution of the decree, the matter is left to the discretion of the Court, to be exercised on judicial principles, including equitable considerations, and it is open to the Court to consider the equities between the two legal representatives and make such order as it thinks fit. [p. 907, col. 2; p. 909, col. 1.]

Appeal from the order of the District Judge, Sukkur.

Mr. *Hassomal M. Gurbuxani*, for the Appellant.

Mr. *Tolasing Khushalsing*, for Respondent No. 1.

JUDGMENT.

FAWCETT, J. C.—The main facts in this case are as follows:—

One Chandumal obtained a decree in Suit No. 206 of 1912 against Puribai, Isarbai and others. This provided that Rs. 855 were to be paid by Puribai personally and Rs. 300 by Isarbai and that if Isarbai did not do so, then Puribai would be liable personally for the amount. Rs. 300 were paid by Isarbai and so she was discharged; also a sum of Rs. 125 was paid by Puribai. After her death the appellant, Kewalaram, who is an assignee of the decree-holder, made an execution application for the balance due under the decree, in which he asked for execution by the attachment and sale of certain immoveable property in the hands of Isarbai as the legal representative of Puribai. Isarbai opposed the application on the strength of a decree in Suit No. 26 of 1914. This was passed on an award, under which she obtained a portion of a house of Puribai free from any liability in respect of this judgment debt, and one Nihalchand, who is stated to have been a paramour of Puribai, obtained another house of Puribai subject to a liability for Puribai's debts. On the strength of this decree, which was admitted in evidence in the case, the Subordinate Judge, Shikarpur, dismissed the application with costs. The assignee, Kewalram, appealed from this order to the District Judge on the ground that the appellant was not a party to the award-decree and was not bound by Isarbai's release from liability as a legal representative of Puribai. In his judgment the District Judge, after referring to a contention of the respondent's Pleader that the appellant in collusion with Nihalchand was trying to get hold of the part of Puribai's property that was given to her sister Isarbai free of liability, says that the appellant's remedy was to proceed against Puribai's property in the hands of Nihalchand and not to harass Isarbai. He accordingly confirmed the lower Court's order and dismissed the

appeal with costs. Kewalram has brought a second appeal, which now is before us.

Mr Hassomal for the appellant has raised three main contentions, *viz*:—

(1) that the award-decree is inadmissible in evidence;

(2) that even if admissible, it does not affect the appellant, who was not a party to it; and

(3) that the decree is a nullity in so far as it decided the question of the validity of Puribai's Will and the rights arising thereunder.

Mr. Tolasing, on the other hand, contends that the orders of the lower Court have been properly passed in the exercise of an equitable jurisdiction, on the principle of marshalling, and that the orders merely ask the judgment-creditor to proceed first against the property of Puribai in the hands of Nihalchand. He admits that the decree in itself is not one that is binding upon the appellant, and that, if he is unable to execute his decree against the property in the hands of Nihalchand, he has the right to proceed for the balance against the property in the hands of Isarbai, inspite of the award-decree freeing it from liability for Puribai's debts. The first question that arises is, therefore, whether the lower Courts have an equitable jurisdiction to refuse the application against Puribai's property until the judgment-creditor has first exhausted his remedies against Nihalchand's. Mr. Tolasing relies on the cases of *Wali Muhammad* v. *Turab Ali* (1) and *Nimbaji Tulsiram* v. *Vadia Venkati* (2) in support of his contention. These do support the view that in execution regard may be had to equity (*cf.*, also section 49 of the Code) but at the same time, as remarked in *Akhund Abdul Wahid* v. *Manager, Encumbered Estates* (3), equity cannot be allowed to override statutory law. Has then the judgment-creditor a statutory right to proceed against whichever of the two legal representatives of Puribai he prefers? If he has, then I do not think it can be upset on mere equitable grounds.

Under section 50 of the Code the judgment creditor "may apply to the Court" to execute his decree against a legal representative; this does not say his application must be granted. Section 51 says the Court "may order execution of the decree . . . by attachment and sale of any property;" even if 'may' is construed as 'shall' in a case where there is a liability to such attachment and sale, still this is "subject to such conditions and limitations as may be prescribed" by the rules in Schedule I. Under Order XXI, rule 17 (4), the Court on a properly framed application "shall, *subject to the provisions hereinafter contained*, order execution of the decree according to the nature of the application." This, therefore, is subject to the provisions of Order XXI, rule 22, under which a notice has to be issued to a legal representative against whom execution is sought. It is also subject to Order XXI, rule 23 (2), under which where the legal representative "offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit." This leaves the matter to the discretion of the Court, which, however, has to be exercised on judicial principles. But these include equitable considerations, and I think, therefore, that it is open to the Court to consider the equities between the two legal representatives who are parties to the application, *viz.*, Isarbai and Nihalchand.

That being so, the award-decree became a relevant fact in considering these equities under sections 7 and 9 of the Evidence Act and is admissible under section 43.

In view of this decree I think it is clearly equitable that the judgment-creditor should be made to proceed against Nihalchand, before he proceeds against Isarbai. No doubt the doctrine of marshalling does not directly apply, but the rule of 'equality' on which that doctrine is based applies, inasmuch as equity tries to effect a distribution of losses proportionate to the several liabilities of the persons concerned (Halsbury's Laws of England, Volume XIII, Article 79, at pages 69-70 and Article 167 at pages 144-45). In this case Isarbai has a legitimate claim to the protection of the Court, which should be regarded under Order XXI, rule 23 (2), the more so since to disregard it might entail subsequent litigation by Isarbai suing to be reimbursed by Nihalchand.

(1) 4 A. 497; A. W. N. (1882) 127; 2 Ind. Dec. (N. S.) 1130.

(2) 16 B. 682; 8 Ind. Dec. (N. S.) 933.

(3) 19 Ind. Cas. 838; 6 S. L. R. 250.

I, therefore, think the lower Courts had jurisdiction to refuse the application against Isarbai: but, on the other hand, the judgment-creditor should not suffer unduly by the Court's regard of the equities between her and Nihalchand. The order under rule 23 should, in my opinion, not be an absolute dismissal of the application, but one allowing it to be amended within a certain time so as to pray for execution against the property of Puribai in the hands o Nihalchand and if the whole decretal debt is not satisfied by such execution, then for the balance against the property of Puribai in the hands of Isarbai. An amendment of this kind is, I think, permissible: *cf. Sakarlal* v. *Bai Parvatibai* (4) and *Durga Das* v. *Dewraj* (5).

I would, therefore, modify the order of the lower Court by directing that the execution application may be amended accordingly within a fortnight or such further time as the Court may allow and that on its being so amended the execution application be remanded to the Sub-Judge's Court for disposal according to law, but that otherwise the appeal should be dismissed.

As appellant has substantially failed, I think he should bear the respondent's costs of the appeal.

KEMP, A. J. C.—This is one of those cases which, if the suspicions of the learned District Judge are correct, furnish an illustration of the disgraceful way in which a Hindu lady can be persecuted by litigation in this country

One Chandumal Khemchand, described as a Pleader of Shikarpur, entered into a champertous agreement with certain clients for payment to him of Rs. 1,000 in the event of success in certain litigation. After that litigation his clients, one of whom was the deceased Hindu lady Puribai, refused to pay and he filed a Suit No. 203 of 1912 against them, joining the present respondent Isarbai as a party. He gave up the male defendants in that suit and proceeded against the two ladies Puribai and Isarbai. Somehow or other these two ladies were induced to compromise the claim in the following manner:—There was to be a decree for Rs. 855 against Puribai, but if Isarbai who was to be liable for only Rs. 300 of that amount paid Rs. 300, Puribai was liable for the balance only. The suit was dismissed against the male defendants. I can only assume these two ladies had not the benefit of independent advice when they were thus induced to hold themselves liable for practically the whole claim in order to free the male defendants.

After this decree Puribai died. A dispute as to her property arose between her sister Isarbai and the respondent Nihalchand, who is described by the learned District Judge as Puribai's paramour, as to the succession to her property. There is also some talk of a Will of Puribai in the arguments. In any case, the matter was referred to arbitration and there is an allegation that one of the arbitrators was partial. However, an award was passed and filed in Court by which a portion of a house was allotted to Isarbai and another house to Nihalchand and the latter was to undertake all the liabilities of Puribai's estate. The present appellant is the assignee of the decree in Suit No. 203 of 1912 and claims to execute the decree against Puribai's estate in the hands of Isarbai. Isarbai had paid before this the Rs. 300 for which she personally was liable. Both the lower Courts have dismissed the appellant's application for execution referring him to Parbai's estate in the hands of Nihalchand. The learned District Judge was clearly influenced, and, in my opinion, very properly, by the suspicion that the appellant is colluding with Nihalchand to make the estate in Isarbai's hands liable whilst the award says the estate in Nihalchand's hands is to be liable.

No doubt if neither the present appellant nor his transferor Chandumal was a party to the award or accepted it, that award cannot bind the appellant who is at liberty under section 50, Civil Procedure Code, to proceed against the estate of Puribai wherever it may be. If, however, the appellant or before the assignment Chandumal knew of and accepted the terms of the award between Isarbai and Nihalchand, then the appellant cannot go back on the term making Puribai's estate in Nihalchand's hands alone liable. The Court would be exercising its discretion under Order XXI, rule 24 (1), correctly, in my opinion, in

(4) 26 B. 283; 4 Bom. L. R. 14.
(5) 33 C. 306; 3 C. L. J. 112; 10 C. W. N. 297.

such a case in dismissing the application so far as execution against the estate in Isarbai's hands is concerned. But Order XXI, rule 23 (2), gives the Court power to consider any objection the legal representative may have to urge and to pass such order as it thinks fit. Under the circumstances of this case I think an order refusing execution against the estate in Isarbai's hands, until the transferee has proceeded first against the estate in Nihalchand's hands, would be a fit and proper order to make. I, therefore, agree with the order the learned Judicial Commissioner proposes to pass in the appeal.

Order of the lower Court modified and the case remanded.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 26, 1918.

Present:—Lord Buckmaster, Lord Dunedin and Lord Wrenbury.

SIVA PRASHAD SINGH—
APPELLANT
versus
THE TATA IRON AND STEEL Co., (LD.)—RESPONDENTS.

Landlord and tenant—Lease, construction of—Surrender, option of, on six months' notice—Notice given by lessee—Surrender, deed of, execution of, after expiry of date of notice—Determination of lease, date of—Rent, liability for.

The Raja of Jeriah granted a mining lease to the defendant firm upon certain terms and conditions as to the payment of rent and royalty upon coal excavated. The lease was for a term of 99 years and contained a clause giving the lessees a right to surrender the lease upon giving six months' notice and satisfying the conditions as to rent and royalty. The lessees, not finding the business profitable, gave the Raja notice that upon the expiration of six months from the date thereof their rights and obligations under the lease would cease, and they went out of possession and informed the Raja of the fact. The Raja's agent demanded a deed of surrender, and negotiations for the execution of this deed and for the payment of rent and royalty were carried on till after the period of six months had expired. When, eventually, the deed was executed and delivered, payment of the rent and royalty was tendered, the same being calculated up to the date of the expiry of the notice, but the Raja refused to accept payment, and instituted the present suit for rent and royalty due up to date of the execution of the deed of surrender. The High Court held that the lease had been determined by the notice and dismissed the suit. On appeal by the plaintiff to the Privy Council:

Held, that the suit had been rightly dismissed, that the request by the Raja's agent for the execution of a deed of surrender merely transferred the payment to the date when the surrender was executed and delivered, the fact that that date was subsequent to the date of the expiration of the notice would make no difference for its operation would take effect from the date when the notice expired whenever it was executed, and payment upon this date was all that was required [p. 913, col 1.]

Appeal from a judgment and decree of the Calcutta High Court (Chapman and Mullick, JJ.), dated the 22nd February 1916, which reversed a judgment and decree of the Subordinate Judge of Perulia.

FACTS appear from the judgment.

Messrs. *Upjohn, K.C., De Gruyther, K.C.*, and *J. M. Parikh*, for the Appellant.—Clause 9 of the lease provided for giving notice to quit. It should expire at the end of the half year or the year. The notice given was, therefore, invalid. Defendants have not paid as per the lease the rents and royalties on the date of expiry of the period fixed by the notice. It is a condition precedent to the validity of the notice. *Grey* v. *Friar* (1). There is no estoppel here at all. There is no waiver on the part of plaintiff and the agent of plaintiff has no power to give up any rights of plaintiff.

Messrs. *P. O. Lawrence, K. C., A. M. Dunne, K. C.*, and *Brown*, for the Respondents.—On a proper construction of the notice, no payment is necessary at the time of giving notice. The exact amount could not be ascertained at that date. Clause 9 is governed by clause 3. Plaintiff's manager also agreed by demanding a formal deed of surrender to accept payment when the deed of surrender was executed. If the manager had authority to accept notice, he had also authority to fix the time for payment for the benefit of the estate. It is not contrary to the provisions of the lease. The conduct of the manager would amount to waiver and it is binding on the plaintiff. Reference was made to sections 126, 229 and 237 of the Indian Contract Act.

JUDGMENT.

LORD BUCKMASTER.—The appellant is the

(1) (1854) 4 H. L. C. 565; 18 Jur. 1036; 10 E. R. 583; 94 R. R. 248.

heir and legal representative of Raja Sri Sri Durga Prashad Singh, the plaintiff in the suit out of which this appeal has arisen. The proceedings were instituted to recover from the respondents the sum of rupees 26,237-12-0, being the alleged arrears of royalties due under two mining leases granted by the Raja to the respondents and dated respectively the 4th March, 1908 and the 29th September 1908. The defence to the claim was that leases had been duly determined by notice, and it is this question and this alone which arises for consideration upon the present appeal, the High Court of Judicature in Bengal having, in reversal of the judgment of the Subordinate Judge, dismissed the action.

So far as the points to be determined are concerned, the leases may be regarded as identical, the variation in date, in the royalties payable and the period allowed before payment begins being the only differences between the two, as will appear in the course of this judgment, these differences are immaterial to the present dispute. Both leases appear to have been in the vernacular and the obscurity of their terms is faithfully reflected in the translation.

The lease of the 4th March 1908 is the one accepted by their Lordships for the purpose of examining the clauses that bear upon the dispute. By it a grant was made by the Raja to the respondent Company of coal, land and mining rights in certain Mouzahs belonging to the ancestral Zemindari of the Raja of Purgunnah Jheria for a term of 999 years. By clause 1 certain royalties were fixed for each ton of coal, and by clause 2 it was provided that the royalties mentioned should be payable quarterly, "*i. e.*, in four Kists of Baisakh, Sraban, Kartic and Magh."

By clause 3 certain minimum royalty was provided, which after the second year obliged the lessee to pay "an annual minimum royalty" of 13,904 rupees per annum until the expiration of the term, with a provision that if the royalties paid under the earlier clause were found on taking the accounts at the end of each year to be less than the minimum royalty, the lessee should be bound to make up the loss, and pay the sum of 13,904 rupees in full within the two months of the following year. The words in which this provision is couched are important, and they are as follows: —

"If on taking accounts at the end of each year it be found that the royalty paid by you for the said lands for that particular year is less than the said minimum royalty, then you shall be bound to make up the said loss and pay the said sum of 13,904 rupees 0 annas 0 Gundahs in full within the two months of the following year."

By clause 6 power was given to the lessees to take the necessary surface land for the purpose of carrying on the colliery business at certain fixed rents per Bigha, and this rent was to become due at the end of each Bengali year. There were consequently three distinct payments to be made.

1. The royalties payable per ton of coal to be paid quarterly.

2. The annual minimum royalty to be paid within two months after the expiration of the year satisfied *pro tanto* by the royalties payable under 1, the accounts being taken at the end of the year and payment made within two months of the following year.

3. The surface rent due at the end of each Bengali year.

By clause 9 a right was given to the lessee to surrender the term, and it is in the alleged exercise of the rights so conferred that the respondent contends that the leases have been determined. The words of the clause are, therefore, important, and they are as follows: —

"That, if you so wish, you shall be entitled to surrender all or any of the Mouzahs hereby leased out to you by giving me six months' written notice, which you shall be competent to give me by a registered letter and paying the minimum royalty for the said six months, *i. e.*, a half of the annual minimum royalty. But I shall not accept any surrender for a portion of any of the Mouzahs, neither shall you be entitled to surrender so long as any rent or royalty remains unpaid. Instead of relinquishing all the Mouzahs settled, you will be able to relinquish any one or more of those Mouzahs by giving six months' notice in writing in the above manner. If you surrender any one or more Mouzahs in

this way, you shall be bound to pay the whole of the minimum royalty for all the Mouzahs leased out as fixed in paragraph 3 of the deed for the remaining Mouzahs, *i. e.*, you shall not be entitled to get a proportionate reduction in the minimum royalty of 13,904 rupees fixed as above for surrendering one or more than one Mouzah in the above way."

The Company duly entered into possession of the mining property under the said lease, carried on mining operations, and from time to time paid the royalties and rents as agreed. But the undertaking does not appear to have prospered, and the respondents attempted to obtain a reduction of the minimum royalty payable under the lease. In this they failed, and on the 11th May 1912 they sent to the Raja personally a registered letter of which the relevant parts are as follows :—

"By the terms of the respective leases it is open to us to relinquish the properties by giving you six months' previous notice in writing. Please take note, therefore, that we hereby wish to relinquish the undermentioned areas held under the leases, and that after the expiry of six months from this date, upon the payment of all royalties due to you, we shall not be responsible for any further minimum royalty, rent, etc., and that all our obligations under the two leases would cease and terminate after the expiry of six months from this date," at the same time according to the evidence of the respondents' manager they went out of possession of the property and informed the Raja of the fact.

The Raja handed the notice to Mr. Smith, who was his general manager, and he, in accordance with what he regarded as the usual practice of the estate, requested the respondents to execute a formal deed of surrender. The lessees placed the matter in the hands of Messrs. Morgan and Co, their Solicitors, and they on the 16th September wrote to Mr. Smith stating that they held the leases, and asking if he wished them to prepare a deed of relinquishment, or whether he would send the form of document he required. No immediate answer was given to this letter, and on the 30th October 1912 they wrote again, and to these letters on the 13th November Mr. Smith sent answer in the following terms :—

"Dear Sirs,

"I must apologise for not having replied to yours of the third September [an obvious mistake for 16th September] and the 30th October earlier.

"I am enclosing the copy of a relinquishment deed given us by another tenant. A deed of this sort will, I understand, be quite sufficient for our purpose.

"All dues on the holdings must be tendered along with the instrument for acceptance.

"Yours faithfully,
"A. J. SMITH,
"*Manager.*"

To this Messrs. Morgan replied on the 30th November 1912 asking for a statement of what Mr. Smith said was due for the royalties. There was certainly no obligation cast on Mr. Smith to comply with this request, but it was an obvious and sensible business proposal, and indeed it seems so to have been regarded by Mr. Smith, who answered on the 1st December saying the matter was receiving attention and that he would write at an early date. This promise seems to have been overlooked, for nothing transpired between the parties till the 28th April, when Mr. Smith wrote to the respondents saying that the minimum royalty was much in arrear and asking that it might be liquidated at an early date. On the 3rd May 1913, Messrs. Morgan & Co. wrote again to Mr. Smith recalling his promise, and asking him to proceed with the matter. Mr. Smith then wrote on the 5th May and explained what had happened in the following terms:—

"From the Manager, Jheria Raj Estate, to Messrs. Morgan & Co., Calcutta.

May 5, 1913.

"Dear Sirs,

"I am in receipt of yours of the 3rd.

"We addressed a note to Messrs. Tata and Sons on the 28th April asking them to pay the minimum royalty due.

"I put the matter of the account before our legal adviser, and he refused to give any opinion or make up a statement of your dues, as he said you were in as good a position to do so as he was, and he failed to see why he should take the responsibility. Your obvious course was to abide by the terms of the document

when relinquishing the properties, and tender the money with the relinquishment deed.

"Yours faithfully.

"A. J. SMITH."

Upon receipt of this Messrs. Morgan & Co. immediately made out what they regarded as the account, and sent the statement on the 16th May with an offer to send a cheque if the account were accepted, and to this Mr. Smith replied, on the 22nd May, stating for the first time that the Raja did not recognise the relinquishment as legal or in accordance with the agreement between the parties. First, because it did not expire with the end of the year, and secondly, because it was not served after full payment of all dues and he accordingly claimed the total amount of the royalties due to date.

An attempt was made to settle the dispute that had thus arisen by reference to arbitration, and this having failed, proceedings were instituted by the Raja to recover the rents on the ground that the leases were still on foot.

The argument put forward in Mr. Smith's letter is the main contention advanced by the appellants both before their Lordships and in the Court below.

In order to test the value of these contentions it is necessary to examine closely the terms of the clause under which the notices were given. Dealing first with the question as to whether the notice could be given at all so as to expire at the expiration of any six months, it is important to observe that, however the clause is construed, the actual provisions of the lease cannot without some modification be made to fit into the circumstances.

The clause is open to three constructions. Either the notice must be one terminating with the end of the year; or it may be given at the expiration of a year of the term so as to terminate half way through another year; or it may be given at any time. Whichever view is adopted, the provisions as to calculation and payment of the royalties cannot be made to fit the circumstances arising with the giving of the notice. It could not have been the intention of the parties that the payment of one-half of the minimum rent should be made when the notice was given, as the amount cannot be calculated till a later date, since its payment may be satisfied by current royalties.

If, therefore, the first hypothesis is adopted and the notice is given in the middle of a current year, the half cannot be ascertained until the year of the lease has expired, and it is plain that then this cannot be the only payment made. In such an event the whole annual minimum royalty would be payable and not one-half, and either two calculations must be made —the one for the half year up to the date of the giving of the notice, and the other at its expiration—or the provision as to payment of the half is inappropriate and unnecessary. If, on the other hand, the notice is given at the beginning of the year, the royalties had to be calculated and the minimum rent fixed at a period half way through the year, and for this, again, the lease makes no provision. There is, therefore, nothing in the terms of the lease itself to fix the notice as one that must be given at any definite period, and there is consequently no reason why words should be introduced into clause 9 to limit the general application of the important right to surrender which is there conferred. The notices, therefore, were, in their Lordships' opinion, rightly given.

There remains the consideration as to whether the conditions prescribed as those that must be observed after the notice has been served have been faithfully obeyed. On behalf of the appellant it is contended that they were not, because of the provisions in clause 9 as to payment. These occur in two passages in the clause. The first which provides that it shall be competent to give notice "by a registered letter and paying the minimum royalty for the said six months, *i. e.*, half of the annual minimum royalty" and the other which stipulates that the lessees shall "not be entitled to surrender so long as any rent or royalty remains unpaid."

The first provision does not give rise to much difficulty, for as has already been pointed out, at the time when the notice is served, it is impossible to know what the annual minimum royalty may be, and in this part of the clause there is nothing to fix a time within which that payment is to be made. The words do nothing except create an obligation to pay, and it

is the latter part of the clause which provides the date of payment.

The latter provision is more precise. After the notice is given, unless all the prescribed conditions are satisfied at the date when the notice expires, the lease will not be terminated, and the notice will become ineffectual. It is probable that the expression contemplated an actual surrender by handing back the leases with an endorsement, and had they been so surrendered there would, in their Lordships' opinion, have been thrown upon the lessee the difficult duty of calculating the exact amount of all the royalties that would then be due, bringing into account the royalty actually payable per ton of coal and apportioning the amount of the deed rent. But this course was not adopted. The Raja's agent, in pursuit of what he regarded as the practice of the estate and acting well within the general authority that he possessed, requested that the surrender should take place by execution of a deed. When once this course was adopted, the payment of the amount was, in their Lordships' opinion, transferred to the date when the surrender was executed and delivered. It would make no difference that this date was subsequent to the date for the expiration of the notice, for its operation would take effect from the date when the notice expired, whenever it was executed: Payment, therefore, upon this date was all that was required by the terms of the lease itself. But, apart from this, it was expressly directed by the letter of Mr. Smith of the 13th November. It is said that in all these acts Mr. Smith was acting in excess of his authority. But their Lordships are unable to agree with this contention.

Mr. Smith was the plaintiff's manager, and as his manager he stated in his evidence that all questions in connection with the estate came before him. In his own words he said:—

"I dealt with them, but not finally. The final decision rests with the Raja. After receiving the Raja's decisions I see them through. The Raja does not know much English. Questions of land settlement of coal property come to me for report. The terms of such property are finally settled by the Raja, I carrying out his orders."

Their Lordships think it is plain from these statements that while Mr. Smith had no power finally to fix or to vary the terms upon which the Raja's land is dealt with, yet he had full authority to carry out directions when once the general question had been determined, and when the notice was handed over to him by the Raja as manager, this clothed him with full authority to make such arrangements as he thought fit in the interest of the estate for carrying the notice into effect.

Their Lordships are in agreement with the learned Subordinate Judge that the principle of estoppel does not apply to this case at all, and they think the statement of the High Court that the plaintiff was estopped by conduct is not an appropriate explanation of the true position. The word "estoppel" is not infrequently used to cover transactions to which it has no proper application. In its essence it means that the party estopped has by conduct or language prevented himself from asserting the true facts on which he would otherwise have been entitled to rely. This is not what has happened in the present dispute. There was nothing to prevent the Raja from asserting the true character of the transaction, but this, for the reason already pointed out, does not entitle him to succeed in his claim.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant: Mr. *E. Dalgado.*

Solicitors for the Respondents: Messrs. *Morgan, Price and Co.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1435 OF 1917.

October 3, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Srimath DEIVASIKAMANI NATARAJA DESIKAR, MADATHIPATHI OF THIRUVANNAMALAI MUTT—PLAINTIFF—APPELLANT

versus

VALLIAMMAI ACHI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 134—Hindu Law—Mutt—Mahant, *whether trustee—Property conveyed to* mahant *for benefit of* mutt, *nature of—Alienation by* mahant, *validity of—Suit to recover properties alienated Limitation.*

The *mahant* of a *mutt* is a trustee, in law, of the *mutt* properties [p. 915, cols. 1 & 2.]

Where property is conveyed to the *mahant* of a *mutt* not for his personal use, but for the benefit of the *mutt*, the transaction is a conveyance in trust, within the meaning of Article 134 of Schedule I to the Limitation Act [p. 915, col. 1.]

A permanent alienation of *mutt* properties by a *mahant* for purposes not beneficial to the *mutt* is beyond his powers, and a suit to recover properties so alienated must be instituted within 12 years of the date of the alienation, otherwise it will be barred under Article 134 of Schedule I to the Limitation Act. [p. 915, cols. 1 & 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Appeal Suit No. 5 of 1917 (Appeal Suit No. 305 of 1916 of the District Court, Ramnad), preferred against the decree of the Court of the Additional District Munsif, Sivaganga, in Original Suit No. 14 of 1914.

Mr. *R Ganapathy Aiyar*, for the Appellant.

Mr. *P. S. Narayanaswami Aiyar*, for the Respondents.

JUDGMENT.

SPENCER, J.—This suit was brought by the Mahant of the Thiruvannamalai Mutt to recover possession of certain lands sold by his predecessor in 1895 to the father of defendants Nos. 1 and 2. He alleged that the sale was for no necessity and that it was not binding on the Mutt. The suit was decreed in the Court of the District Munsif but, on appeal, the Subordinate Judge dismissed it as barred by limitation.

The questions raised in the second appeal are, *first*, whether the Mahant of a Mutt is a trustee or a life-tenant; *secondly*, whether Article 134 of the Limitation Act applies to this case; and *thirdly*, whether the alienation was void or voidable, it being suggested that if it was only voidable, the cause of action to set it aside would only arise on plaintiff's accession to the headship of the Mutt. On the first point, in *Ram Parkash Das* v. *Anand Das* (1) and *Basudeo Roy* v. *Jugalkishwar Das* (2) the Judicial Committee of the Privy Council have laid it down that the Mahant of a Mutt is a trustee of the Mutt properties. In *Baluswami Aiyer* v. *Venkitaswamy Naicken* (3) it was held that a Mahant was a trustee and not a life-tenant as regards the properties of the Mutt. In *Obla Venkatachalapathi Aiyer* v. *Thirugnana Sambanda Pandara Sannadhi* (4) a doubt was raised whether this proposition had not been too broadly expressed in *Baluswami Aiyer* v. *Venkitaswamy Naicken* (3). In *Kailasam Pillay* v. *Nataraja Tambiran* (5), this question was again discussed and Benson and Wallis, JJ., said that it could not be predicated that a Mahant was a trustee in all cases, but it must depend on the constitution of the particular institution. Sankaran Nair, J., said that, in the absence of evidence to the contrary, the Mahant was not a trustee and that he was not a life-tenant either. In *Muthusamier* v. *Sree Sree Methanithi Swamiyar* (6) it was said that the position of a Mahant was analogous in many ways to that of the estate of a Hindu female heir, and in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (7) it was observed that the Mahant was not a mere trustee but was a corporation sole.

The last named authorities contain attempts to strictly define the position of a Mahant by comparing it to the position of Hindu females or corporations sole in English Law. But they do not show that, generally

(1) 33 Ind. Cas. 583; (1916) 1 M. W. N. 406; 20 C. W. N. 802; 14 A. L. J. 621; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 43 I. A. 78; 43 C. 707; 20 M. L T. 267 (P. C.).

(2) 45 Ind. Cas. 818; 35 M. L. J. 5; 5 P. L. W. 57; 16 A. L. J. 601; 22 C. W. N. 841; (1918) M. W. N. 431; 8 L. W. 130; 24 M. L. T. 305; 28 C. L. J. 476; 20 Bom. L. R. 1088 (P. C.).

(3) 40 Ind. Cas. 531; 40 M. 745; 32 M. L. J. 24.

(4) 42 Ind. Cas. 273; 33 M. L. J. 297; 6 L. W. 637.

(5) 5 Ind. Cas. 4; 33 M. 265; 7 M. L. T. 1; 19 M. L. J. 778.

(6) 19 Ind. Cas. 694; 38 M. 356; 25 M. L. J. 393; 13 M. L. T. 498; (1913) M. W. N. 581.

(7) 27 M. 435; 14 M. L. J. 105.

speaking, the Mahant is not a trustee. The learned Judges who decided these cases were careful not to say that the Mahant of a Mutt was not a trustee. I think that he is not the less a trustee, because his position has been in some respects compared to that of a Hindu female or to that of a corporation sole in English Law. On the whole, there is no good reason for distinguishing the case of this Mutt from those which came under the consideration of the Privy Council in their latest rulings. I hold that the plaintiff and his predecessor were trustees in law.

The next question is whether the suit property was "conveyed or bequeathed in trust" within the meaning of Article 134 of the Limitation Act. Exhibit II is the document under which this property was conveyed by the perpetual lessees under the Devastanam. It is dated 28th July 1886 and the Mutt became the perpetual lessee from that date subject to an annual payment to the Devastanam. As the property was not conveyed to the Mahant for his personal use but sold to him for the benefit of the Mutt, there can be no doubt that the transaction was a conveyance in trust.

Lastly, the Privy Council case in *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (8), which is relied on for the appellant as showing that an alienation by a Mahant for a purpose not beneficial to the Mutt would be good for the lifetime of the Mahant for the time being, was the case of a lease in which the personal right of the Mahant was put forward. There would have been no injury to the estate of the Mutt by the granting of a lease for the Mahant's lifetime, but a permanent lease would have been an alienation beyond his powers, and in this sense the Privy Council must be understood as holding that the lease was only valid during the lifetime of the Mahant in office. Exhibit I being a document of out-and-out sale executed in October 1895, this suit brought in 1914 more than 12 years after the sale, was clearly barred and the Subordinate Judge was right in deciding this point in favour of the defendants.

The second appeal is, therefore, dismissed with costs.

SADASIVA AIYAR, J.—I entirely agree with the conclusions and reasoning of my learned brother in the judgment just now pronounced by him. I only wish to add with the greatest respect to the decision in *Kailasam Pillay* v. *Nataraja Tambiran* (5) that it has always seemed to me a very startling proposition that the ascetic head of a Mutt, who is supposed to have renounced the world and all its vanities, whose fall from a strict life of continence or Brahmacharya disqualified him from holding the office of Matadipathi (which involves the initiation of others spiritually fitted into the holy order of Sanyasa) but who was (in degenerate mediæval ages), however, allowed to be the manager and the trustee and thus the legal owner of properties dedicated to the support and advancement of religion and charity generally and of a particular school of monastic institution and doctrine specially, should be considered not to be a trustee of any institution at all, unless the person who alleges him to be a trustee proves that fact by evidence.

In the case in *Muthusamier* v. *Sree Sree Methanithi Swamiyar* (6) I had, with great respect to the decision in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (7), ventured to express serious misgivings about the soundness of the view conferring on the heads of these Mutts the status of corporation sole. I had also expressed grave doubts of the soundness of the prevailing view that these heads could spend the income of their Mutt institutions in even immoral, extravagant and inappropriate ways without question and without liability to removal for any misconduct and even for patent unfitness (through a notoriously profligate and unascetic life) to hold the position of the head of a monastic institution.

However, I am clear that their Lordships of the Privy Council have in their recent decisions, referred to in my learned brother's judgment, not accepted the view enunciated in *Kailasam Pillay* v. *Nataraja Tambiran* (5) or *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (7) and that

(8) 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148 (P. C.).

these decisions are, therefore, no longer of binding force.

As regards *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (8) both Miller, J., and myself considered it carefully in *Muthusamier* v. *Sree Sree Methanithi Swamiyar* (6) and our opinion as to the exact scope of their Lordships' decision in that case is (I am glad to find) supported by the opinion of my learned brother.

M. C. P.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 20 OF 1917.

March 26, 1919.

Present:—Mr. Kemp, A. J. C., and Mr. Raymond, A. J. C.

Bhai CHAINRAI—DEFENDANT—APPELLANT

versus

Musammat DEVIBAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 31—Award—Decree based on award—Fraud—Rectification of decree, suit for, maintainability of.

Where fraud is alleged, a suit will lie to rectify a decree based on an award, and such suit may be brought in a Court of inferior grade to the one which passed the decree, provided such inferior Court has jurisdiction as to the subject-matter of the suit. [p. 917, cols. 1 & 2.]

Section 31 of the Specific Relief Act, which permits the rectification of an award, must also be taken to permit the rectification of a decree which is based on and gives formal expression to the award. [p. 917, col. 1.]

Appeal from the decision of the District Judge, Hyderabad.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Fatehchand Assudomal*, for the Respondents.

JUDGMENT.

KEMP, A. J. C.—This is a second appeal from the decision of the District Judge, Hyderabad, decreeing plaintiffs-respondents' suit filed in the Court of the Sub Judge of Hyderabad and reversing the decision of the Sub-Judge dismissing the suit.

The facts of this case are as follows:—

The plaintiffs are the widow and sons of the deceased Lalchand. The defendant is the son of the deceased by another wife. Certain disputes having arisen between the parties, they were referred on 27th September 1911 to arbitration. The award was made on 4th February 1912. An application to file it was presented on 20th February 1912, and on 27th February 1912 the award was made a rule of Court in Suit No. 6 of 1912. The plaintiff Devibai got a copy of the award decree on 15th November 1912. In the award itself there is a provision regarding the payment to Devibai of Rs. 25-4-0 per mensem so long as a certain liquor shop therein mentioned is in defendant appellant, Chainrai's name. The words "up to the year 1913 14" have been interpolated in this clause, so that with the interpolation it runs "that or so long as it is continued from year to year in Chainrai's name up to the year 1913 14 the claimant *Musammat* Devibai is entitled to take from the opposite party for Nos. 2 and 3 and for her expenses of living Rs. 25 4 0 per mensem," etc. The words which have been interpolated have not been initialled by the arbitrator although other interpolations have. The decree in terms of the award shows the disputed words in the body of it and not as an after insertion.

Clearly, therefore, the disputed words were inserted in the award before the decree was signed by the Judge.

Plaintiffs say the words were fraudulently inserted without their consent after the award was passed. The defendant says the words were in the award as originally published by the arbitrator and that they are not a subsequent insertion. Plaintiffs on 21st May 1914 applied to the Court which passed the decree to rectify it. They were ordered to file an affidavit, but did not proceed with the application but filed this suit instead praying for rectification of the decree by expunging the words objected to. The Sub Judge dismissed the suit, holding there was no after insertion and that no fraud had been proved. The lower Appellate Court reversed that order and decreed the suit, holding that there had been a fraudulent interpolation in regard to the words referred to after the award had been published.

CHAINRAI v. DEVIBAI.

This is a second appeal and we accept the finding of fact that there has been an after-insertion of the words "up to 1913 14" in the award. The arbitrator's evidence shows he did not insert those words in his award and they are further not initialled by him, although clearly they are words so materially affecting his decision that they should have been initialled if he had intended to insert them.

That the words were fraudulently interpolated is also clear from the fact that they materially affect plaintiff's right under the award in favour of the defendant.

Certain other objections have, however, been raised before us. Firstly, it is contended that no suit will lie to rectify the decree of another Court and, in any event, such a suit cannot be brought in a Court of inferior grade. But as has been pointed out in *Kusadhaj* v. *Broja Mohan* (1), a suit will lie to rectify a decree based on a compromise, as the decree is merely the formal expression given, in the present case, to the contract embodied in the reference and award. Quite apart from the fact that here we are dealing not with a case of mistake but with one of fraud, the distinction between a suit to set aside a decree passed after trial and one passed on a compromise has been very clearly pointed out in the judgment of Jenkins, C. J., in the case of *Kusadhaj* v. *Broja Mohan* (1). That case is also an authority for saying that where fraud is alleged a suit will lie to set aside a decree. If a suit will in such a case lie to set aside the decree I fail to see why, where the decree is based on a reference and award, a suit will not equally lie to rectify it. Section 31 of the Specific Relief Act permits the rectification of the award and, if it permits that, it also permits the rectification of the decree which is based on and gives formal expression to it. Indeed the correct procedure in England by which such a claim as this can be asserted is by action, and not by re-hearing nor by application to the Court in which the judgment or order was given or made. [*Flower* v. *Lloyd* (2), *Brooks* v. *Lord Mostyn* (3) and *Davenport* v. *Stofford* (4).]

I do not mean by this that no application would lie under section 151 of the Civil Procedure Code, but only that there is no bar to plaintiffs' suit as framed. As to whether an application under section 151 would lie I express no opinion.

Nor do I see why such a suit as the present one cannot be brought in a Court of inferior grade to the one which passed the decree, provided such inferior Court had jurisdiction as to the subject matter of the suit. The case of *Arunachellam Chetty* v. *Sabhapathy Chetty* (5) is a distinct authority on the point. In my opinion, therefore, there is nothing in this contention.

Then it is argued that no particulars of the fraud alleged were given, but it seems to me that the fraud was sufficiently particularised to enable the defendant-appellant to know the case he had to meet. Of course, it would be impossible for the plaintiff-respondent to say exactly at what moment the fraud was committed. That is a matter peculiarly within the knowledge of the defendant-appellant. That the fraud was effected by him or some one on his behalf is clear from the fact that the defendant-appellant is the only person to gain by the fraud and that he supports it.

Then it is contended that the present suit is barred by reason of the dismissal of the earlier application for rectification of the decree. This argument is based on general principles of law analogous to those of '*res judicata*.' But the earlier application cannot be said to have been heard or finally decided. It was dismissed for failure of the applicant (plaintiff respondent) to comply with the Court's order requiring her to furnish an affidavit. The Court did not proceed to decide the application on its merits.

Lastly, it is urged the plaintiff respondent was barred by her laches from filing this suit. But there is nothing to show she had reason to know of the interpolation before she filed the suit. So long as she received the monthly payments, she would

(1) 31 Ind. Cas. 13; 43 C. 217; 19 C. W. N. 1228.
(2) (1877) 6 Ch. D. 297; 46 L. J. Ch. 838; 37 L. T. 419; 25 W. R. 793.
(3) (1864) 33 Beav. 457; 55 E. R. 445; 12 W. R. 616; 10 Jur. (N. S.) 554; 10 L. T. (N. S.) 218; 140 R. R. 218.
(4) (1845) 8 Beav. 503; 14 L. J. Ch. 414; 9 Jur. 801; 50 E. R. 198; 68 R. R. 173.
(5) 41 Ind. Cas. 937; 41 M. 213; 6 L. W. 368; 33 M. L. J. 499.

have no reason to suspect anything was wrong. It is only when they ceased that her suspicions would be aroused. I, therefore, think there is nothing in this contention.

The result is that the decree appealed against must be confirmed and the appeal dismissed with costs.

RAYMOND, A. J. C.—I concur.

Decree of the lower Appellate Court confirmed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1287 OF 1918.

April 4, 1919.

Present :—Mr. Justice Phillips and Mr. Justice Napier.

RAVUNNI ACHAN—PLAINTIFF—APPELLANT

versus

KIZHAKKE NADUVATH KARNAVAN AND MANAGER THANKUNNI *alias* VALIA ACHAN—DEFENDANT No. 1—RESPONDENT.

Malabar Law—Husband and wife belonging to different tarwads—*Wife, whether entitled to* "menchilavu" *from husband's* tarwad—*Maintenance, past, whether can be decreed.*

According to Malabar Law a wife who belongs to a *tarwad* different from that of her husband is not entitled to maintenance from her husband's *tarwad*, and, having no legal right to maintenance, she is not entitled to *menchilavu, i.e.*, a luxurious form of maintenance. [p. 919, col. 1.]

A claim for compensation for *menchilavu* is on the same footing as a claim for past maintenance for which the Courts may give a decree. [p. 919, col. 1.]

Second appeal against the decree of the District Court, South Malabar, in Appeal Suit No. 501 of 1917, preferred against the decree of the Court of the District Munsif, Alatur, in Original Suit No. 314 of 1916.

FACTS.—Suit for *menchilavu*. The lower Appellate Court disallowed portion claimed on the ground that the wife's expenses were not such as can legitimately be claimed from the Tarwad of the husband.

Mr. *C. Madhavan Nair*, for the Appellant.—The question is "whether an Anandravan, in claiming his maintenance, is entitled to include therein a reasonable amount towards the expenses of his wife." The right of the wife is by custom and by law: *Parvathi* v. *Kamaran* (1).

[PHILLIPS, J.—The wife has got similar rights in her own Tarwad. How can she be allowed to claim them again from her husband's Tarwad?]

The decisions lay down that even if a wife be maintained by her husband, she can claim maintenance from her own Tarwad. And it is the primary duty of the Tarwad to meet all the reasonable expenses of an Anandravan according to its means.

[NAPIER, J.—That duty does not extend to the wife of the Anandravan.]

Derivatively. For it is the primary duty of the husband to maintain his wife: *Parvathi* v. *Kamaran* (1) and *Kelu Achen* v. *Lakshmi Nethyer Ammal* (2).

The liability to pay is admitted as a matter of course in the written statement. The dispute is only as regards the amount.

[NAPIER, J.—You are trying to establish a legal liability by proof of practice.]

Yes.

The practice of this family has been all along so. And the answer is that my unruly conduct bars my claim. That is not a denial of legal liability to pay. And the liability is admitted by the account-books.

The amount awarded is without any reference to the circumstances of the Tarwad.

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondent, cited Moore's Malabar Law, pages 128-129. There is no authority for the proposition that the wife is entitled to be maintained out of her husband's Tarwad.

On the memorandum of objections.—A junior member who lives and is fed in the Tarwad house is not entitled to claim separate *menchilavu*. It is only if he goes out of the Tarwad that he can so claim. *Kunhammatha* v. *Kunhi Kutti* (3). The Karnavan is the person to purchase and pay for necessaries. The junior member cannot claim a separate allotment of money.

[PHILLIPS, J.—It is not that but a claim for the value of articles not supplied.]

(1) 6 M. 341; 2 Ind. Dec. (N. S.) 518.
(2) 18 Ind. Cas. 234; (1913) M. W. N. 379.
(3) 7 M. 233 at p. 235; 8 Ind. Jur. 33; 2 Ind. Dec. (N. S.) 747.

Menchilavu is a part of maintenance and so cannot be claimed by a person who is maintained.

[*Kalavoor Chembazhi Govindan Nayar* v. *Kunja Nair* (4) was referred to by Mr. C. Madhavan Nair.]

Mr. *C. Madhavan Nair* in reply.

JUDGMENT.—Appellant's Counsel contends, that an Anandravan of a Malabar Tarwad is entitled to *menchilavu* not only for himself but also for his wife, who belongs to another Tarwad. *Prima facie*, a junior member of a Malabar Tarwad, whether male or female, must look to the Karnavan of his or her own Tarwad for maintenance. If, therefore, a woman, who can claim maintenance from her own Karnavan, is entitled also to claim maintenance from her husband's Tarwad, it gives her a right apparently opposed to the principles of Marumakathayam Law, and we have not been referred to any authority which recognises such a right except *Parvathi* v. *Kamaran* (1). That case is, however, no authority for any such proposition of law. This Court merely accepted a finding that such a custom existed in North Malabar, and this finding, based on the evidence of two witnesses, was not objected to. We are not, therefore, prepared to accept without authority this new proposition of law that a wife is entitled to maintenance from her husband's Tarwad, a proposition which even in *Parvathi* v. *Kamaran* (1) was described as inconsistent with the principles of Marumakathayam Law. If the wife has not a legal right to bare maintenance, *a fortiori* her claim to *menchilavu*, which may be termed a luxurious form of maintenance, must be negatived.

A memorandum of objections is filed for respondent, and it is contended that plaintiff is not entitled to any money allowance from the Karnavan and reliance is placed on *Kunhammatha* v. *Kunhi Kutti* (3). In this case, however, no money allowance is decreed, but only compensation for *menchilavu* not received in the past, to which plaintiff has been held to be entitled. This claim to *menchilavu* must be treated as on the same footing as a claim to past maintenance for which, undoubtedly, a decree could be given. *Vide Kelu Achen* v. *Lakshmi Nethyar Ammal* (2) and *Kalavoor Chembazhi Govindan Nair* v. *Kunja Nayar* (4).

The second appeal and memorandum of objections are both dismissed with costs.

M. C. P.

Appeal dismissed.

(4) 51 Ind. Cas. 326; (1919) M. W. N. 302; 26 M. L. T. 180; 36 M. L. J. 565.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 3359 OF 1917.

November 20, 1918.

Present:—Mr Justice Shadi Lal and Mr. Justice LeRossignol.

RAWEL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAI RAM—PLAINTIFF—RESPONDENT.

Hindu Law—Succession—Lameness, whether disqualification—Murder committed to hasten succession, effect of.

According to the Hindu law lameness which is congenital is a disqualification for purposes of succession. Lameness which is not complete, as where a person is able to move about with the assistance of crutches, is not a disqualification. [p. 920, col. 2.]

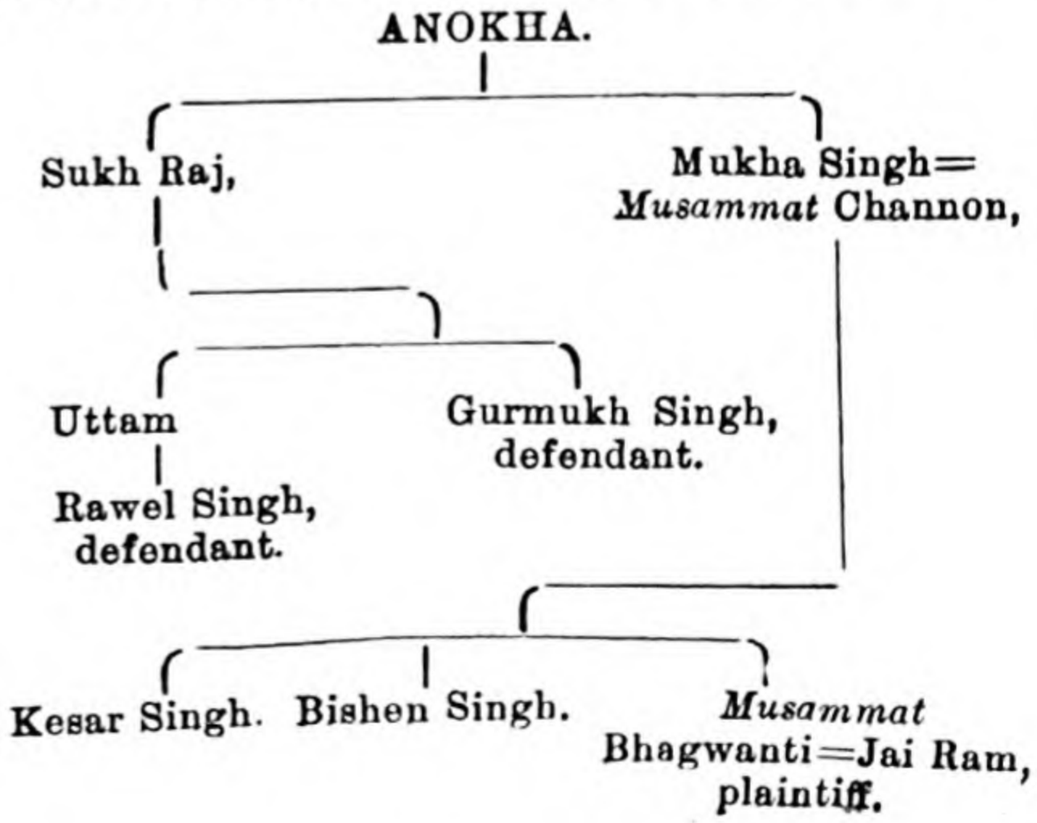
A person is not debarred from succeeding merely on the ground that a member of his family committed murder to hasten the succession, where the former was not a party to the murder and the benefit to him was not present in the mind of the murderer. [p. 920, cols 1 & 2.]

Second appeal from the decree of the District Judge, Jhelum, dated the 27th August 1917.

Mr. *D. R. Sawney*, for the Appellants.

Dr. *Gokal Chand Narang*, for the Respondent.

JUDGMENT.—The following is the pedigree-table of the parties in this case:—



In 1911 Kesar Singh, Bishen Singh and their mother *Musammat* Channon were murdered and Uttam Singh was convicted as their murderer and was hanged. *Musammat* Bhagwanti, the daughter of *Musammat* Channon, in the absence of her brothers succeeded to the property now in dispute and remained in its enjoyment until her death, which took place shortly before the institution of this suit whereupon the defendants, Gurmukh Singh and Rawel Singh, both minors, took possession of the property. The plaintiff, who is the husband of *Musammat* Bhagwanti deceased, claims the property. His suit was dismissed by the first Court, but the learned District Judge has decreed for him on the ground that Rawel Singh, being the son of the murderer, Uttam Singh, is disqualified from taking the succession, whilst Gurmukh Singh is also disqualified by the reason that he was a member of the joint Hindu family constituted by him and Uttam Singh and Rawel Singh and, therefore, cannot be allowed to benefit by the murder committed by a member of the family.

The parties are Hindu Khatris and admittedly are governed by the personal law, and even if the case of Rawel Singh fails, plaintiff, in order to achieve success, must show that Gurmukh Singh is disqualified. On behalf of the appellants it has been urged before us that under Hindu Law the son of a disqualified heir is not himself disqualified, and it is further pointed out that under Hindu Law a son has a right of succession independent of his father. But these are considerations which affect only the case of Rawel Singh and need not be discussed at this juncture, because if Gurmukh Singh has a good title, he would exclude the plaintiff. Now, at the time of the murder Gurmukh Singh was, and is, still a minor and no authority has been cited to us in support of the great extension of the principle "*nemo ex suo delicto meliorem suam conditionem facere potest*," on which the learned District Judge has based his rejection of Gurmukh Singh's claims. For the respondent, however, it is urged that Gurmukh Singh is disqualified to take the succession for another reason, and that is that he is congenitally lame. It is urged that in the plaint the plaintiff stated that Gurmukh Singh had been lame from birth and that this allegation was not specifically denied by the defendants, but having seen the pleas we find that the paragraph of the plaint referred to was generally denied and it was denied further that Gurmukh Singh was incapacitated according to Hindu Law from taking the succession. It is unnecessary for us to determine whether the lameness which disqualifies for succession according to Hindu Law must be a complete lameness. The provision is one which is repugnant to modern ideas of justice, but such authority as does exist on the subject requires that if lameness does disqualify an heir, it must be congenital. The finding of fact, however, is that Gurmukh Singh's lameness is not proved to be congenital, and this is a finding which cannot be challenged in second appeal. It is further found that the lameness is by no means complete, for with the assistance of crutches Gurmukh Singh attends school and is consequently not a hopelessly infirm creature. For these reasons we hold that Gurmukh Singh is not debarred by his lameness from taking the succession. It does so happen that he benefits by the murder committed by Uttam Singh, but he was certainly not a party to the murder and that the benefit to Gurmukh Singh was present to the mind of Uttam Singh at the time when he planned and committed the murder, is in the highest degree improbable.

For these reasons we accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

RAMA RAO *v.* MARTHA SEQUEIRA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 494 OF 1918.

April 23, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

A. RAMA RAO—DEFENDANT No. 1—APPELLANT

versus

MARTHA SEQUEIRA AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Madras District Municipalities Act (IV Mad. of 1884), ss 207, 64 (a), 278—Latrine erected and located with approval of Municipality—Nuisance—Right of private owner to sue for removal of nuisance—Decree for demolition of latrine, legality of—Compensation, award of, under s 278, whether bars other remedies—Permissive and obligatory duties of Corporations.

The erection of a latrine under the orders of a Municipality in a place approved by the latter does not render the owner immune from an action by a neighbouring owner or occupier for nuisance caused to him by the latrine. [p 923, col. 2; p. 924, col. 1.]

Though the Municipal Act has authorized the Council to direct the location of the latrine in a particular place, the work should not be carried out so as to injuriously affect private interests more than is necessary. [p. 923, col. 2.]

The power given to a Municipality to supervise the erection by a private individual of a latrine must be regarded as a permissive obligation which should be exercised without unnecessary detriment to private rights and without creating an unreasonable nuisance [p. 924, col. 1.]

The person complaining of the nuisance has a right of action to prevent the use of the building as a latrine, but no decree should be passed for the demolition of the building. [p. 922, col. 1.]

The provision in section 278 of the Madras District Municipalities Act for award of compensation by the Municipal Council for damage caused by the exercise of its powers does not interfere with the common law rights of injured parties. [p. 924, col 1.]

West v. *Bristol Tramways Co*, (1908) 2 K. B. 14; 77 L. J. K. B. 684; 99 L. T. 264; 72 J. P. 243; 6 L. G. R. 605; 24 T. L. R. 478, distinguished.

Permissive and obligatory duties of Corporations explained.

Second appeal against the decree of the District Court, South Kanara, in Appeal Suit No. 85 of 1917, preferred against the decree of the Court of the District Munsif, Mangalore, in Original Suit No. 269 of 1914.

Mr. *B. Sitarama Rao* (with him Mr. *K. P. Lakshmana Rao*), for the Appellant.—The latrine was erected under orders of the Municipality and its location was approved by the Municipality. The appellant would have laid himself open to prosecution if he had disobeyed the orders of the Municipal executive. For performance of a statutory obligation he cannot be sued at the instance of private owners as for a nuisance. The duty cast on the Municipality is obligatory.

There is a remedy provided in the District Municipalities Act in section 278 for wrongful exercise of its power by the Municipality. It is liable to pay compensation to any person who suffers damage by its act. No further remedy is open to the injured party.

In any event, the decree for demolition of the latrine is wrong. The 1st defendant is entitled to use it for any other purpose not interfering with the comfort or convenience of neighbours.

Mr. *K. Ramanath Shenai*, for the Respondents.—The fact that the Municipality approved of the nuisance will not destroy the common law rights of injured parties. If the latrine is a nuisance to the plaintiff, she has an undoubted right to ask for its mitigation or abatement. The powers of the Municipality should be reasonably exercised so as not to interfere with private rights

Section 278 of the Act is not exhaustive of the remedies.

JUDGMENT.—(*December* 20, 1918.)—The 1st defendant and the plaintiff are neighbours. The former owns a large piece of land on which he has built cottages which he has let out for rent. For the convenience of the tenants he had put up a latrine in a particular place. This was objected to by the Municipal Council, who directed the demolition of it "and the construction of a proper and substantial one for the use of his tenants in the garden in an unobjectionable place about 25 yards to the west of the latrine complained of." (*Vide* Exhibit II.) The 1st defendant began to put up the latrine close to the house of the plaintiff. The site was approved of by the Municipal Chairman. The plaintiff complained against it and appealed to the Collector. The Collector passed orders stating that the site for the latrine was chosen by the Municipal Chairman after consulting both the parties and it could not be changed. This suit was brought for a mandatory injunction to remove the latrine

as it is a nuisance to the plaintiff. In both the Courts below plaintiff was successful. They held that the statement in the order of the Collector that the Chairman consulted both the parties was wrong. They further held that the latrine was a nuisance. The District Munsif stated:—"The place is an abomination and it is an unmitigated nuisance to the plaintiff." The learned District Judge says:—"That the erection of the latrine opposite to and at a distance of only 25 yards from her house causes serious discomfort to, and is likely to endanger the health of the inmates of the plaintiff's house." In the lower Courts the decision was largely based upon *Sayad Jafar Saheb* v. *Sayad Kadir Rahiman* (1).

In second appeal Mr. Sitarama Rao has addressed to us a very able and elaborate argument on the question. His main contention was that under section 207 of the Municipal Act he was bound on the direction of the Municipal Council to put up a latrine, and that otherwise he would have rendered himself liable to be fined for his neglect, and that as he put up the latrine in the place approved of by the Municipal Council through its Chairman, no action lies against him. He also contended that the injunction to remove the building was wrong. Upon the latter question there can be no doubt. All that the plaintiff can complain against is the use of the building as a latrine, for that alone constitutes the nuisance. She has no right to object to the building itself, which can be utilised for other purposes which would not cause any nuisance nor injure the inmates of her house. She was not justified in coming to Court with a prayer for the removal of the building. To that extent the decree must be modified and as we understand that the walls have been pulled down, she should be directed to restore the building at her own expense. The more important question is whether the plaintiff has a right of suit under the circumstances mentioned.

Very recently we had to consider the liability of a Taluk Board for damages in the execution of a duty enjoined by the Legislature. *Krishna Murthi Iyer* v. *Taluq Board of Mayavaram* (2). We there pointed out that there is a well-marked distinction between permissive and obligatory duties; but as the question has been more fully argued on the present occasion, we think it desirable to state succinctly the rules and the limitations applicable to the two branches of duties. If the act is only permitted by the Statute to be done, the Corporation is practically under the same obligations to respect the rights of others as a private individual. The Corporation should so perform the duty as not to injure private rights. [See *Attorney General* v. *Thames Conservators* (3) and *Madras Railway Company* v. *Zemindar of Carvetinagaram* (4).] Further the duty must be done without negligence and with care. See *Khagendra Nath Mittra* v. *Bhupendra Narayan Dutt* (5). There is no distinction between misfeasance and non feasance in such cases. See *Canadian Pacific Railway* v. *Parke* (6). The position of a Corporation which is bound to carry out certain duties is different. In enjoining the performance of them the Legislature contemplates the fact that private individuals will have to submit to a certain amount of infraction of their rights. The principle is that where the Legislature directs a duty to be done, it must be deemed to have weighed the balance of convenience between public benefit and private rights and to have laid down that the latter should give way to the former. See *Geddis* v. *Proprietors of Bann Reservoir* (7), *L. B. & S.C. Ry., Co.* v. *Truman* (8), *West* v. *Bristol Trammays Co.* (9) and *Westminster Corporation* v. *London and North Western Ry.* (10). But the

(1) 12 B. 634; 6 Ind. Dec. (N. S.) 906.

(2) 50 Ind. Cas. 809; 9 L. W. 353; 42 M. 331.

(3) (1862) 1 Hem. & M. 1; 1 N. R. 121; 8 Jur. (N. S.) 1203; 8 L. T. 9; 11 W. R. 163; 71 E. R. 1; 136 R. R. 1.

(4) 1 I. A. 364 at p. 384; 14 B. L. R. 209 (P. C.); 22 W. R. 279; 3 Sar. P. C. J. 391.

(5) 8 Ind. Cas. 530; 38 C. 296; 15 C. W. N. 316; 11 Cr. L. J. 665.

(6) (1899) A. C. 535; 68 L. J. P. C. 89; 48 W. R. 118; 81 L. T. 127; 15 T. L. R. 427.

(7) (1878) 3 A. C. 430 at p. 455.

(8) (1886) 11 A. C. 45; 55 L. J. Ch. 354; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388.

(9) (1908) 2 K. B. 14; 77 L. J. K. B. 684; 99 L. T. 264; 72 J. P. 243; 6 L. G. R. 609; 24 T. L. R. 478.

(10) (1905) A. C. 426; 72 L. J. Ch. 629; 69 J. P. 425; 54 W. R. 129; 93 L. T. 143; 21 T. L. R. 686; 3 L. G. R. 1120.

private individual is not altogether without remedy even in such cases. If the work has been done negligently or carelessly the Corporation will be liable. See *Hammersmith & Ry. Co.* v. *Brand* (11) and *Thompson* v. *Eccles Corporation* (12). The Corporation will also be liable where it acts maliciously and with a wanton desire to injure private rights. But it is not liable for mere non feasance. The question now is under which of the two categories we should place the erection by the 1st defendant of the latrine ordered by the Municipality. Section 207 runs "The Municipal Council may by a notice require, etc." Mr. Sitarama Rao drew our attention to section 264 (*a*), which contains the penal clause. He also referred to section 35, which enables the Governor in Council to suspend the operations of the resolutions passed under the Act if the execution of such resolutions is likely to cause obstruction, injury or annoyance to any person lawfully employed or danger to human life, health, or safety. The learned Vakil argued from these provisions that the duty cast upon the Municipality must be regarded as obligatory. We are unable to agree with him. *Prima facie* the provision of a latrine is for the convenience of the inmates of the place, and has no doubt a bearing on the health of the town. But a direction to build at a particular place without reference to the surroundings cannot be said to be obligatory on the Municipality. Under very similar circumstances it was held in *Vernon* v. *Vestry of St. James, Westminster* (13), to which Mr. Shenai drew our attention, that the Corporation would be liable in damages to a private individual. In that case Malins, V. C., stated:—"Therefore, I repeat, if the question before me were simply whether they were right in selecting the place, and whether one place or another was better, I should be bound to decide that the vestry are the sole Judges as to what the situation should be. But great as the powers of the vestries under the Act are, they are not absolute, and vestries are, like all other public bodies, liable to be controlled by this Court, if they proceed to exercise their powers in an unreasonable manner, whether they are induced to do so by improper motives or from error of judgment." Further on the V. C. says: "It is clear that the Court has power to entertain such suits, and that these vestries must not execute these powers in such a manner as to create a nuisance when the object of the Act is to remove nuisances." The case was taken up to the Court of Appeal. Lord Justice James said:—"If the erection in question were made by a private landowner on his own soil and freehold, it would seem to be beyond all question a nuisance so grave and so serious that the neighbours would be entitled to apply to the Court for an injunction to restrain it. The question is whether the fact that the thing is done, not by a private owner on his private soil, but by the parish vestry on a place that is said to be a public highway, makes any difference." The learned Lord Justice then quoted section 6, which is very similar to section 207 of the District Municipalities Act and proceeded:—"*Prima facie* nobody is authorized to commit a nuisance and nobody is to be held so authorized under an Act of Parliament unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance." Lord Justice Cotton said:—"Therefore the mere fact that an urinal is authorized to be erected does not necessarily or by necessary implication give parliamentary power to do it if it is a nuisance." Lord Justice Lush said:—"That if the inconvenience is only to the public and there is no special injury to a particular individual no action would lie." This case is strong authority for the position that although the Municipal Act has authorized the Council to direct the location of latrine in a particular place, the work should not be carried out so as to affect injuriously private interests more than is necessary. In *Sellors* v. *Matlock Bath Local Board* (14) the same principle was enunciated. In *Rapier*

(11) (1869) 4 H. L. 171; 38 L. J. Q. B. 265; 18 W. R. 12; 21 L. T. 238.

(12) (1905) 1 K. B. 110; 74 L. J. K. B. 130; 69 J. P. 45; 53 W. R. 211; 91 L. T. 750; 21 T L. R. 49; 3 L. G. R. 20.

(13) (1881) 16 Ch. 449; 50 L. J. Ch. 81; 44 L. T. 299; 29 W. R. 222.

(14) (1885) 14 Q. B. D. 928; 52 L. T. 762.

v. *London Tramways Company* (15) also this principle was affirmed. It seems to us, therefore, that in the contemplation of the Legislature the power given to the Municipality to supervise the erection by a private individual of a latrine must be regarded as a permissive obligation which should be exercised without unnecessary detriment to private rights and without creating unreasonable nuisance. The evidence of the Medical Officer is to the effect that all latrines in Mangalore are to a certain extent a nuisance. This being so, their erection must be detrimental to some private right.

The learned Vakil for the appellant further relied upon the fact that by section 278 of the Act, compensation is payable by the Municipal Council for any damage caused by the exercise of its powers and hence the plaintiff is not entitled to any further remedy from the defendant in this suit. In the case already referred to, namely, *Vernon* v. *Vestry of St. James, Westminster* (13), Lord Justice James referred to the clause which provided for compensation and held that the plaintiff was not confined to that remedy alone. In *Attorney-General* v. *Lewes Corporation* (16) it was held that none of the provisions relating to remedies in the Act would interfere with the common law rights of injured parties We do not think the decision in *West* v. *Bristol Tramways Co.* (9) is any authority for the proposition contended for by the learned Vakil for the appellant.

Moreover, this is not a suit against the Corporation for any injunction or for damages, although the Municipal Council has been impleaded as a defendant. The suit is primarily against the 1st defendant for what he has done on his premises. It would be unreasonable to expect that the Municipal Act should provide for reliefs as against private individuals.

We are, therefore, of opinion that there is no substance in this contention. In the result our conclusion is that the direction to pull down the whole building was wrong and that there should be an enquiry as to whether the defendant could have located the latrine in such a place as no to cause unreasonable injury to the plaintiff. Even should the defendant be obliged to remove some of the cottages in order that a convenient place may be found for erecting a latrine without causing inconvenience to the plaintiff, he should be required to do so. Therefore we must ask the District Judge to return a finding on the following issue:—

Was the latrine erected by the defendant in a reasonable manner so as not to infringe unnecessarily the rights of plaintiff?

Six weeks for finding and seven days for objections.

In compliance with the order contained in the above judgment, the Distict Judge of South Kanara submitted the following

FINDING.—I have been directed to return a finding on the evidence on record on the following issue, *viz.*:—

"Was the latrine erected by the defendant in a reasonable manner so as not to infringe unnecessarily the rights of the plaintiff?"

The District Munsif and this Court found that the latrine was a nuisance, and that the allegation that the latrine was built on the plaint site with the consent of the parties had not been substantiated. There cannot, I think, be any doubt, nor is this seriously disputed, that the defendant could have located the latrine in such a place as not to cause unnecessary injury to the plaintiff. The defendant's garden is, as I pointed out in paragraph 4 of my judgment, an extensive one, and it is difficult to believe that an unobjectionable site could not be found. The location of the latrine within 25 yards of plaintiff's house was clearly unjustifiable. It may, however, have been due to a mistake on the defendant's part, and it is possible that he was under the impression that the site in question had been approved of by the Municipal Council. At the request of the parties I inspected the plaint locality in the presence of the Vakils for plaintiff and defendant, and the result of the inspection was to confirm the opinion I expressed that an unobjectionable site in another part of the garden could have been found. The defendant is prepared to erect the latrine at any place that

(15) (1893) 2 Ch. 588; 63 L. J. Ch. 36; 2 R. 448; 69 L. T. 361.

(16) (1911) 2 Ch. 495; 55 S. J. 703; 127 T. L. R. 581.

may be approved of by the Municipal Council. The question of the selection of the site may, I think, be left to be determined by the Municipal Chairman. I would accordingly return a finding that the latrine was not erected by the defendant in a reasonable manner so as not to unnecessarily infringe the rights of plaintiff.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and subject to the modification indicated in our remand order, the second appeal is dismissed. Each party to bear his own costs throughout.

M. C. P.

Appeal dismissed subject to modification.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 102 OF 1918.

December 10, 1918.

Present:—Mr. Justice Young.

W. CHANCE—PLAINTIFF

versus

BISWANATH—DEFENDANT.

Post Office Act (VI of 1898), s. 44 (1)—Post Office Rules, r. 94—Provident Funds Act (IX of 1897), s. 4—Money remitted through Post Office, whether belongs to remitter or payee—Provident Fund remitted through Post Office, whether can be attached in execution of decree against payee.

Money remitted by money-order through the Post Office does not cease to be the property of the remitter until it is actually paid to the remittee. Therefore, money standing to the credit of a person in the Railway Provident Institution as a compulsory deposit does not lose its character as such by the mere fact of its being remitted by money-order to the depositor, and it retains that character until it is actually delivered to the depositor.

Mr. *Woodham*, for the Plaintiff.

Mr. *Munshi*, for the Defendant.

JUDGMENT.—The only question in this case is whether a money order in course of transmission by the postal authorities is held by them as the servant of the remitter or whether the remitter has parted with his property and they hold as agent of the payee.

Mr. Munshi, who has argued his case very frankly, admitted that if the Post Office was a servant of the remitter, then the remitter could not be said to have parted with the money. Under rule 94 of the Post Office Rules to be found at page 750 of Part I, Gazette of India, for 8th August 1903, it is provided that the remitter of a money order which has not been paid may stop payment and require that the money be paid to himself. This is to be done without any additional charge, on the remitter applying in writing to the Post Office at which the money order issued and producing the receipt and giving full particulars of the payee's address as entered in the money order, and the rule goes on to prove that, in no case shall the Post Office be responsible for inability or failure to stop payment in compliance with the remitter's request. I can only read these rules as meaning that the Post Office as regards money orders is placed at the orders of the remitter. I do not think, therefore, that the property of the remitter in money remitted by money order ceases until it is actually paid to the remittee. The sum in question was, as Mr. Munshi admitted, a compulsory deposit in the hands of the remitter and if it was such, he acknowledged that it was not liable to attachment. I must hold that the money till paid over was still under the control and dominion of the remitter. It follows, therefore, that it still retained the character of a compulsory deposit and was not liable to attachment. Under these circumstances it seems to me that the remitter, as indeed Mr. Munshi again acknowledged, was the proper person to bring this suit. He is the Manager of the Railway Fund who has obtained leave to sue on behalf of the general body of members. The declaration, therefore, must be given as prayed with costs.

Order accordingly.

RAM SARAN DAS *v.* NATHWA.

PUNJAB CHIEF COURT.

MISCELLANOUS SECOND CIVIL APPEAL No. 3050 OF 1918.

March 31, 1919.

Present:—Mr. Justice Abdul Raoof.

RAM SARAN DAS—PLAINTIFF—APPELLANT

versus

NATHWA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 19—Appeal, dismissal of, for default—Application for restoration, whether can be summarily dismissed—Procedure.

An application under Order XLI, rule 19, Civil Procedure Code, praying for the restoration of an appeal dismissed in default, ought not to be rejected summarily without affording the applicant an opportunity of establishing the allegations made in his application, and without considering whether there was good cause for his absence on the date fixed.

Appeal from the decree of the District Judge, Delhi, dated the 14th August 191-, affirming that of the Munsif, 1st Class, Delhi, dated the 20th May 1918, dismissing the plaintiff's claim.

Lala *Shamair Chand*, for the Appellant.

Mr. *Manohar Lal*, for the Respondent.

JUDGMENT.—This is an appeal from an order refusing to set aside an order dismissing an appeal for default of appearance on the part of the appellant. The appeal was fixed for hearing for the 14th August 1916. During the early part of the day it was called for hearing when neither appellant nor his Counsel was present to prosecute it. The learned Judge of the Court below dismissed it for default of appearance.

On the 21st of August 1918, an application was made in accordance with rule 19, Order XLI, Civil Procedure Code, praying for the restoration of the appeal to its original number. In the application it was stated that the applicant could not appear on account of his illness, that he had sent his *mukhtar* to look after the case but as he could not find the Pleader to attend to the appeal, it was dismissed for default of prosecution. It was further stated that the Counsel was actually brought to the Court of the learned District Judge later on, but it was discovered that the appeal had already been disposed of and the record consigned to the record room. The application was summarily rejected by the learned Judge, who remarked that as there was no medical certificate filed and as there was no reason why the applicant's Counsel should not have been present, sufficient cause had not been shown for the restoration of the appeal. That is not what is contemplated by the law. The learned Judge ought to have taken into consideration the allegations upon which the application was made and ought to have come to the conclusion whether there was good cause for the absence of the applicant on the date fixed. There appears to be no material upon the record upon which it may be possible for this Court to form an opinion. The proper course for the learned Judge would have been to have called upon the applicant to establish the allegation made in his application. If the appellant was unable to prove by evidence the allegations made in the application, the learned Judge would have been entitled to refuse his application but there appears to be no indication in his judgment that he gave any opportunity to the applicant to establish the ground set forth in his application. In my opinion an opportunity should be given to the petitioner to show by evidence whether he was unable to appear on the date fixed for the hearing of the appeal.

I set aside the order rejecting the application for restoration and send the case back to the lower Appellate Court, in order that the Court may give the appellant an opportunity to produce such evidence as he wishes to produce. If in the opinion of the learned Judge after considering the evidence it is necessary to hear the opposite party, notice may be issued to him to show cause why the application should not be allowed. Costs will abide the result.

Appeal accepted; Case remanded.

DHAR *v.* HTOON MAY.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 35 OF 1918.

August 26, 1918.

Present:—Mr. Justice Young.

W. DHAR—PLAINTIFF

versus

HTOON MAY AND OTHERS—DEFENDANTS.

Transfer of Property Act (IV of 1882), s. 6 (a)—Buddhist Law, Burmese—Chance of succession, transfer of, validity of—Civil Procedure Code (Act V of 1908), O. I, r. 3, O. II, r. 3—Joinder of parties and causes of action, when permissible.

Where the succession to an estate is governed by the Burmese Buddhist Law, an heir-apparent is precluded by the provisions of section 6 (*a*) of the Transfer of Property Act from transferring his chance of succeeding. [p. 927, col. 2.]

Where different portions of an estate are in the possession of different persons, each of whose interests is opposed to that of the others, except where they are joint, a person interested in the estate suing for his share therein cannot join all the persons in possession as defendants in one suit, unless they are in possession in virtue of the same transaction or the same series of transactions within the meaning of rule 3 of Order I of the Civil Procedure Code, nor can he, by virtue of rule 3 of Order II of the Code, join in the same suit several causes of action against the several parties in possession, unless they are all jointly interested in each separate cause of action. [p. 928, col. 1.]

Mr. *B. Cowasji*, for the Plaintiffs.

Messrs. *Lentaigne*, *N. M. Cowasji* and *Maung Thin*, for the Defendants.

JUDGMENT.—This is a suit brought by Mr. W. Dhar, a Barrister at-Law, claiming a share as heir of his deceased wife, a daughter of the deceased U Htoon Myat, who predeceased her.

It is contended by the defendants *inter alia* that she released her interest in her father's estate in consideration of a sum of Rs. 25,000 by a deed, dated the 12th February 1914, and the plaintiff replies *inter alia* that the deed is of no binding effect under section 6 (*a*) of the Transfer of Property Act, which provides that the chance of an heir-apparent succeeding to an estate, or any other mere possibility of a like nature cannot be transferred. The defendants retort that the deed is not a transfer, but merely a surrender or release, and that the provision does not extend to Buddhists by reason of section 2 (*d*) of the same Act, which provides that nothing in the section shall affect any rule of Hindu, Muhammadan or Buddhist Law. For the purposes of the argument it is assumed that none of the other objections taken to the deed are of any validity.

A very similar case arose in Bombay amongst Muhammadans in 1906 in *Sumsuddin* v. *Abdul Husein* (1), where one Fatmaboo claimed that a release in favour, as in the present case, of her father was not binding on her: a contention that was upheld be Sir Lawrence Jenkins, C.J., and Beaman, J., who held that her chance of succession was neither transferable nor releasable, relying for the latter proposition on the dictum of Lord Davey in *Sham Sundar Lal* v. *Achhan Kunwar* (2) that a Hindu reversioner could neither transfer nor bind his chance of succession. The same view was expressed by the High Court of Madras in *Meerangani Rowther* v. *K. Nagur Meera* (3) and by the Calcutta High Court in *Rebati Mohan Das* v. *Ahmed Khan* (4) and the Allahabad High Court in *Fayazul Rahman* v. *Muhammad Usman* (5). In *Mohammad Hashmat Ali* v. *Kaniz Fatima* (6) it was held that although by reason of section 6 of the Transfer of Property Act it was impossible for any person to transfer the chance of becoming entitled to a share in the property of a living person, there was nothing illegal in a person for good consideration contracting not to claim in the event of his becoming entitled on the decease of a living person. The distinction seems rather subtle, and none of the above or any other authorities seem to have been cited. To me it seems an evasion of the section and I prefer to follow the former authorities rather than this, unless there is anything in Buddhist Law to show that section 6 does not apply, Counsel were unable to quote any text of Buddhist Law to show that it did not apply. Certain decisions were quoted in which Judges have upheld such agreements, but in none was any reference made to the provisions of this section.

It was argued that a Muhammadan could not be disinherited, while a Burman's right to a share depended on his conduct; but I cannot see that this makes any difference. If an heir-apparent's chance which can only be

(1) 31 B. 165; 8 Bom. L. R. 781.

(2) 25 I. A. 183 at p. 189; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. S.) 755.

(3) 18 Ind. Cas. 185; 24 M. L. J. 258; (1913) M. W. N. 371; 13 M. L. T. 91.

(4) 1 Ind. Cas. 590; 9 C. L. J. 50.

(5) 2 Ind. Cas. 865.

(6) 27 Ind. Cas. 701; 13 A. L. J. 110.

defeated by his death is a *spes successionis, a fortiori* is the chance of a Burman which depends on other contingencies.

The deed of release, I would, therefore, hold, does not prevent Mr. Dhar from having an interest in the estate. The further questions whether his claim to have the document declared void or voidable is barred by limitation, and whether he is bound to make restitution have not been argued and decisions on these points must be reserved. Both defendants have, however, claimed that the suit as framed is bad for misjoinder. Only the 5th defendant took the point in her written statement. But the other defendants joined in the objection, and Mr. Cowasji for the plaintiff accepted the position.

In my opinion the suit as framed is hopelessly bad. If it were to stand, I can see no reason why in an administration suit a plaintiff should not sue all the debtors to an estate. If one looks at the precedents of Pleadings Nos. 41, 42, 43 of Appendix A, or the precedent of an Administration Decree No. 17 of Appendix D to the Civil Procedure Code, it is clear that the suit as framed is far wider than is contemplated by these precedents.

Order I, rule 3, allows all persons to be joined as defendants against whom any right to relief is claimed in respect of the same transaction or series of transactions. Here the plaintiff claims that all the defendants are in wrongful possession of portions of the estate of the deceased, but no nexus is shown to exist, showing that they were in possession by virtue of the same transactions or series of transactions.

The plaintiff has a cause of action against each defendant, but so far from all being jointly interested, the interest of each defendant is opposed to that of the others, except where and in so far as the conveyances are joint—a matter upon which the plaint throws no light. There is, therefore, a misjoinder of parties and causes of action under Order II, rule 3. It may be that all the defendants are interested in the questions whether the plaintiff has a right to sue, whether the right is barred, and whether he can sue without restitution. But further than this the plaintiff cannot go in this suit in my opinion.

If these questions are settled in his favour, he will be entitled to the ordinary administration decree with the ordinary enquiries and these may and presumably will result in further suits against the present defendants severally or in some cases against more than one jointly. But the present plaint, which tries to consolidate all these into one, is in my opinion bad for misjoinder of defendants and causes of action, and must be returned for amendment.

Plaint returned.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 171 OF 1918.

October 17, 1918.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Krishnan.

BADMI SESHIAH—DEFENDANT No. 1—APPELLANT

versus

KATTI CHINNA MARIPPA AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 103—R. 103, whether restricted by provisions of s. 47.

Order XXI, rule 103, Civil Procedure Code, which gives a right of suit to a party who is not a judgment-debtor, is not restricted by the general provisions of section 47.

Ramasawmi Sastrulu v *Kameswaramma*, 23 M. 361 (F. B.); 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653, explained.

Appeal against the order of the District Court, Bellary, in Appeal Suit No. 114 of 1917, preferred against the decree of the Court of the District Munsif, Bellary, in Original Suit No. 78 of 1917.

Messrs. *B. Somaya* and *B. Bhima Row*, for the Appellant.

Messrs. *C. Narasimhachariar* and *A. Narasimha Aiyar*, for the Respondents.

JUDGMENT.—Plaintiff is not a judgment-debtor; and Order XXI, rule 103, of the Code of Civil Procedure specially gives him a right of suit. This rule is not, in our opinion, restricted by the general provisions of section 47 of the Code of Civil Procedure. The decision in *Ramaswami Sastrulu* v. *Kameswaramma* (1) was passed under the old Code; and we may respect

(1) 23 M. 361 (F. B.); 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653.

fully add, does not consider the distinction between a party to the suit and judgment debtor as defined in the Code. The appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL NO. 124 OF 1918.
February 4, 1919.
Present:—Mr. Justice Pratt.
MA SEIN U—APPELLANT
versus
TUN BA—RESPONDENT.

Buddhist Law, Burmese—Succession—Death of husband or wife, childless—Survivor, rights of.

According to Burmese Buddhist Law, on the death of a husband or wife without children, the survivor succeeds to the whole of the deceased spouse's estate, including the right of the deceased to a share in undivided ancestral property.

Mr. *Judge*, for the Appellant.

Mr. *Ginwala*, for the Respondent.

JUDGMENT.—The only point for decision in this appeal is whether the husband is entitled to his deceased wife's share in the undivided estate of her parents. *Prima facie* there would seem to be no reason why a share in an undivided estate should not be heritable.

Mr. Judge for the appellant relies on *Mi Pyu* v. *Mi Bon Dok* (1) as an authority for the view that the husband cannot inherit the wife's share in undivided ancestral property. The effect of this ruling is discussed in *Mi Lan* v. *Maung Shwe Daing* (2), and it is clear that the Judicial Commissioner of Lower Burma did not intend to lay down the general rule that the widow as representative of her deceased husband cannot inherit his share in an undivided estate, but limited its application to cases in which the brothers and sisters are living together in commensality and managing the family property jointly. It seems very doubtful whether at the present day the wife's or husband's

(1) L. B. R. (1872—1892) 35.
(2) U. B. R. (1892-96) II, 121.

right to inherit the deceased spouse's share in an undivided family estate would be limited even to this extent.

After a very full consideration of the authorities Burges, J. C., came to the conclusion in *Mi Lan* v. *Maung Shwe Daing* (2) that the only restriction to the general rule of inheritance by husband or wife from one another relates to impartible immoveable property, the succession to which is governed by special rules. This ruling was followed in *Maung Waik* v. *Maung Nyein* (3) and the principle was enunciated as follows: "On the death of a husband or wife without children, the survivor succeeds to the whole of the deceased's estate, including the right of the deceased to a share in undivided ancestral property."

I have no doubt that this is a correct statement of the law on the subject, and that it is in accordance with the practice prevailing in Lower Burma at the present day. The appeal is dismissed with costs.

Appeal dismissed.

(3) U. B. R. (1897-01) II, 146 at p. 153.

CALCUTTA [HIGH] COURT.
APPEAL FROM APPELLATE DECREE NO. 2467 OF 1917.
May 14, 1919.
Present:—Mr. Justice Newbould and Mr. Justice Duval.
HARIDAS GOSWAMI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
EKKARI KONAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Cause of action, meaning of.

A cause of action has no relation to the defence set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. [p. 930, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, Burdwan, dated the 23rd August 1917, reversing that of the Munsif, 2nd Court at that place, dated the 11th September 1916.

RANGLAL *v.* S. T. M. CHETIY.

FACTS appear from the judgment.

Babu *Surendra Chandra Sen*, for the Appellants.—The plaintiffs are appellants here. This appeal arises out of a suit for recovery of possession and declaration of title to a plot of land.

The first Court was right in coming to the conclusion that there was a cause of action and the Appellate Court was wrong in coming to a contrary finding.

Here the cause of action arose from the date of cutting the *khal*, *i.e.*, in Sravan 1322 B. S. There is a cause of action and he does not deny my title and says that he takes water from it.

Babu *Ram Chandra Majumdar* (with him Babu *Fanindra Kumar Guha*), for the Respondents.—The cause of action as alleged in the plaint arose on the cutting of the *khal* and the *media* was dispossession. But the *khal* was cut by some other person.

Cause of action must depend on the allegation in the plaint as has been held by the Judicial Committee: *Chand Kour* v. *Partab Singh* (1).

Babu *Surendra Chandra Sen* briefly replied.

JUDGMENT.—This appeal arises out of a suit for recovery of possession, on declaration of the plaintiffs' title to a piece of land measuring 18 *cottas*. Out of this 18 *cottas*, the plaintiffs claimed *khas* possession of 16 *cottas* and possession through tenants of the remaining 2 *cottas*. The Munsif decreed the suit in part and the lower Appellate Court has dismissed the suit on the ground that the plaintiffs had no cause of action. In our opinion the learned Subordinate Judge is perfectly right. The cause of action as set out in the plaint arose on the cutting of a *khal* on the 7th Sravan 1322. It is found that the *khal* in question was not cut on the 7th Sravan 1322 but was cut long ago in the year 1892, and also that it was not cut by the defendants. It is contended on behalf of the appellants, and apparently was so found by the Munsif, that the denial of the plaintiffs' title in the written statement and the defendants' allegation that they had a right of easement gave the plaintiffs a cause of action. The statement made by the defendants in the written statement cannot in itself give a cause of action. In this connection it is sufficient to refer to the remarks of the Judicial Committee in the case of *Chand Kour* v. *Partab Singh* (1): "Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour." Here the ground set forth in the plaint for giving the cause of action was the cutting of the *khal* and as it entirely fails, it must be held that the plaintiffs have failed to show that they had any cause of action which would justify their bringing this suit.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 16 C. 98 at p. 102 (P. C.); 15 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 76 OF 1918.

January 21, 1919.

Present:—Mr. Justice Pratt.

RANGLAL—APPELLANT

versus

S. T. M. CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Attachment before judgment—Security furnished—Property not returned to surety—Surety, whether liable for decree.

Where property attached before judgment is released on security being furnished but the surety is not placed in possession of the property, he cannot be proceeded against in the event of a decree being passed against the defendant. [p. 931, col. 1.]

Mr. *Campagnac*, for the Appellant.

Mr. *N. C. Sen*, for the Respondent.

JUDGMENT.—In Civil Regular No. 748 of 1918 in the Small Causes Court, Rangoon, the plaintiff Karuppen Chetty attached property before judgment. One Ranglal came forward on behalf of the defendants Natha Singh and Suran Singh and applied

for removal of attachment on his furnishing security.

On the 7th February Ranglal executed a bond in which he undertook, in case the attachment before judgment should be ordered to be continued, to pay Rs. 1,169-12 0 or to produce the three carts, eleven bullocks and two cows attached. On the same date and before the properties attached had left the custody of the bailiff of the Court, the plaintiff in a second suit against the same defendants (No. 581 of 1918) applied for attachment before judgment of the same properties and an order was issued to the bailiff directing him to hold the property pending orders of the Court.

Subsequently one Kaliha came forward by arrangement with plaintiff and was accepted as surety for payment of the decree and the removal of the attachment was ordered. The property attached was made over to Kaliha. Since then it has disappeared, and it is not necessary for the purpose of this appeal to attempt to follow it. The plaintiff obtained his decree in Suit No. 748 and proceeded to execute it against the surety Ranglal.

On the 9th March 1918, Ranglal filed a petition asking that the bond be cancelled on the ground that although the release of the property from attachment on his furnishing security was ordered, he had never got possession and that defendants in collusion with plaintiff had sold the property to a third party. The Court rejected the application, holding that the bond was still binding on the petitioner. Against this order Ranglal has appealed.

On the admitted facts I am of opinion that the bond cannot be held to be binding on the appellant. It is quite clear that the condition on which appellant executed the bond was that the property should be released from attachment. This is clear from the application of the first defendant, and the Court ordered that the property be released if the security offered was sufficient. It seems also clear that the first attachment was not in fact removed immediately and that the plaintiff did not intend that it should be. In the affidavit accompanying his application of the 7th February in consequence of which the attachment in Suit No. 581 was issued, the Chetty says in so many words, if the attached properties are released they will be disposed of there and then, which shows that his object was to prevent the release of the property from attachment. It is obvious that when appellant executed the security bond, he had a right to expect that the attachment would be removed forthwith. The Chetty not merely prevented the property leaving the Court at the time, but subsequently withdrew his second attachment and allowed the property to be made over to the surety in the other suit. By his own conduct he made it impossible for the surety (the appellant) to comply with his alternative undertaking to produce the property in case the attachment should be ordered to be continued.

It is true that the appellant undertook to pay the decretal amount into Court in the alternative, but it is clear that he only expected this alternative to be enforced on failure to comply with his undertaking to produce the property, if ordered to do so.

The essential part of his undertaking was to be responsible for the production of the property as a consideration for the removal of the attachment. Under these circumstances the plaintiff was himself responsible for the appellant's inability to perform his part of the agreement and I cannot now hold him to the strict letter of his bond. It would not be just or equitable to allow the plaintiff to execute the decree against the surety. The application is allowed with costs, Advocates' fees have by consent been fixed at two gold *mohurs*. The money paid by the applicant must be refunded.

Application allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1269 OF 1918.

February 19, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SUBRAHMANYA IYER—DEFENDANT—APPELLANT

versus

SIVA SUBRAHMANYA IYER AND ANOTHER PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Manager, whether can

sue in his own name as representing family—Mortgage by manager and junior member of family—Redemption, suit for, by manager alone, maintainability of—Civil Procedure Code (act V of 1908), O. XXXIV, r. 1.

The father or managing member of a Hindu family is not legally incapacitated from solely representing the family in a suit, by the fact that the transaction out of which the litigation arises is embodied in a deed in which a junior member of the undivided family had joined as obligee or obligor. The addition of the name of a junior member is sometimes made to avoid disputes in future but it does not make the document legally more valid than if it had been executed by the managing member alone. In the case of a mortgage executed by the managing member and a junior member of the family, the former is entitled to redeem in his own name. [p. 932, col. 2; p. 933, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in Appeal Suit No. 59 of 1918 (Appeal Suit No. 387 of 1917, District Court, Trichinopoly), preferred against the decree of the Court of the District Munsif, Namakkal, in Original Suit No. 37 of 1913.

FACTS appear from the judgment.

Mr. *L. A. Govindaraghava Aiyar* (with him Mr. *N. Rajagopalachariar*), for the Appellant.—The suit was not maintainable by the father alone. He executed the document for himself and as guardian of a minor son, who was a major at date of suit. The son should also have joined as plaintiff. The father is not competent to represent the family in the litigation.

As the father had no right to sue in his own name, the suit is barred.

Mr. *T. V. Venkatarama Aiyar*, for the Respondents.—The father's right to represent the joint family in the suit is not affected by the fact that the mortgage was executed by another member also. It would be anomalous if, while he could represent the family in other transactions, a special disability should attach in enforcing rights under a document to which another coparcener was a party. The addition of other members is often at the instance of the creditor and to ensure freedom from unnecessary litigation. Section 85 of the Transfer of Property Act cannot have the effect of preventing the manager from suing for the family.

JUDGMENT.

SADASIVA AIYAR, J.—I am unable to agree with the contention of Mr. Govindaraghava Aiyar that the father or managing member of a Hindu family loses his capacity to solely represent the family in a suit, if the transaction out of which the litigation arose was embodied in a deed in which a junior member of the undivided family had joined with the managing member as obligor or obligee. The addition of the name of a junior member is sometimes made in a document for the avoidance of dispute in future with the person whose name is so added where the added name is that of an adult, and for the perpetuation of testimony that the act is done by the manager as such where the added name is that of a minor represented by the manager as guardian. Such addition does not make the document legally more valid than if it had been executed by the managing member alone for purposes binding on the family, whether he describes himself as manager or not in the document. I am unable to see how an unnecessary addition of a name by the manager of his own accord or at the instance of the other party to the document, and which does not affect the legal validity of the document, can result in creating a legal disability in the manager to represent thereafter the family in litigations connected with that transaction, while retaining his full capacity so to represent the family by his sole name in all other litigations and transactions. Section 85 of Act IV of 1882 was not, in my opinion, intended to affect the right of a managing member to bring a suit in his sole name on behalf of the family, and from *Sedheshuri Pershad Narain Singh* v. *Dharamjit Narain Singh* (1), which seems to lay down a different rule, I respectfully dissent. The contention as to limitation based on such alleged disability, therefore, fails.

The only other question is whether the award of interest to plaintiff at 9 per cent. per annum throughout is appropriate. I think that while the award of such interest on the purchase-money (Rs. 2,700) till the date of payment of the Rs. 3,000 by the defendant is not excessive, interest might be safely reduced to 6 per cent. on the balance of Rs. 401-4-0 (then remaining due) for the subsequent period till date of suit; calculating at such reduced rate, the amount due to plaintiff on

(1) 22 Ind. Cas. 570; 41 C. 727; 19 C. L. J. 437.

date of suit is diminished by Rs. 108-5-0.

I would modify the lower Appellate Court's decree accordingly. I would also in the matter of costs allow only two-thirds of the costs incurred in all Courts to the plaintiff, the defendant bearing his own costs throughout. Three months' time from this date is granted for redemption.

NAPIER, J.—I am quite clear that where a father executes a mortgage in circumstances that will bind his minor sons and would entitle him to bring a suit to redeem in his own name, the fact that he chooses to execute also *qua* guardian does not disentitle him to bring such suit by himself after the minor has come of age, *vide Adaikulam Chetti* v. *Subban Chetti* (2), but I express no opinion on the question whether if a major son had joined in the mortgage he would not have been a necessary party. I agree in the decree proposed by my learned brother.

M. C. P.

Decree modified.

(2) 26 Ind. Cas. 35; 27 M. L. J. 621; 16 M. L. T. 279; (1914) M. W. N. 684.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 127 OF 1918.

March 29, 1919.

Present:—Mr. Prideaux, A. J. C.

Musammat AMIRBI—PLAINTIFF—APPELLANT

versus

SHAIKH KHAJA AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Guardian and minor—De facto *guardian, power of, to transfer property belonging to minor—Transferee, position of—Suit by minor to recover property.*

A *de facto* guardian of a minor has no power to convey to another any right or interest in immoveable property belonging to the minor, which the transferee can enforce against the minor, nor can any such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. [p. 934, col. 1.]

Imambandi v. *Mutsaddi*, 47 Ind. Cas. 513; 45 C. 878; 35 M, L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73, followed.

Appeal against the decree of the Additional District Judge, Raipur, in Civil Appeal No. 231 of 1917, dated the 18th December 1917, arising out of Civil Suit No. 10 of 1917, decided by the Subordinate Judge, Raipur, on the 30th July 1917.

Dr. *H. S. Gour*, for the Appellant.

Mr. *D. P. Tiwari*, for the Respondents.

JUDGMENT.—One Punaji Jamadar at his death left two widows of his son Shaikh Ratan, *Musammat* Amirbi the present plaintiff and *Musammat* Issubi. Shaikh Ratan had predeceased his father but had left three sons Hassu, Raju (defendant No. 2) and Fathu. By a registered deed, dated the 20th September 1893, *Musammat* Issubi, acting on behalf of her sons Raju and Fathu, sold two houses situated at Raipur to her co-widow, the plaintiff, for Rs. 150. On the 28th of June 1915 Raju mortgaged a third share of this property to the 1st defendant Shaikh Khaja Miya, and the latter sued on his mortgage, obtaining a preliminary decree for sale on the 21st July 1916. Plaintiff, who fears that the decree will affect her, sued for a declaration that she is the absolute owner of the two houses in suit, that Raju had no right to mortgage them and that the decree dated the 21st July 1916 is void as against her. There was some doubt as to whether the houses in suit were the houses sold, but the trial Court found that the houses in suit were built by the plaintiff on the site of the *kotha* transferred by the document of 1893, and that finding was apparently not questioned before the lower Appellate Court. Both Courts find that *Musammat* Issubi did execute the sale-deed for the two minors receiving consideration therefor. Further that the sale was for necessity and for the benefit of the minors, the houses being sold to pay off Punaji, the grandfather's debts. It was also found that Issubi was the *de facto* guardian of the minors. Both Courts on the authority of *Husen* v. *Rajaram* (1) found the sale void *ab initio* and have on this ground dismissed the plaintiff's suit.

(1) 26 Ind. Cas. 813; 10 N. L. R. 133,

N. K. M. M. CHETTY *v.* LUTCHMAN CHETTY.

Their Lordships of the Privy Council in *Imambandi* v. *Mutsaddi* (2) held:

"That a *de facto* guardian has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant: nor can any such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that being himself without title, he cannot seek to recover property in the possession of another equally without title."

The transfer in the present case being, therefore, absolutely void, the lower Courts are right in holding that the plaintiff cannot obtain the declaration she seeks for on the ground of her having bought the property in suit.

It is, however, here contended for her that she should be allowed to prove her title by adverse possession. It is argued that since 1893 she has been in adverse possession of the house in suit. After she had bought them she built two houses on the site of the *kotha* she purchased, proceedings which show that she set up a definite title to the site acquired.

It is contended on the authority of *Nallamuttu Pillai* v. *Betha Naickan* (3) that the 1st defendant's decree can be defeated by the plaintiff's possession for a period exceeding 12 years prior to the institution of the suit; for plaintiff's claim is inconsistent with the rights of both the mortgagee and the mortgagor. There seems to be a conflict of authority on this point. *Nandan Singh* v. *Jumman* (4) deals with the case of a trespasser ousting a mortgagor under a simple mortgage, and it is obvious that in such a case adverse possession cannot extinguish the rights of the mortgagee but even then if adverse possession precedes a simple mortgage, it will run against the mortgagor and the mortgagee both. *Budankayala Ballakrishnamma Subudhi* v. *Vinayaka Rava Bisoyi* (5) and *Parthasarathi Naikan* v. *Lakshmana Naicken* (6) are authorities for holding that the interest in immoveable property which is acquired by adverse possession, can only be that interest which the person entitled to immediate possession had at the time that adverse possession began. In the present case it seems to me that plaintiff is entitled to show that she had adverse possession of the property in suit against the rightful owners from the time she took possession of the property, namely, in 1893. That case, however, has not been tried. Pleadings will have to be taken and issues framed. It is contended for the respondents that as ownership by prescription was not advanced by the plaintiff, she should be made liable for costs in both Courts. I do not think so. The pronouncement by the Privy Council of the effect of a transfer by the *de facto* guardian of a Muhammadan minor was made after the case was concluded in the lower Appellate Court. Had the suit been brought after the views of their Lordships of the Privy Council on this point were known, doubtless the present plaint would have contained a prayer that plaintiff claimed to be owner by prescription, and as such her claim be decreed. I set aside the decree dismissing the suit and remand the case to the first Court for a retrial with advertence to the above remarks. Refund certificate will issue and other costs will abide the result.

Case remanded.

(2) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).
(3) 23 M. 37; 9 M. L. J. 258; 8 Ind. Dec. (N. S.) 420.
(4) 17 Ind. Cas. 632; 34 A. 640; 10 A. L. J. 278.
(5) 26 M. 72; 12 M. L. J. 410.
(6) 9 Ind. Cas. 791; 35 M. 231; 21 M. L. J. 467; 9 M. L. T. 399; (1911) 1 M. W. N. 201.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 176 OF 1914.

August 16, 1915.

Present:—Mr. Justice Young.

N. K. M. M. CHETTY—PLAINTIFF

versus

LUTCHMAN CHETTY AND OTHERS—DEFENDANTS.

Limitation Act (IX of 1908), s 14—Insolvency pro-

ceedings—Creditor proving debt—Annulment of insolvency—Suit to recover debt—Limitation—Exclusion of time spent in proving debt in insolvency.

A creditor who files a proof of his debt before the Official Assignee, prosecutes a civil proceeding within the meaning of section 14 of the Limitation Act, and is entitled to deduct the period during which he was so engaged in filing a suit to recover his debt on the insolvency being annulled.

Messrs. *N. M. Cowasji* and *Mani*, for the Plaintiff.

Messrs. *S. N. Sen*, *Shaw* and *Chari*, for the Defendants.

ORDER.—It being admitted in this case that the suit is barred unless the plaintiff is entitled to exclude the period during which he was engaged in proving his claim against the defendant firm in an insolvency which was subsequently annulled, the question is raised as a preliminary issue. The plaintiff relied both on sections 14 and 15 of the Limitation Act, urging with regard to the latter section that section 17 of the Presidency Towns Insolvency Act operated as a statutory injunction or order. This seems to me rather a novel contention, unsustainable if for no other reason than that the plaintiff never attempted to get the requisite permission of the Court. The case differs from that of *Wazir* v. *Mahomed Imam* (1) in that section 29 of the Punjab Act IV of 1872 contains an absolute prohibition. Section 17 of the Insolvency Act, on the other hand, merely orders any person who wishes to sue an insolvent to obtain the Court's permission as a condition precedent. Section 14 of the Limitation Act seems to me more applicable. A creditor who files a proof of his debt before the Official Assignee seems to me to be prosecuting a proceeding which is certainly a civil proceeding within the meaning of the section where, as I read it, civil proceeding is used as opposed to criminal proceeding.

The fact that he has to prove his debt before the Official Assignee in the first instance does not prevent its being a proceeding in the Insolvency Court. If it is not a proceeding in the Insolvency Court, I do not know what it is. The section does not say "before a Court of first instance or before a Court of Appeal," but "in a Court of first instance or in a Court of Appeal," and when we read as we do in section 46 and the following sections what debts are "provable in insolvency," it seems to me impossible to contend that a person trying to prove his debt and obtain his due share thereof "in insolvency" is not prosecuting a proceeding in the Insolvency Court, just because in the first instance he appears only before an officer of that Court.

With regard to the allegation that the plaintiff was not prosecuting it with due diligence, the facts are that the order of adjudication was made on the 6th June 1913 and that the claim was sent in a couple of months later, no further steps were taken, but Counsel who filed the claim states that the acting Official Assignee informed him when he did so that steps were to be taken to annul the adjudication, and the adjudication was annulled some six months later. It was a very heavy insolvency, and there was not much to be gained by creditors rushing in with their proofs, especially as those would be waste paper if the insolvency was annulled. There is no evidence that the Official Assignee in any way pressed him to prove his claim, and for my own part I think that under the circumstances of the case the plaintiff acted wisely in not incurring costs by doing so. Nor do I think that it was in any way incumbent on him to apply for leave to sue the defendant in the ordinary Civil Court. He considered that he would be saved by the section and I think he was right in his view. The question must, therefore, be answered in the affirmative. Costs, two gold *mohurs*, to be costs in the case.

Answered affirmatively.

(1) 66 P. R. 1874.

BAIKUNTHA NATH *v.* CHAITANYA CHARN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 241 OF 1918.

June 24, 1919.

Present:—Mr. Justice Newbould.

BAIKUNTHA NATH SARMA AND OTHERS —PLAINTIFFS—APPELLANTS

versus

CHAITANYA CHARN CHOUDHURY AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Adverse possession—Landlord and tenant—Dispossession of tenant, effect of—Knowledge of landlord—Trespasser, possession of, nature of.

The general rule that where property is let out on lease the possession of a trespasser does not become adverse as against the lessor until the termination of the lease, is not applicable to a case where the tenant is holding over and the dispossession of the tenant is brought to the knowledge of the landlord. In such a case, the possession of the trespasser becomes adverse to the landlord's interest. [p. 937, col. 1.]

Kishwar Nath Sahi Dev v. *Kali Sankar Sahai*, 10 C. W. N. 343, followed.

Appeal against the decree of the Subordinate Judge, 1st Court, Sylhet, dated the 1st October 1917, reversing that of the Munsif, Additional Court at that place, dated the 16th April 1917.

FACTS appear from the judgment.

Babu *Hemendra Kumar Das*, for the Appellants, submitted that by dispossessing the defendant No. 6 the principal defendant, who was a trespasser, could not claim title by adverse possession as against the plaintiff who was the lessor. Plaintiff's title as a lessor could not be affected in the least by dispossession of his tenant by a trespasser. The Court of Appeal below, therefore, erred in law in holding that the suit was barred by limitation as it was not instituted within 12 years from the time when the lease to the defendant No. 6 expired and the plaintiff had knowledge of his tenant's dispossession. *Hajra Sardara* v. *Kunja Behari Nag* (1) referred to

Babu *Birendra Kumar De*, for the Respondents —The learned Subordinate Judge was right in holding that the suit was barred by limitation. The case of *Hajra Sardara* v. *Kunja Behari Nag* (1) does not support the plaintiff's case. In this case the finding of the lower Appellate Court is that after the expiry of the lease where the defendant No. 6 was holding over with the consent of the plaintiff landlord, the principal defendant dispossessed the defendant No. 6, and continued to remain in possession of the land adversely to him for the statutory period, and during this whole period the plaintiff had full knowledge of the dispossession of his tenant. The present case is on all fours with the facts and circumstances of the case of *Kishwar Nath Sahi Dev* v. *Kali Sanker Sahai* (2). The general rule of law laid down in *Hajra Sardara* v. *Kunja Behari Nag* (1) has no application in this case. It is clear, therefore, that by adverse possession for the statutory period the principal defendant has acquired the limited interest of a tenant, and he is not liable to be ejected as a trespasser.

Babu *Hemendra Kumar Das*, for the Appellant, briefly replied.

JUDGMENT.—This appeal is preferred by the plaintiffs who, after getting a decree in the Court of first instance, had their suit dismissed by the lower Appellate Court on the ground that it was barred by limitation. The plaintiff's case is that the land was in actual possession of their tenant, defendant No. 6, who was at first joined with them as plaintiff. The lower Appellate Court has found that this defendant was dispossessed from the land by the principal defendant sometime not later than the year 1902.

The point pressed in this appeal is that this dispossession of the tenant by a trespasser could not affect the title of the plaintiffs, who are the lessors of the person who has been ejected. The principle on which this contention is based is clearly established and the latest case in which the authorities are reviewed is that of *Hajra Sardara* v. *Kunja Behari Nag* (1). There the principle is stated in the following terms, where property is let out in lease, the possession of the trespasser does not become adverse as against the lessor until the termination of the lease. Though there is this general rule, it is one to which there may be exceptions under certain circumstances and it appears to me on the finding of the lower Appellate Court that this is one of the cases to which the general rule is not applicable. In the case of *Kishwar Nath Sahi Dev* v *Kali Sankar Sahai* (2) after stating the general rule

(1) 40 Ind. Cas. 271; 21 C. W. N. 1001; 25 C. L. J. 685.

(2) 10 C. W. N. 343.

it is pointed out that when the lease has expired and the tenant is holding over with the landlord's consent and the possession of the trespasser is adequate in continuity, in publicity and in extent so as to show that it is possession adverse to the landlord, the latter is not precluded from determining the tenancy and suing the trespasser in ejectment and his right to sue will be barred after 12 years of such possession. It is not in every case where a tenant has been holding over that the general rule is inapplicable, but it seems to me on a consideration of the authorities that the general rule would be inapplicable in a case where the tenant is holding over and the dispossession of that tenant is brought to the knowledge of the landlord for a sufficient period to give the trespasser the statutory title. If the landlord has the right to take possession and knows that the person in possession is not his tenant, the possession of the person in possession under such circumstances would be adverse to the landlord's interest. Here admittedly the tenant was holding over, and it is found by the final Court of fact that the principal defendant's possession was adverse, open and public and so perfected his statutory title.

I, therefore, hold that this appeal fails and must be dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 214 OF 1918.

May 14, 1919.

Present:—Mr. Justice Pratt.

ISAHUT AND ANOTHER—APPELLANTS

versus

MI HLA MO WE—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5), (6)—Execution of decree—Notice under cl. (6)—Step-in-aid of execution—Limitation, starting point of.

Where an application is made for a step-in-aid of execution which would entitle the applicant, under clause (5) of Article 182 of Schedule I to the Limitation Act, to a starting point for the computation of the period of limitation, the fact that a notice was issued previously under clause (6) of the Article would not prevent the applicant from taking advantage of the provisions of clause (5).

Where both clauses (5) and (6) of Schedule I to the Limitation Act are applicable to the facts of a case, the decree-holder is entitled to have the one which is most favourable to him applied.

Mr. *Lambert*, for the Appellants.

JUDGMENT.—The point for determination in this appeal is whether an application for execution which would be time-barred if Article 182, clause 6, of the First Schedule to the Limitation Act be applied, since a notice had issued to show cause against execution as was required by the Code of Civil Procedure, and three years had elapsed since the issue of notice, can be held to be not time-barred, because of an application for a step in-aid of execution made subsequently to the issue of the notice. The learned District Judge has held that clause 5 of Article 182 of the Schedule applies and that the starting point for computation of the period of limitation is the date of application for a warrant of arrest issued on the 29th June. For the appellants it is contended that the starting point for the period of limitation is the 19th June, the date on which the notice to show cause was issued, and that as a notice has issued, clause 6 must be applied, and the fact that the notice has issued excludes the application of the 5th clause, even though an application for a step-in-aid of execution on a later date may be presumed.

I am unable to agree with this view. I do not think clauses 5 and 6 must be construed as mutually exclusive. When there has been an application for a step-in aid of execution which would entitle appellant under clause 5 to a starting point for the computation of the period of limitation, so that his application for execution would not be time-barred, I do not consider the decree-holder should be debarred from executing his decree, because a notice has issued, and if limitation were computed from that date, the application would be time-barred under clause 6. As both clauses are applicable to the facts of the case, the decree-holder is entitled to have the one which was most favourable to him applied. The appeal is dismissed.

Appeal dismissed.

AYYA PATTAR *v.* ATTUPURATH MANAKKAL.

MADRAS HIGH COURT.
CIVIL APPEAL No. 211 OF 1918.
February 13, 1919.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

P. R. AYYA PATTAR—PLAINTIFF—APPELLANT

versus

ATTUPURATH MANAKKAL, KARNAVAN AND MANAGER, VASUDEVAN BHATTATHIRIPAD, AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Execution of decree—Attachment—Objections, petition of, asking that objections be recorded, effect of—"Kuri" transaction—Security, duty of bidder to furnish—Time, whether of essence of contract.

Where a person objects to the attachment of property and files a petition asking that his objections be recorded, without asking for an investigation of his claim, and the Court records his objections, such recording of objections does not amount to an order against the objector to which the provisions of rule 63 of Order XXI of the Civil Procedure Code would apply. [p 939, col. 2.]

The rule in *kuri* transactions being that the amount which is payable to the bidder is to be paid to him only on his furnishing security for future instalments, time is of the very essence of the contract, and, unless the security is furnished within the prescribed period, the bidder loses his right to the amount payable to him. [p. 939, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Palghat at Calicut, in Original Suit No. 7 of 1917.

Messrs. *C. V. Ananthakrishna Aiyar* and *C. R. Ramakrishna Aiyar*, for the Appellant.

Messrs. *C. Madhavan Nair* and *T. Eromani Unni*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The case arose out of a *kuri* transaction. The *kuri* was started by the 1st defendant, 1st respondent in the appeal, for Rs. 10,500 divided into 21 tickets of Rs. 500 each. One Narayanan Somayajipad had one ticket. He paid in 5 instalments and purchased the *kuri* amount at the 6th instalment sometime in 1913. His bidding was for a sum of Rs. 6,565. He was entitled to get that amount on furnishing security for future instalments, that is, for 15 more instalments, amounting altogether to Rs. 7,500. It appears that he could not find security and he pledged his *kuri* receipts for the amounts which he had already paid, it may be also what he was to get by his purchase: which is the correct interpretation of the transaction does not make any difference as to the point we have to decide. The present plaintiff appellant, who advanced money to Narayanan Somayajipad, afterwards instituted a suit in order to realise the money and before judgment attached the money which, according to him, was payable to Narayanan Somayajipad by the 1st defendant. It is alleged that the defendant preferred an objection under Order XXI, rule 58, of the Code of Civil Procedure to the attachment, but in the event, the attachment was made absolute and the property attached was sold and bought by appellant. In this suit, the appellant seeks to recover the amount of the *kuri*, both principal and interest, from the defendant.

It is proved that Narayanan Somyajipad did not furnish security within 30 days of the auction as required by the agreement. Repeated demands were made for security and even the plaintiff did not offer the security at least for 4 years. The learned Subordinate Judge has held that, under these circumstances, the plaintiff was not entitled to the money and decided against him.

The first point raised before us by Mr. Ananthakrishna Aiyar is as to the alleged agreement under which, it is said, the defendant agreed to hold the money for the plaintiff and invest it for him in proper securities and give him interest. The Subordinate Judge has dealt fully with this question in his judgment and has found that this allegation is not true, and I have not the least doubt that that finding is correct. It will be superfluous to add anything to that part of the first Court's judgment.

Then it was argued that under the *karar* the plaintiff was entitled to the money in the hands of the defendant and to reasonable interest on such amount. But one of the provisions of the *karar* is that the purchaser would be entitled to the money only on tendering proper security to the satisfaction of the starters. If the bidder made default and the amount of the bid was not found sufficient, then the deficit with interest at 12 per cent. would be recoverable from the purchaser at the discretion of the starter of the *kuri*. This,

it is quite clear, negatives the case of the appellant. Neither Narayanan Somayajipad nor the plaintiff acted up to the agreement and it could not, therefore, be said that they were entitled to the *kuri* amount which the former had purchased at auction It is a well-known rule of *kuri* transactions that the amount which is payable to the bidder is to be paid to him only on his furnishing security for future instalments, and I do not understand how it can be said that even if the bidder failed to furnish security for the future instalments, he would still be entitled to the money. I should say, generally speaking and apart from the conduct of the parties in this case, that time in such transactions is the very essence of the contract. It may be that the defendants, by making a demand for security even after the expiry of one month specified in the *karar*, consented to extend the time, but it would not at all be reasonable to hold that the plaintiff became entitled to the money even though he failed to furnish security for 4 years after the sale at auction. I think that the Subordinate Judge was quite right in holding that the plaintiff had no claim against the defendants at all.

Then it was urged by Mr. Anantha-krishna Aiyar that rule 63, Order XXI, of the Civil Procedure Code applied to this case and, therefore, the plaintiff must be held to be entitled to the money claimed by him. We have been pressed by a recent decision of the Full Bench, *Venkataratnam* v. *Ranganayakamma* (1), as to the scope of this rule. There a petition of claim was put in but, it appears, too late, and the executing Court passed an order to the effect that the objections made by the claimant would be notified to the bidders. The Full Bench held that that amounted to an order under rule 63, Order XXI, and, therefore, a suit brought more than one year after the date of that order was barred. I do not think, however, that this decision, though it goes very far, covers the present case. In the present case the defendants in their petition did not ask for their claim or allegations to be investigated at all. Though they set out their objections in an affidavit filed along with the petition, the only thing they asked for in the petition by way of prayer was that the objections might be recorded, and the Court passed an order to the effect that the objections were recorded. In the Full Bench case, there was a prayer to investigate the claim although the petition was filed too late. It may be that the Court in that case did not in so many words reject the petition: but the learned members of the Full Bench construed what happened as amounting to a negativing of the right of the claimant and as such the order against him was held to come under rule 63, Order XXI. But it would be going too far to say that the rule applies to a case where a person, while putting in a petition setting out his objections, does not ask the Court to investigate his claim but expressly prays that his objections might be recorded. Whether the executing Court was justified in merely recording his objections, it is unnecessary to consider. But it could not be said that there was any order against the petitioner, because the petitioner did not ask for any order and the Court did not profess to pass any order on the merits of the petition. All that the Court was asked to do was to record the objections and the objections were accordingly recorded. I am, therefore, of opinion that rule 63 of Order XXI does not apply.

It was argued, I may mention, that we ought to relieve the plaintiff against the penal provision of the stipulation. But really no question of penalty arises because the plaintiff was not entitled to any money at all.

The appeal fails and must be dismissed with costs.

SPENCER, J.—I agree.

M. C. P.

Appeal dismissed.

(1) 48 Ind. Cas. 270; 41 M. 985; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335.

JAIRAM *v.* SITARAM.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 483 B OF 1916.

March 6, 1919.

Present:—Mr Batten, A. J. C., Sir Henry Stanyon, A. J. C, and Mr. Mittra, A. J. C.

JAIRAM—APPELLANT

versus

SITARAM—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 10, applicability of—Pre-emption suit—Limitation, commencement of—Physical possession, delivery of, not possible, effect of.

The first part of the third column of Article 10 of Schedule I to the Limitation Act does not apply to a case where the subject-matter of the sale consists of land or other tangible immoveable property, physical possession whereof at the date of the sale is with the holder of a particular or intermediate estate, *e g.*, an usufructuary mortgagee or a lessee, or a tenant for a time, owing to which circumstance the vendor is unable to give immediate physical possession to the purchaser. [p. 947, col. 1; p. 949, col. 1.]

Second appeal against the appellate decree of the 1st Additional District Judge, East Berar, Amraoti, decided on the 22nd August 1916, arising out of the decree of the Subordinate Judge, Morsi, decided on the 28th October 1915.

Messrs. *M. B. Kinkhede* and *W. R. Puranik*, for the Appellant.

Messrs. *M. V. Joshi*, *V. V. Chitale* and *Atmaram Bhagwant*, for the Respondent.

OPINION OF THE FULL BENCH.

STANYON, A. J. C.—(*October 20th*, 1917). —The answer to the question of law involved in this reference turns upon the interpretation of Article 10 of the Limitation Schedule 1908, though in the reference made the question is put as follows:—

'Whether the case of *Baxiram* v. *Bhikaji* (1) was rightly decided or not,'

Since a decision may be sound and just notwithstanding the fact that it includes an interpretation of some particular point of law which seems wrong to other Judges, it seems expedient to explain that the particular question upon which the opinion of the Full Bench is invited is whether the first part of the third column of Article 10, Limitation Schedule, 1908, applies to a case where the subject-matter of the sale consists of land or other tangible immoveable property, physical possession whereof at the date of the sale is with the holder of a particular or intermediate estate, *e.g.*, an usufructuary mortgagee or a lessee or tenant for a time, owing to which circumstance the vendor is unable to give immediate physical possession to the purchaser. In the case mentioned in the reference that question was answered in the affirmative.

The facts which are material to the question now before us may be stated briefly. The plaintiff is the co-occupant of a survey number of unalienated land in Berar. Another co occupant, holding the northern half of this field, was the defendant Narayan, who mortgaged his share to the defendant Jairam. On the 11th April 1910 Jairam obtained a final decree for foreclosure against Narayan. At this time the share of Narayan was in the actual and physical possession of a lessee under a lease granted by the Collector to satisfy another decree which Jairam held against Narayan. That lease subsequently expired and in June 1911 Jairam entered into physical possession of Narayan's share transferred to him by the final foreclosure decree on the 11th April 1910. On the 11th December 1913 the plaintiff brought the suit out of which has arisen the appeal, leading to this reference, claiming to pre empt the said northern half by virtue of the right of pre-emption conferred upon him by the Berar Land Revenue Code, 1896. The defendant Jairam pleaded, *inter alia*, that the suit is barred by limitation, having been filed more than one year after the date on which he took physical possession of Narayan's share. This plea has been decided against Jairam. The view taken by Courts below may be stated thus:—

(*a*) Narayan's share was subject to a lease on the date of the final foreclosure decree; therefore by that decree Jairam obtained a transfer of something which did not admit of immediate physical possession by him: consequently the first part of Article 10 of the Limitation Schedule does not apply.

(*b*) The transfer to Jairam was not made by a registered instrument but by a decree: therefore the second part of the said Article does not apply.

(*c*) Hence, the suit is governed by Article 120 of the Limitation Schedule,

(1) Second Appeal No. 130-B of 1914.

and having been brought within six years of the date of the transfer is within time.

Jairam has appealed to this Court, claiming that the suit is governed by the first part of Article 10, under which time began to run against the plaintiff's right of possession in the month of June 1911 when Jairam entered into physical possession. Mittra, A. J. C, found some conflict of opinion in this Court on the question whether a transfer of a right of co-occupancy subject to pre emption at a time when physical possession of the share is with some subordinate holder, *e. g.*, a lessee or a mortgagee, is a transfer of a subject which does not admit of physical possession. On the one hand he found the decision of Skinner, A. J. C., in *Ramji* v. *Sheikh Mansur* (2) to the effect that where property sold is subject to an existing lease, it is not capable of physical possession within the meaning of the first part of entry in the third column of Article 10 of the Limitation Schedule, 1877 (which has been repeated in the Schedule of 1908). On the other hand there were decisions for which I am chiefly responsible, including that in *Baxiram* v. *Bhikaji* (1), in which it was held that where the property sold is land, the subject-matter of the sale does admit of physical possession and that irrespective of any intervening lease, time would only run against the pre-emptor under the first part of Article 10 from the date on which the purchaser entered into physical possession. Under these circumstances Mittra, A. J. C., has referred the question for the opinion of a Full Bench.

I have given the matter the most earnest consideration and studied all the authorities. I have also had the advantage of discussing the question with my learned colleagues: and I have come to the conclusion, though with regret and reluctance, that I cannot sustain the dissent from the decision of Skinner, A. J. C., in *Ramji* v. *Sheikh Mansur* (2) which I adopted in (*sic*). In that case, the learned Additional Judicial Commissioner expressed his dissent from the decision of my brother Batten, in *Yesaji* v. *Ramkrishna* (3), which, however, was a peculiar case decided with reference to its own particular circumstances, and can easily be distinguished in his opinion from the present case. In *Dattatraya Shanker* v. *Pandurang* (4) decided on the 23rd November 1914, I gave detailed reasons for my inability to concur with the *dictum* in *Ramji* v. *Sheikh Mansur* (2). When *Baxiram* v. *Bhikaji* (1) went before Prideaux, A. J. C., he found the above conflict of views and on his representation the Judicial Commissioner referred the appeal for decision by a Division Bench. It came before Prideaux, A. J. C., and myself sitting as such a Bench and was decided on the 12th April 1915. *Ramji* v. *Sheikh Mansur* (2) was respectfully dissented from and *Dattatraya Shanker* v. *Pandurang* (4) was followed.

The reasons which commended the view adopted as to the meaning of the third column of Article 10 by Prideaux, A. J. C., and myself were thus stated in our judgment: —

"The language used is simple and clear, and seems to us to deal with two descriptions of property, namely, (1) that which does and (2) that which does not admit of physical possession. There is no definition of 'property' of general applicability made anywhere by the Indian Legislature: but it may be accepted as a safe conclusion that under the term 'immoveable property' the law of British India recognizes the existence of estates and interests, both tangible and intangible, which in English Law would be called corporeal and incorporeal hereditaments.* * *

"In the Article of the Limitation Schedule now under consideration the Legislature seems to have had before it these two descriptions of property, namely, (1) that which does and (2) that which does not admit of physical possession. Property is generally capable of physical possession and, therefore, the rule is that time begins to run against the pre emptor when the purchaser takes physical possession, it being of the essence of the right of pre emption to prevent such invasion on a co-occupancy: but in exceptional cases

(2) 15 Ind. Cas. 890; 8 N. L. R. 68.

(3) 3 N. L. R. 142.

(4) Second Appeal No. 103-B of 1914.

physical invasion being impossible, the Legislature has been compelled to enact as an exception to the rule the only reasonable alternative available. The Article does not deal with any case of the sale of intangible property by an unregistered instrument or orally, because it does not appear that the Law of British India ever recognized such a transfer: and since 1882 it has been made impossible in territories to which the Transfer of Property Act, 1882, applies. Therefore, if the section is interpreted as we think it ought to be, namely, as one whereof the application is governed by the nature of the property sold, it is obviously exhaustive and covers every possible case of pre-emption. But uncertainty has been introduced into the application of the Article by some of the published decisions, and it seems expedient to examine some of the relevant case-law."

Thereafter we commented on the cases of *Jageshar Singh* v. *Jawahir Singh* (5), *Bijai Ram* v. *Kallu* (6), *Jaikaran Rai* v. *Ganga Dhari Rai*(7), *Unkar Das* v. *Narain* (8), *Bholi* v. *Imam Ali* (9) and *Betul Bagam* v. *Mansur Ali Khan* (10), confirmed by the Privy Council in *Batul Bagam* v. *Mansur Ali Khan* (11), and endeavoured to show that none of these decisions in itself afforded support to the view taken in *Ramji* v. *Sheikh Mansur*(2). We found, however, that it was certainly sustained by certain decisions of the Punjab Chief Court, and in discussing the principal one among these rulings we made the following observations:

"The case of *Panna Lal* v. *Bhagwan Das* (12) is very much in point, and gives direct support to the view taken in *Ramji* v. *Sheikh Mansur* (2). There certain house-property situated in the Hissar District of the Punjab, and occupied by tenants, was sold by the owners to a purchaser by a deed of sale executed and registered in Bombay where both vendors and purchaser carried on business. This sale took place on the 12th March 1895. The vendee obtained physical possession in January 1897.

"The Chief Court took the view that a pre emption suit lodged in April 1897 to impeach the sale of the 12th March 1895 was time barred, even though the pre emptor had no knowledge of the sale until the purchaser took physical possession in January 1897. This decision was based on the proposition that the property being in the physical possession of tenants did not admit of physical possession by the vendee on the date of the sale, and that, therefore, time began to run against the right of pre-emption from March 1895, when the deed of sale was registered. The ignorance of the pre-emptor as to the accrual of his rights during the whole of the limitation period was held to afford him no relief, because it had not been caused by any fraud on the part of vendors or purchaser. It was argued before the learned Judges responsible for the above decision that the intention of the Legislature in enacting Article 10 was to draw a distinction between two classes of property, one of which does and the other of which does not admit of physical possession. As to this argument the judgment contains the following passage:—

'The subject is not free from difficulty, but we think the argument of the learned Counsel for the appellant as to the two classes into which all property should be divided is not perfectly sound. Doubtless a clear distinction can be drawn between property which is ordinarily capable of physical possession, such as a house, and property which is ordinarily incapable of physical possession, such as an equity of redemption, a contingent remainder, or a share of undivided land, but this does not cover the whole subject. Physical possession of the first class according to recent rulings, *viz.*, *Batul Begam* v. *Mansur Ali Khan* (10), must be considered to mean immediate and personal possession; consequently, in the case of a house let to tenants, the purchasers cannot be said to obtain possession so long as the tenants remain in the house, even if they attorn to him and pay him rent'. ... ...

"With due respect we are unable to accept the Punjab view adopted in *Ramji* v. *Sheik*

(5) 1 A. 311 (F. B.); 1 Ind. Dec. (N. S.) 213.
(6) 1 A. 592; 1 Ind. Dec. (N. S.) 411.
(7) 3 A. 175; 2 Ind. Dec. (N. S.) 94.
(8) 4 A. 24; A. W. N. (1881) 116; 2 Ind. Dec. (N. S.) 630.
(9) 4 A. 179; A. W. N. (1881) 176; 2 Ind. Dec. (N. S.) 792.
(10) 20 A. 315 (F. B.); A. W. N. (1898) 61; 9 Ind. Dec. (N. S.) 582.
(11) 24 A. 17 (P. C.); 5 C. W. N. 888; 28 I. A. 248; 3 Bom. L. R. 707; 8 Sar. P. C. J. 133.
(12) 16 P. R. 1902; 15 P. L. R. 1902.

Mansur (2) as a correct interpretation of the law. The Legislature has insisted, by repeated amendments, that as far as possible the short period of limitation allowed to a pre emptor shall not begin to run until there is an invasion of the kind against which all laws and customs are directed, namely, the entry of a stranger upon a joint or common estate in the place of one part-owner thereof, irrespective of the wishes of the remaining co-owner or co-owners. It seems to us that before the Law of Limitation begins to operate against a pre-emptor, it requires him to have knowledge that his cause of action has arisen beyond all doubt, namely, by the entry of the purchaser into physical possession of the property in every case where the nature of the property makes such possession possible. It is only where the property itself is of a kind not susceptible to physical possession that the Legislature provides the only possible alternative, namely, such notice as can be given to the pre-emptor by the registration of the sale. There is no authority for reading into Article 10 something which is not there. The Punjab Courts have done so in the latest of the above cases; for they have interpreted the words 'does not admit of physical possession' to signify 'does not, *for the time being*, admit of physical *and personal* possession *by the purchaser*.' The Article assumes the existence of a registered instrument in every case to which the second part of the entry in the third column applies; and we think that this indicates that the words 'does not admit of physical possession' refer to the *nature* of the property and to nothing else. If the Legislature had intended to apply the second part of the entry to cases where the property sold, though by its nature capable of physical possession, cannot immediately be given into the physical possession of the purchaser, it would have said so. The language used in this part makes no reference to the possession of any person but, in the clearest words, is a definition of the property which is the subject of the sale.

"The Punjab decision followed by Skinner, A. J. C., involved an interpretation of the Law of Limitation which we are unable to follow, inasmuch as it was held that a right of suit had been destroyed by time without any neglect of his right by the plaintiff who was in innocent ignorance of his cause of action having accrued. We are fortified in this dissent by the very recent decision of the Madras High Court in *Mamabi* v. *Kunhifappi Haji* (13), where it was held that a right of pre-emption cannot be said to arise unless the plaintiff has the necessary knowledge of the sale. Such a right can only be exercised when the person entitled to it knows first of all that the property is sold or attempted to be sold to another person, and what are the terms of the sale or proposed sale. Without such knowledge he is not in a position to elect. The law of limitation being directed against laches, it is opposed to its fundamental principle to hold that it operates against a plaintiff who is in ignorance of the facts which give him the right to sue. ... ...

"But a further argument has been advanced, namely, that a usufructuary mortgage or a lease being the transfer of a part of an estate of ownership which carries with it the right of physical possession, all that is left with the original owner after it has been executed, is an intangible fraction of his ownership. Therefore when he sells that, he parts with something which no longer admits of physical possession: and a pre-emptor's suit to impeach such a sale must be governed by the second part of Article 10. In this connection reference has been made to *Shiam Sundar* v. *Amanat Begam* (14) and *Ramasami Patter* v. *Ohinnan Asari* (15). In all these cases it was held that an 'equity of redemption' is an intangible thing, which does not admit of physical possession. This is also the view taken by the lower Court in the present case. It is, therefore, a point on which something has to be said.

"Under the Law of England when a mortgage is made, the legal estate is transferred to the mortgagee, and the mortgagor retains a right to have it reconveyed to him, upon payment of a specified sum on a certain date. If such payment was not made, then under common law the estate automatically

(13) 17 Ind. Cas. 337; 38 M. 67; 12 M. L. T. 535; 23 M. L. J. 607; (1912) M. W. N. 1217.
(14) 9 A 234; A. W. N. (1887) 44; 5 Ind. Dec. (N. S.) 591.
(15) 24 M. 449; 11 M. L. J. 132.

became finally the property of the mortgagee, but the Courts of Equity interfered and gave the mortgagor, notwithstanding default in payment on the contractual due date, further time to pay the debt and redeem the property. This practice became universal, and the concession so made to the debtor came to be called the 'equity of redemption'. It is obviously an intangible thing in the fullest sense of that term. But in India, except in the case of what is called an English mortgage, the equity of redemption, so called, has no existence. Owing to a habit of borrowing terms from English Law which has naturally grown up in this country and is sometimes responsible for anomaly and confusion in interpreting the law, the phrase 'equity of redemption' is constantly misused by the Indian Courts to denote the right of redemption which has been incorporated in the Transfer of Property Act, 1882. But there is no such thing as the transfer of the whole legal estate of ownership in any form of mortgage recognized by that Act except the English mortgage defined in clause (*e*) of section 58. English mortgages have been used in Presidency towns and among Europeans, in other parts of India; and on such mortgages the Indian Courts have accorded to the parties thereto the same rights as are recognised in the English Courts. But even in this respect a distinction was made between Europeans and Hindus. [See *Manly* v. *Patterson* (16) and *Shernomoyee Dasi* v. *Srinath Das* (17).] The Transfer of Property Act, 1882, merely recognises a form of transaction which had already come into existence in India before it was enacted: but the idea of the legal estate of ownership passing from the mortgagor to the mortgagee, leaving with the former only an intangible estate in equity, is absolutely foreign to the conception of a mortgage in India: and the term 'equity of redemption' applied to the mortgagor's interest in any Indian form of mortgage is a misnomer.

"There is a fascinating subtlety in the disembodiment of legal rights from the corpus of the property in which they ordinarily exist, and lawyers are prone to deal with them as incorporeal entities, and to sub-divide them as such. In this way we obtain interests of varying extent in land, such as free-hold, copy-hold, lease-hold, estates for life, in reversion and in remainder. In systems, like the Law of England, where this method prevails we are presented with a conception of an estate of ownership broken up into fractions, each of which is possessed by a different person, so that there is no owner, properly so called, for the time being. The Indian Legislature has tried to avoid the adoption of a system too highly technical and scientific, its object being to legislate so that a mass of people, mostly unversed in the academic conceptions of English Law, may readily understand and apply the enactments designed for their use and benefit. That many of the principles of English Law, both adjective and substantive, should find place in British Indian enactments, is only natural under the circumstances; but very obvious attempts have been made to present them in a vulgar and non-technical form. Under the Transfer of Property Act, 1882, there is no transfer of ownership except by sale (voluntary or compulsory), gift or exchange. In other transactions recognised by the enactments we have transfers of interest which subject the owner and his property to burdens, but which leave the ownership otherwise intact. In England, if you sell land which you have mortgaged or leased for a term, you transfer an equity of redemption or an estate of reversion. In India, in such a case, you sell your land. It may be said that here we have a difference only in nomenclature and not in substance. That is so, but it is a circumstance which makes the argument stronger against allowing more forms to vary the application of substantive provisions of law. In *Ramasami Patter* v. *Chinnan Asari* (15) one learned Judge, applying the technicalities of English Law, held,

(1) that the equity of redemption in an usufructuary morgage is an intangible thing, which can only be sold by a registered instrument under section 54, Transfer of Property Act, 1882;

(2) that the equity of redemption in a simple mortgage is tangible property; and

(3) that the interest of a simple mortgage is an intangible thing.

"It seems to us with due respect that the

(16) 7 C. 394 at p. 398; 3 Ind. Dec. (N. S.) 803.

(17) 12 C. 614; 10 Ind. Jur. 458; 6 Ind. Dec (N. S.) 418 on appeal 16 C. 693; 16 I. A. 85; 13 Ind. Jur.132; 8 Sar. P. C; J. 315; 8 Ind. Dec. (N. S.) 458. (P. C.).

term 'equity of redemption' is a misnomer in the first two of the above *dicta*: and the inconsistency of holding the same estate to be tangible in one case and intangible in the other is manifest. Such formulæ lead to endless anomaly and confusion. We do not think that it was ever intended by the Indian Legislature to apply Article 10 of the Limitation Schedule or any other of its enactments upon the principle or assumption that though the ownership of unencumbered property or the right to redeem a non-possessory mortgage comprise tangible estate, capable of physical possession, the ownership of encumbered property or the right to redeem an usufructuary mortgage constitute intangible things which do not permit of physical possession. We think and hold that when the owner of tangible immoveable property in a territory covered by the Transfer of Property Act, 1882, sells the same, he effects a transfer of ownership in property which does admit of physical possession, whether at the time of sale such property be in his own possession or in possession of his mortgagee or lessee as such: and that a suit by a pre-emptor to impeach the sale will be governed by the first part of Article 10 of the Limitation Schedule, and time will only begin to run against it from the date on which the purchaser takes physical possession of the whole of the property."

It has been urged that if the above view is correct, no suit for pre emption can ever be brought where the owner of a property liable to pre emption sells it subject to a lease in perpetuity, while a purchaser of a property over which his physical possession is postponed owing to an intervening temporary estate of possession, may find himself deprived of his purchase many years after he has made it. As to the case of a lease in perpetuity, it is obvious that the pre emptor's position remains unaffected by the sale of the perpetual lessor's interest, and no suit for pre emption is necessary. In the case of a temporary intervening estate, it must be remembered that a cause of action for a pre-emption suit arises only when there is wrongdoing on the part of the vendor and neglect on the part of the vendee. Under every system of pre-emption known to me, it is the duty of the intending vendor to give notice to the person having a right of pre-emption of his intention to sell. And it is clearly a course of caution for an intending purchaser of an estate subject to a right of pre-emption to see that the person having such right is given an opportunity of exercising his option. A purchaser who buys and a mortgagee who forecloses seeing that such an option has been given, has only his own want of care to thank for any inconvenience or loss he may suffer from a delayed pre-emption suit. But even if an interpretation of law is to be governed by the nature of the results ensuing from it, it is clear that anomalies and difficulties of a far more serious kind arise if we interpret the third column of Article 10, Limitation Schedule, in the way approved by the Punjab Chief Court and Skinner, A. J. C., in the cases above cited.

I have already shown that in the Punjab case a right of pre emption became time-barred without the owner of such right having any notice, direct or constructive, that his cause of action had arisen. I have also drawn attention to the Madras case in which the estates of mortgagor and mortgagee in land were held to be tangible in one form of mortgage and intangible in another. Other anomalies flow from these. For example, if the interest transferred to a simple mortgage is intangible, then where the mortgage is for less than Rs. 100, we may have a transfer of an intangible thing from mortgagor to mortgagee effected without a registered instrument, while if the mortgagee desires to assign that same interest to any one else, he can only do so by a registered instrument. Similarly when the owner of a field who has created an usufructuary mortgage upon it wishes to sell it, he has only an intangible thing in his possession, and though the mortgage may be for less than Rs. 100 and made orally by delivery of the property, any transfer of the rights to redeem cannot be effected without a registered document.

There are other cases of a kind likely to occur. Suppose *A* and *B* are two Hindu brothers divided in estate, but co-occupants of a survey number in Berar, divided by metes and bounds, the northern half be-

longing to *A* and the southern half belonging to *B*. *A* dies leaving a widow *W* but no issue. *B* under a claim of survivorship takes possession, and turns *A's* widow out. She goes away to another part of the country and sells her inheritance in the field to *X* by a deed duly registered, and *X* sues *B* for possession of *W's* share. *B*, honestly believing in his right of survivorship, contests the suit. It is decided against him more than a year after the date of the sale to *X* by *W*. Within one year of *X's* entering into possession of the share *B* sues to pre-empt. Is it not obviously unjust to hold that suit time-barred? If it be said that *B* can set up his right of pre-emption as a defence in *X's* suit for possession, then *X* can always defeat that move by not filing his suit for more than one year after the date of his registered deed of purchase.

Again *M* owns and occupies the northern half of a house in which *N*, the owner of the other half, has a right of pre-emption. *Y* buys *M's* share subject to a condition that *M* shall continue to occupy it for a month to enable him to clear away his personal effects. Here the Punjab Chief Court would presumably declare that the subject-matter of the sale was capable of physical possession, though the entry of the purchaser is delayed for *a month*. But if on the date of the sale he was not occupying the house himself but had let it to a tenant whose lease was to expire one week after the date of the sale, then according to the Punjab view, the subject matter of the sale is not capable of physical possession. This seems to me to bring the law into ridicule.

Again, having regard to the *raison d'etre* of a right of pre-emption, namely, in order that a co-owner may not have an undesirable stranger substituted for another co owner, we see in the present case that although the plaintiff has submitted to the invasion by the purchaser from June 1911, when he entered into physical possession, until December 1913, when this suit was brought—a period exceeding by six months, the maximum period allowed by law to a pre-emptor governed by the first part of Article 10, Limitation Schedule, yet upon the Punjab interpretation of that Article, the suit is within time.

I adhere to the opinion that when the owner of a house sells the same, the subject-matter of the sale is a house, and the sale gives the vendee the same rights as the vendor had at the date of the sale. The house may be subject to a usufructuary mortgage, or a lease or other temporary estate obstructing immediate physical entry by the vendor. But, however circumstanced it may be, the subject matter of the sale is the house, and no further transaction is necessary to entitle the vendee to take physical possession of the house whenever the vendor himself might have done so, had no sale taken place. If the house is with a tenant at the date of sale, then on expiry of the tenant right the purchaser takes possession by virtue of the same deed under which for a time he could not enter. Much has been made of the words used to define a sale in the Transfer of Property Act. But to my mind such an argument is misleading. A definition of the elements which go to make up a human body does not make the thing defined anything but a body. As I have already said, such analysis of legal transactions is fascinating to pedantic lawyers. It sounds very well to describe a sale of land as the transfer of an interest in land passing from the vendor to the vendee for a price paid, and so on. But in whatever technical terms you may paint it, when I sell my house, whether unincumbered in my possession or let to any one else for a term, the thing which I sell, the property with which I part is my house; and that is something which is by its nature capable of physical possession. It must be remembered that technical phraseology is the very breath of life to professors whether of law or of any other of the learned professions. On a trial for assault a medical witness informed the Court that on examining the complainant he found him 'suffering from a severe contusion of the integuments under the left orbit, with great extravasation of blood and ecchymosis in the surrounding cellular tissue, which was in a tumefied state. There was also considerable abrasion of the cuticle.' It required the vulgar

common sense of the Judge to ascertain that this was a description of a 'black eye'. Technical phraseology must not be allowed as I fear it frequently is allowed, to confuse us in making a just and reasonable application of the law. In my opinion the only way in which the principles and rights of the law of pre-emption can be enforced justly and reasonably is by providing that the cause of action for a suit by a pre-emptor who has been denied his option out of Court, shall arise on the day on which the physical entry of the purchaser as an undesirable co occupant or neighbour first breaks into the comfort and convenience which every law of pre-emption is designed to protect. If, therefore, in the language of Article 10 of the Limitation Schedule I could find sure ground or even sufficient ambiguity to allow me to credit the Legislature with the intention to make such a provision, I would adhere to the view propounded in *Baxiram* v. *Bhikaji* (1).

But after careful consideration I have now formed the opinion that interpreted in accordance with well established judicial principles, the third column of Article 10 cannot sustain that view. In *Musammat Salu Bai* v. *Bajat Khan* (18) I referred to the duty of British Indian Courts in interpreting Statute Law, and to the tendency of Judges to strain interpretation to give effect to some view deemed to be consonant with justice, equity and good conscience. I think that I fell to that temptation in *Baxiram* v. *Bhikaji* (1) for the judgment in which I am mainly responsible. My chief reason for amending my opinion lies in this that if *Baxiram* v. *Bhikaji* (1) contained a correct interpretation for the legislative intention, then every case of pre-emption would be governed by the first part and no case by the second part, since pre-emption is a right inseparably connected with tangible immoveable property. There is no such thing as pre-emption of an immunity or other intangible thing. That would make the second part of the Article a superfluity. Again, in the second part the Legislature does not deal only with the phrase 'intangible thing.' It uses the phrase 'reversion or other intangible thing.' The legal significance of the word reversion is too well established to be open to discussion. It is used in two senses, *i.e.*, either to denote an estate left continuing during the particular estate; or to signify the return of the land after the particular estate ended. In English Law it is the undisposed of interest in land which reverts to the grantor after the exhaustion of the particular estate, *e.g.*, for years, for life, or in tail, which he may have created. It is impossible to hold to the view that in using this word the Indian Legislature did not intend to refer to an estate of full ownership subject to a lesser estate carved out of it, *e.g.*, a lease, a mortgage, or a temporary grant.

Finally, it cannot be disputed that there is now considerable authority to sustain the view taken by Skinner, A. J. C., in *Ramji* v. *Sheikh Mansur* (2). Therefore I concur with my learned colleagues in the view that *Baxiram* v. *Bhikaji* (1) should be overruled.

MITTRA, A. J. C.—(*December 20th*, 1917.) —The question referred to the Full Bench is whether the judgment in *Baxiram's case* (1) with regard to the interpretation of Article 10 of the Limitation Act is correct.

The language of Article 10, as has been often pointed out, is not free from difficulty, but I think the view which prevails in all Courts which had to interpret that Article should be adopted rather than the view taken in *Baxiram's case* (1). The only case which supports the conclusion reached there is a Punjab case which has since been overruled.

The learned Judges in the case under consideration say:—

"We think and hold that when the owner of tangible immoveable property in a territory covered by the Transfer of Property Act, 1882, sells the same, he effects a transfer of ownership in property which does admit of physical possession, whether at the time of sale such property be in his own possession or in the possession of his mortgagee or lessee as such: and that a suit by a pre-emptor to impeach the sale will be governed by the first part of Article 10 of the Limitation Schedule, and time will only begin to run against it from the date on which the purchaser takes

(18) 42 Ind. Cas. 200; 13 N. L. R. 130 at pp. 141, 142.

physical possession of the [whole of the property."

The judgment points out that Article 10 deals with two descriptions of property, namely, (1) that which does and (2) that which does not admit of physical possession. It then proceeds:—

"Therefore if the section is interpreted as we think it ought to be, namely, as one whereof the application is governed by the nature of the property sold, it is obviously exhaustive and covers every case of pre-emption."

In a later part of the same judgment it is stated that the Privy Council decision in *Batul Begam's case* (11) has no application to specific property which, by its nature, is capable of physical possession, *e g.*, a particular field or other area of land, a house or the like which can be specifically possessed by human agency. In the concluding part of the judgment it is argued as follows:—

'In England, if you sell land which you have mortgaged or leased for a term, you transfer an equity of redemption or an estate of reversion. In India, in such a case, you sell your land."

In this connection I may point out that the learned Judges take exception to the use of the expression 'intangible thing.' The judgment then criticises Sir Bhashyam Aiyangar's well known *dicta* in *Ramasami Patter* v. *Chinnan Atari* (15).

With due respect I am unable to agree with this. The law deals with things only in relation to legal rights and duties. A sale is defined by the Transfer of Property Act as the transfer of 'ownership', that is of 'rights'. But a group of rights is often treated in law as a thing. Thus section 54 speaks of reversion or other intangible thing. Professor Holland in his Elements of Jurisprudence, 12th Edition, at page 102, after pointing out a similar artificial use of the term '*res*' by Cicero, Gaius and Roman writers generally, says:—

"It is no doubt convenient for the purposes of our science to include among 'things', not only physical objects, but also certain groups of rights, which, for purposes of transfer and otherwise, are occasionally treated as if they were physical objects. The fiction by which patents, bankrupts' estates, or easements are regarded as 'things', is indeed not only harmless but almost indispensable."

Article 10 of the First Schedule of the Limitation Act runs as follows:—

To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract.	One year.	When the purchaser takes, under the sale sought to be impeached, physical possession in the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.

It is only a thing which is capable of physical possession, rights being only capable of enjoyment. 'The subject of the sale', 'the property sold', is the group of rights artificially regarded as a 'thing'. It is in reference to such rights that we have to determine whether the 'thing' sold is capable of physical possession, that is, 'personal and immediate possession.'

Commenting upon the Punjab decisions the judgment proceeds as follows:—

"There is no authority for reading into Article 10 something which is not there. The Punjab Court have done so in the latest of the above cases; for they have interpreted the 'does not admit of physical possession' to signify 'does not, for the time being, admit of physical and personal possession by the purchaser.' The Article assumes the existence of a registered instrument in every case to which the second part of the entry in the third column applies; and we think that this indicates that the words 'does not admit of physical possession' refer to the nature of the property and to nothing else. If the Legislature had intended to apply the second part of that entry to cases where the property sold, though by its nature capable of physical possession, cannot immediately be given into the physical possession of the purchaser, it would have said so. The language used in this part makes no reference to the possession of any person but, in the clearest words, is a definition of the property which is the subject of the sale."

With great respect I am unable to agree with this argument. The starting point of limitation under the first part of the entry in the third column is the taking of

Physical possession by the purchaser. Obviously the expression 'does not admit of physical possession', therefore, refers to physical possession by the purchaser. It does not, in my opinion, refer to lawful physical possession being possible at any future period but at the time of sale. A contingent right may one day become a vested right capable of enjoyment by physical possession. The interest of a coparcener in joint property may admit of physical possession after partition. Similarly a house or a field sold subject to a lease or usufructuary mortgage in favour of a third party, as in the case here, may be capable of physical possession by the purchaser on the expiry of the lease or upon redemption. The construction sought to be put upon the latter part of the entry in the third column of Article 10 is, in my opinion, unduly narrow. To hold that time runs from such a future date, however long it may be, seems to be against the policy of the law which allows a short period of enforcing a right of pre-emption. Even minority or other disability is no ground for extending this period. Under the Berar Land Revenue Code the price to be paid is the price fixed by the parties in the sale deed, unless the price is found by the Court not to have been fixed in good faith. Upon the view taken in *Baxiram's case* (1) although the property may have increased considerably in value when the purchaser takes possession after the expiry of a lease or mortgage, he can only get what he had himself paid.

Time runs against the pre-emptor from the date when he has constructive notice, whether from the purchaser taking physical possession or from the registration of the instrument. It is naturally presumed that a person entitled to immediate physical possession will take it as soon as he can, but if he does not, it is intelligible that time does not run against the pre-emptor.

The judgment of the Privy Council in *Batul Begam* v. *Mansur Ali* (11) does not decide the point now before us. It lays down that physical possession means 'personal and immediate possession.' At page 26 occurs the following suggestive passage:—

"The physical possession of the villages was with others, and Bhagwati, not having enforced a partition, could not get physical possession of any definite portion of those lands and had no right to oust the existing occupiers."

I understand from this that undivided property after partition admits of physical possession, provided there is a right to oust the existing occupiers. The fact that the property sold is in the possession of a trespasser does not prevent the property being susceptible of physical possession. But neither undivided property nor property in the occupancy of a tenant or other person entitled to occupy the same admits of physical possession within the meaning of Article 10.

I agree that *Baxiram* v. *Bhikaji* (1) should be overruled.

BATTEN, A. C. J.—(*February 27th*, 1919.) —I had hoped to have pronounced a fully reasoned opinion in this case but I have been unable to do so. In view of the reference in the opinion of Stanyon, A. J. C., to my ruling in *Yesai* v. *Ramkrishna* (3), I think it necessary to state that my ruling in that case was confined to the special circumstances of the case and has no bearing on the question now before us The question for the decision of the Full Bench has been stated by Stanyon, A. J. C., as follow:—

"Whether the first part of the third column of Article 10, Limitation Schedule, 1908, applies to a case where the subject-matter of the sale consists of land or other tangible immoveable property physical possession whereof at the date of the sale is with the holder of a particular or intermediate estate, *e. g.*, an usufructuary mortgagee or a lessee or a tenant for a time, owing to which circumstance the vendor is unable to give immediate physical possession to the purchaser."

In *Baxiram* v. *Bhikaji* (1) Stanyon, A. J. C., and Prideaux, A. J. C., answered the question in the affirmative. In making the reference to the Full Bench Mittra, A. J. C., doubted the correctness of this decision, and both Stanyon, A. J. C., and Mittra, A. J. C., have recorded opinions to the effect that the question should be answered in the negative, and that the expression 'does not admit of physical possession' refers to immediate physical possession by the predecessor,

They concur in saying that *Baxiram* v. *Bhikaji* (1) should be overruled. With the opinions of my learned colleagues I agree. The view adopted by them is the only one that, in my opinion, can give a consistent meaning to the words "physical possession" in the first and second parts of the third column. It will be observed that Stanyon, A. J. C., has changed his view. This he would not have done except for very stringent and convincing reasons. In the last sentence of his opinion he says 'I concur with my learned colleagues in the view that *Baxiram* v. *Bhikaji* (1) should be overruled.' He was aware when he delivered his opinion what my recorded opinion would be and, as he himself says, I had the advantage of discussing the question with both my learned colleagues. My opinion is the same as that of both my colleagues.

JUDGMENT.—(*March 6th*, 1919).—According to the unanimous opinion of the Full Bench the suit is not barred by limitation. The appeal, therefore, fails and is dismissed with costs. One set of costs to be awarded to Sitaram, plaintiff-respondent.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1661 OF 1918.

July 30, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Burn.

MANAMATHI MUNUSAWMI MUDALI —DEFENDANT No. 3—APPELLANT

versus

PERUMAL MUDALY—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 60—Creditor and debtor—Appropriation of payments—Collection of debt due to debtor—Prejudice to third parties, effect of.

A creditor's right of appropriation of payments on behalf of the debtor towards any particular debt due to him is preserved until the moment of his filing his plaint in Court. In appropriating a particular debt the creditor is not bound to look to the likely or probable prejudice which might be caused to third parties having claims against the debtor, but can put himself in an advantageous position so long as it is not unconscionable or inequitable on his part to do so. [p. 951, col. 1.]

Cory Brothers & Co. v. *The Owners of the Turkish Steamship "Mecca,"* (1897) A. C. 286; 76 L. T. 579; 45 W. R. 667, 66 L. J. P. C. 86, followed.

Kundan Lal v *Jagan Nath*, 30 Ind. Cas. 92; 37 A. 649; 13 A. L. J. 908, not approved.

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 104 of 1917, preferred against the decree of the Court of the District Munsif, Conjeevaram, in Original Suit No. 951 of 1916.

FACTS appear from the judgment.

Mr. *K. Rajah Aiyar*, for the Appellant.—The plaintiff should have appropriated what he collected on behalf of defendants Nos. 1 and 2 to his mortgage debt, so that his liability might be discharged *pro tanto*. He should have elected immediately he had his debtor's money. The delay in appropriation prejudices the rights of others having claims against the same debtor.

Mr. *T. V. Muthukrishna Aiyar*, for the Respondent.—There is no time limit to the exercise of the right to appropriate. The plaintiff was entitled to wait till the last possible moment. He had no concern with the interests of third parties, and his right cannot be taken away unless there was anything inequitable in his action.

JUDGMENT.—An interesting question was argued by Mr. K. Rajah Ayyar relating to appropriation of payments. The plaintiff had a mortgage from defendants Nos. 1 and 2. There was also a debt due to him from them on a promissory note. Defendants Nos. 1 and 2 requested the plaintiff to collect some money due to them from a third party. This was done on the 16th August, 1915. Prior to that, the plaintiff sued on his pro note, and obtained a decree. In his earlier execution application, he could not have asked that the money collected by him should be credited in partial discharge of the decree. On the 11th November 1915 under another money decree against defendants Nos 1 and 2, the 3rd defendant purchased the equity of redemption in the properties mortgaged. Five days after this, plaintiff entered up satisfaction of his money decree to the extent of the money collected by him. He then sued for the full amount due on the mortgage. The 3rd defendant contended that the plaintiff should have appropriated the money to the mortgage debt and that his liability *pro tanto* should be discharged. The lower Appellate Court

refused to accept this contention. We think the District Judge was right.

It is now well settled that the plaintiff's right of appropriation is preserved to him until the moment of his filing the plaint in Court. See Lord Macnaghten in *Cory Brothers & Co.* v. *The Owners of the Turkish Steamship "Mecca"* (1). In *Seymour* v. *Pickett* (2) Lord Justice Romer pointed out that, provided it will not be inequitable to do so, the plaintiff should not be deprived of this right. Mr. K. Rajah Ayyar contends that when the rights of third parties are likely to be prejudiced, it must be taken that it would be inequitable on the part of the plaintiff to make the appropriation in a particular way. Our reading of the learned Lord Justice's judgment is that there must be something unconscionable, something which would operate as an estoppel, before this right of the plaintiff is taken away. It was held in *Simson* v. *Ingham* (3) that a creditor can cancel an appropriation entered in the accounts if the same was not communicated to the defendant. This authority shows that the question of inequity has to be looked at not only from the point of view of the third party, but also from the point of view whether the creditor should not endeavour to put himself in an advantageous position so long as there is nothing which makes it unconscionable on his part to do so. Viewed in this light we think the District Judge has applied the proper test in giving his decision.

We may say that the decision in *Kundan Lal* v. *Jagan Nath* (4), which seeks to go back to the principle enunciated in *Clayton's case* (5), namely, that the creditor should elect as soon as the payment is made, is opposed to the language of the Indian Contract Act and to *Cory Brothers & Co.* v. *The Owners of the Turkish Steamship "Mecca"* (1) and to *Seymour* v. *Pickett* (2).

The second appeal is dismissed with costs.

Appeal dismissed.

M.C.P.

(1) (1897) A. C. 286; 76 L. T. 579; 45 W. R. 667; 66 L. J. P. C. 86.
(2) (1905) 1 K. B 715; 74 L. J. K. B 413; 92 L. T 519; 21 T. L R. 302.
(3) 1823 2 B. & C. 65; 3 D. & R. 249; 1 L. J. (o. s.) K. B. 234; 26 R R. 273; 107 E. R. 307.
(4) 30 Ind. Cas 92; 37 A. 649; 13 A. L. J. 908.
(5) (1816) 1 Mer. 572; 15 R. R. 161; 35 E. R. 781.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1639 TO 1644 OF 1916.

April 17, 1918.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

K. RAMACHENDRA THEVAR, ZEMINDAR OF PALAYAMPATTI—DEFENDANT—APPELLANT IN ALL

versus

S. V. VELAYUTHA NADAN—PLAINTIFF—RESPONDENT IN S. A. NOS. 1639, 1642 AND 1644.

NARAYANA NADAN AND ANOTHER—PLAINTIFFS—RESPONDENTS IN S. A. NO. 1640.

SIVA SIVATHALPERIYAVA NADAN—PLAINTIFF—RESPONDENT IN S. A. NOS. 1641 AND 1643.

*Madras Estates Land Act (I Mad. of 1908), ss. 3 (11), 13 (3), 143—Landlord and tenant—Tenant paying rent at higher rates before passing of Act—Presumption as to future payment at same rate—Implied contract—*Pada nazzar, *levy of, legality of.*

Section 13 (3) of the Madras Estates Land Act does not preclude the Court from finding, from the payment by the tenant of higher rates for a long series of years prior to the passing of the Act, that an implied contract existed to pay at these rates in the future. The consideration for such an agreement may be presumed from the same facts as the agreement itself. [p 952, col. 1.]

Arunachelum Chetty v. *Syyad Ahamed Ambalam*, 31 Ind Cas. 539; 19 M. L. T. 138; (1916) 1 M. W. N. 237; 2 L. W. 1117, doubted.

Pada nazzar, not being a part of rent, cannot be levied from a tenant. [p. 952, col. 1.]

Second appeals against the decrees of the District Court, Ramnad at Madura, in Appeal Suits Nos. 128, 129, 130, 204, 205 and 206 of 1915, preferred respectively against the decrees of the Court of the Special Deputy Collector, Ramnad Division, in Summary Suits Nos. 2853 to 2855 and 4145 to 4147 of 1914.

Mr. *K. N. Aiyar*, for the Appellant.

Messrs. *P. M. Srinivasa Ayyangar*, *A. Chidambaram* and *C. H. Nilakanta Mudaliar*, for the Respondents.

These second appeals coming on for hearing on the 20th August 1917, the Court delivered the following

JUDGMENT.—The landlord in these suits under the Madras Estates Land Act appeals in respect of three items, namely, Vanpayir, (2) Pada Nazzar, (3) Vagaira,

On the first point, we think that the District Judge was in error in regarding the provisions of section 13 (3) of the Act as precluding him from finding, from the payment of higher rates for a long series of years prior to the passing of the Act, that an implied contract existed to pay at these rates in future. It was decided in *Venkata Perumal* v. *Ramudu* (1) that section 13 applied to improvements made after the new Act came into force and had no retrospective effect. The Judge has referred to the fact that the Jamabandi accounts and Pattas show that these special rates have been paid since 1330, and we must now ask him to find as a question of fact whether the payments made by each of the tenants concerned in these appeals have been continuing for such a length of time that it may be properly presumed that they are based on an agreement between the parties and that there must have been some consideration for that agreement. We do not follow the judgment of the learned Judges that decided *Arunachelum Chetty* v. *Syyad Ahamed Ambalam* (2) so far as they expressed an opinion that consideration for agreement implied from payments for a number of years must depend on independent proof for its existence and cannot be presumed from the same facts as the agreement itself. [*Vide*, *Prayaga Doss Jee Varu* v. *Venkama Naidu* (3).]

On the second point, the District Judge has found that Pada Nazzar was not a part of rent, there is evidence to support his finding and the name itself suggests that it is a payment of the description referred to in section 143, rather than in section 3 (11), of the Act. We think this was rightly disallowed. On the last point it has not been shown that any crops other than those described in clause 9 of the Patta were grown in the suit Faslis and, therefore, the omission of the word "*vagaira*" in the Pattas for that Fasli is immaterial. The clause as amended by the lower Court may stand in the present Patta.

(1) 27 Ind. Cas. 688; 39 M. 84; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129.
(2) 31 Ind. Cas. 539; 2 L. W. 1117; 19 M. L. T. 138; (1916) 1 M. W. N. 237.
(3) 44 Ind. Cas. 641; 23 M. L. T. 137; 7 L. W. 477; (1918) M. W. N. 346.

Finding on the first point is to be on the evidence on record and is to be returned within two months. Ten days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Ramnad at Madura submitted the following

FINDING.—I am directed to find as a question of fact "Whether the payments made by each of the tenants concerned in these appeals have been continuing for such a length of time that it may be properly presumed that they are based on an agreement between the parties and that there must have been some consideration for that agreement."

2. Both the presumptions referred to in the issue are presumptions of fact and as observed by their Lordships in *Prayaga Doss Jee Varu* v. *Venkama Naidu* (3), "there is no principle by which Courts are to be enabled to make the one presumption and disabled from making the other", and "the consideration may be of the same implied nature as the covenant to pay." Before referring to the evidence adduced in the cases before me, it may be useful to quote another important observation of their Lordships in the said second appeals that "the distinction between contract rates and customary rates is a very subtle one as between landlords and tenants" and that "the facts and the evidence to prove a contract, where the contract is a very old one, are almost the same as those on which a custom to pay enhanced rents has to be proved, if such a custom is valid."

3. Now, we have three tenants concerned in these cases. One of them holds Pattas Nos. 457 and 42. Patta No 457 corresponds to old Pattas Nos. 266 and 372. Exhibits XI, XI (*a*) and XI (*b*) are Muchilikas for Faslis 1292, 1299 and 1300 respectively. Exhibits A to A(6) are Pattas for Patta No. 266 for Faslis ranging from 1305 to 1317. Exhibits B to B (2) are Pattas for Pattadar No. 372 for Faslis 1310 to 13 2. Exhibits XI (*c*) and XI (*d*) are Muchilikas for recent Faslis 1319 and 1320. It will be noticed that the earliest of these documents relates to Fasli 1292 (1882 83)

4. Another tenant is concerned with Patta No. 150 and the documents XVII (*a*) and XVII (*b*) are for Faslis 1305 and 1306. They are the earliest Faslis for which Pattas and Muchilikas are produced.

5. The third tenant holds Patta No. 433. In respect of his holding, the earliest Muchilika produced is for Fasli 1291.

6. These documents would show that in the case of two of the tenants, Vanpayir rates have been levied for over thirty years and in the case of the other for about twenty years. This does not mean that Vanpayir rates were not levied earlier. Defence witness No. 1 proves a number of old Jamabandi accounts, which show that cropwar assessment was levied in respect of lands in the village for a long series of years commencing so early as 1830. Defence witness No. 2 swears that the several cropwar rates deposed to by him are very old rates and have not been subject to any changes within his knowledge. In fact prosecution witness No. 1 speaking on behalf of himself and of the other tenants deposed that "we have been paying special rates for Vanpayir." The tenants object to those rates now merely because they have been advised that there has been a change in the law in their favour. But for this impression, this dispute would not have arisen either in these cases or in the numerous other cases which have recently come up before the Courts in this District. In fact it was accepted in the lower Court as an undisputed fact that the tenants were paying these special rates from time out of memory. If the fact of payment was in itself a matter of dispute, the landlord would have put into Court a much larger quantity of documentary evidence in support of his claim. Even as the evidence stands now, I think it establishes the landlord's claim. I would, therefore, return a finding in the affirmative on the issue remitted by the High Court.

These second appeals and the memorandum of objections coming on for final hearing after the return of the findings of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the lower Court's finding about Vanpayir. The decree will be varied accordingly.

In place of clause (*b*) in the District Court Pattah at page 24 of the printed papers, we direct clause 9 in the form of Patta approved by the Special Deputy Collector at page 20 to be inserted. In other respects the District Judge's Patta will stand for the suit Faslis. The parties will pay and receive proportionate costs throughout.

M. C. P.

Decree varied.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 153 OF 1918.

March 25, 1919.

Present:—Sir Henry Drake Brookman, KT., J. C.

MURLIDHAR AND OTHERS—APPELLANTS

versus

MULCHAND AND ANOTHER—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 6 (d)—Maintenance allowance, right to, whether can be transferred · Interest Act (XXXII of 1839), s. 1—Sum payable under written instrument—Interest, whether can be allowed.

An annuity by way of maintenance is alienable, whether by voluntary or involuntary transfer, and unless the annuity creates a charge upon immoveable property, an alienation of such annuity is not barred by the provisions of clause *d* of section 6 of the Transfer of Property Act [p. 955, col. 1.]

Where a certain sum of money is payable by virtue of a written instrument at a certain time, the Court has authority under the Interest Act to allow interest, if it thinks fit, at a rate not exceeding the current rate of interest, from the time when the money is payable, and where there is no security a rate of one per cent. per mensem is not unreasonable. [p. 955, col. 2.]

Second appeal against the Appellate Decree of the Additional District Judge, Narsinghpur, decided on 8th December 1917, reversing that of the Munsif, Narsinghpur, decided on 31st August 1917.

Mr. *M. Gupta*, for the Appellants.

Mr. *P. S. Kotwal*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought to obtain arrears of

an allowance the right to which originated in the following circumstances.

On the 14th November 1877 one Daryao and his son Murlidhar sold Mouza Nimach to Murlidhar, son of Sheocharan, and one Nandlal, stipulating in the conveyance as follows:—

"Rs. one hundred, British currency, have been settled for our maintenance. We will receive the same from you in the months of Kartik and Chait every year. Our right as well as that of our heirs shall remain intact. Whether the village may remain with you (vendees) or may be given to any one else on your behalf, our right will remain in force."

The plaintiffs are the sons of one Ganpat Potdar and sued on the 11th April 1917 to recover from the vendee Murlidhar and his brothers Debiprasad and Parmanand one-half of the allowance beginning with the instalment due in Chait Sambat 1968, and ending with that due in Chait Sambat 1974, the English dates given in the plaint being respectively the 13th April 1911 and the 7th April 1917. Interest at Re. 1 per cent. per mensem was claimed as damages and in default of payment sale of the village was asked for on the ground that the conveyance of 1877 created a charge thereon.

On the 11th August 1892 Murlidhar, son of Daryao, and his brother Mojilal mortgaged their right to receive the annuity of Rs. 100 to (1) Nathuram, (2) Deokaran, Bhagwandas and Gokalchand, owners of the shop styled Modiram-Gokalchand, and (3) Ganpat Potdar, a partner in the said firm.

On the 11th June 1903 Nathuram and his son Mulchand purchased from Murlidhar, Debiprasad and Permanand the right to receive the entire annuity for Rs. 1,075.

In 1907 Ganpat Potdar, alleging himself to be the owner of a half share in the mortgage of 1892, sued Murlidhar, Mojilal and Nathuram's son Mulchand to foreclose the mortgage in respect of one-half of the annuity. The matter was referred to arbitration and eventually Mulchand's right of redemption was foreclosed on the 28th September 1907 so far as a half share in the annuity was concerned.

The defendants in the present case denied that any charge was created by the conveyance of 1877 and pleaded that the right to the annuity was restricted in its enjoyment to the vendors of the village personally, and, therefore, could not be transferred by them. Liability to pay interest by way of damages was also denied.

The trial Judge held on the strength of clause (*d*), section 6 of the Transfer of Property Act, that the right to the annuity could not be transferred and that the conveyance of 1877 created no charge. The decision of 1907 in the mortgage suit was held not to be binding on the defendants and the claim was dismissed, the plaintiffs being regarded as having no title.

The plaintiffs having appealed to the District Court, the trial Judge's decree was reversed and the claim including interest allowed in full. The conveyance of 1877 was held to create an heritable charge on Mouza Nimach for the benefit of the vendors and their heirs, this decision being rested on *Churaman* v. *Balli* (1).

In second appeal the decision that a charge was created by the conveyance of 1877 is impeached. The case relied upon by the lower Appellate Court is certainly nowise in point. There the conveyance expressly made the annuity payable as *malikana*, and from the use of the words quoted it was inferred that the payment was to be an annual charge on the property sold. There are no such words in Exhibit P. 1 in the present case, and the respondents' learned Counsel supports the conclusion of the lower Appellate Court solely on the ground that in the circumstances the parties must have intended the creation of a charge. It is urged that the vendors would not have run the risk of losing the security of the village and that the inclusion of the stipulation for an annuity in the conveyance is of itself good reason for inferring an intention to create a charge. In my opinion the words of the document as above referred to suffice to negative the intention for which the respondents contend. The terms of the document contemplate payment by the vendees themselves, whether they retained or alienated the village, and there is no suggestion that the alienee

(1) 9 A. 591; A. W. N. (1887) 121; 5 Ind. Dec. (N. S.) 831.

would be liable. Such language is consistent only with the supposition that the vendors were content to make the vendees personally responsible for payment. The lower Appellate Court's direction that the village should be sold if the amount awarded to the plaintiff is not paid must, therefore, be set aside.

The next point pressed for the appellants is that the right of the vendors to receive an annuity was restricted in its enjoyment to them personally and could not, therefore, be transferred. Clause (*d*), section 6 of the Transfer of Property Act, is relied on, but it seems to me clear that no charge having been created, the vendors cannot be regarded as taking any interest in any specific property such as would make the clause applicable. The vendees merely undertook to pay a certain sum of money half yearly and, so far as I am aware, there is nothing in the nature of a maintenance which is necessarily incompatible with its alienation, whether by voluntary or involuntary transfer. In *Singai Parmanandsao* v. *Baji Rao* (2) it was held that land granted by way of maintenance is liable to attachment and sale in execution of a money decree obtained against the grantee, notwithstanding that the grant contains a prohibition against alienation. And in *Harris* v. *Brown* (3) the sale by a woman of an allowance of Rs 50 per mensem taken under a Will was recognized by their Lordships of the Privy Council as operative. There are, moreover, cases in which it has been held that an annuity the payment of which is a charge upon an estate is alienable and can be attached in execution of a decree: see *Asad Ali* v. *Haider Ali* (4). In the circumstances of the present case I have no doubt that the vendors' right to the annuity was transferable.

The third point pressed is that Ganpat Potdar is not shown to have been entitled to a half share in the mortgage of 1892. On this point I am satisfied from the judgment and decree in Civil Suit No. 19 of 1902 (Exhibits P. 6 and P. 7) and the evidence of Jagannath (P. W No. 2), who was Ganpat's partner in the firm of Modiram Gokalchand, that the said mortgage came to Ganpat's share when the partnership was dissolved. The suit of 1902 was brought by Deokaran, Bhagwandas and the aforesaid Jagannath against Ganpat to obtain dissolution of the partnership and the final decree passed on the 27th August 1906 gave to Ganpat all moveable and immoveable properties of the partnership in Mauza Paloha, where the present defendants-appellants live, including the debts due to the partnership by the debtors of that village.

The last ground of appeal relates to the claim for interest. It is said that no interest whatever should have been allowed. But this contention should clearly be overruled, inasmuch as the annuity is payable by virtue of a written instrument at certain times and the appellants admittedly made payments to Ganpat Potdar up to Sambat 1959 (1902 03). The Interest Act authorises the Court, if it thinks fit, to allow interest, at a rate not exceeding the current rate of interest, from the time when a certain sum which is payable by virtue of a written instrument at a certain time is payable, and where there is no security a rate of one per cent. per mensem cannot but be regarded as reasonable. The appellants did not plead before the trial Judge that any lower rate would be more appropriate.

Inasmuch as no charge can be recognized, the first seven instalments claimed in the plaint with the interest thereon must be disallowed as barred by limitation. The decree of the lower Appellate Court will be modified not only by deleting the direction for sale in default of payment, but also by reducing the amount payable to Rs. 150 for principal and Rs. 21-11 6 for interest up to the institution of the suit. From the date of the suit to the date of the Court's decree the ordinary Court rate of 8 annas per cent. per mensem will be allowed on Rs. 150, and thereafter the same rate will be payable on the aggregate amount adjudged until payment. Costs in all Courts will follow this result.

Decree modified.

(2) 14 C. P. L. R. 114.

(3 28 C. 621: 28 I. A 159; 5 C. W N. 729; 3 Bom. L. R. 808: 8 Sar. P C. J. 92 (P C).

(4) 6 Ind. Cas. 826; 38 C. 13 at p. 19; 14 C. W. N, 918; 12 C. L. J. 130.

RAMAYYA AYYAR *v.* KRISHNA CHARIAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1196 OF 1918.

February 26, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Justice Sir William Ayling, KT.

RAMAYYA AYYAR—DEFENDANT—APPELLANT

versus

KRISHNACHARIAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O XXI, r. 83—Execution of decree—Equity of redemption belonging to two brothers, attachment of—Permission to one brother to raise decretal amount by private sale—Brother not joining in sale, title of, whether affected—Suit to recover half share, maintainability of.

Where the equity of redemption in certain property belongs in equal shares to two divided brothers, and is attached in execution of a decree against both, and is ordered to be sold, the senior brother has no power to sell his brother's interest by virtue of permission obtained under Order XXI, rule 83, of the Civil Procedure Code to sell the equity of redemption privately.

In the case of such a sale the junior brother is entitled, on payment of half the purchase-money, to recover his share from the purchaser.

Second appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, in Appeal Suit No. 77 of 1917 (Appeal Suit No. 111 of 1917, District Court, Tinnevelly), preferred against the decree of the Court of the District Munsif, Ambasamudram, in Original Suit No 280 of 1915.

Mr. *C V. Anantha Krishna Aiyar*, for the Appellant.

Mr. *A. Krishnaswami Aiyar*, for the Respondent.

JUDGMENT.—In this case the equity of redemption in certain property belonging in equal shares to two divided brothers was attached in execution of a decree against both and ordered to be sold in execution. The senior brother obtained leave to sell privately under Order XXI, rule 83 of the Code of Civil Procedure. The junior brother objected and the District Munsif, instead of cancelling the permission to sell privately, allowed the sale to go on, leaving the elder brother's right to sell his brother's interest undecided. On the authority of *Danappa* v. *Yamnappa* (1) we must hold that the senior brother had no power to sell his brother's interest. The property was purchased by the defendant, a prior mortgagee, from both the brothers, and who has since been in possession and is now sued by the younger brother for his half of the suit property.

At the date of the defendant's purchase the interests of both brothers had become liable to be sold for the decree debt by virtue of the attachment and order of sale. In these circumstances the defendant having by his purchase paid the money to free the plaintiff's share of the property from sale in execution of the decree, we do not think the plaintiff should be allowed to recover from him, except on payment of one-half of the price paid by the defendant with interest at 6 per cent. As regards the 8 cents, we think they belong to the defendant and that plaintiff has no interest in this. The decree will be modified accordingly, the final decree to be passed by the District Munsif. Parties to pay and receive proportionate costs in the High Court.

M.C.P.

Decree modified.

(1) 26 B. 379; 4 Bom. L. R. 61.

MUKHLAL PANDEY *v.* KESHO PRASAD SINGH.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 541 AND 542 OF 1918.

August 4, 1919.

Present:—Mr. Justice Das.

MUKHLAL PANDEY—APPELLANT

versus

Maharaja KESHO PRASAD SINGH BAHADUR—RESPONDENT.

Lease, construction of—Printed portion in conflict with manuscript portion, effect of.

Where in a printed form of a lease there is a manuscript portion at the end of the printed portion, and there is a conflict between the printed portion and the manuscript portion, the manuscript portion must prevail over the printed portion. [p. 957, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. *Sheo Saran Lal* and *Sant Prasad*, for the Appellant.

Messer. *Kulwant Sahai* and *Nirsu Naryan Sinha*, for the Respondent.

JUDGMENT. This is an appeal on behalf of the tenant. The full amount of the rent has been deposited in Court, and the only

question before me is whether the lower Appellate Court was right in holding that the plaintiff was entitled to recover from the defendant interest, and secondly whether the mode of calculation in preparing the decree is the correct mode. This is the only question which I have to determine.

The lease is contained in a printed form but there is a manuscript portion at the end of the printed form. According to all canons of construction if there is any conflict between the written portion and the manuscript portion, the manuscript portion must prevail over the written portion. Now the written portion provides that the annual rent of Rs. 4,000 shall be realised by regular instalments detailed below, namely, in four instalments: Kuar 4 annas, Pous 4 annas, Chait 4 annas, and Jeth 4 annas. The lease then provides that in default of the payment of rent by instalments from year to year, interest at one per cent. per month or damages prescribed by law shall be realised from the defendant. This is, as I have said, in the written portion of the lease but the manuscript portion is as follows:—"Be it known that the rent of the lands settled shall have to be paid according to measurement after deducting the *bal panchat* lands." This condition is an important one, when we remember that the lands are subject to alluvion and dilluvion and that sometimes it is possible for the tenant to cultivate the whole area and sometimes it may be impossible for the tenant to cultivate any portion thereof. In my opinion the manuscript portion is the real contract between the parties, since there is a clear conflict between the printed portion and the manuscript portion. In my view the rent for three instalments becomes due as soon as the measurement is made, and the finding of the lower Appellate Court is that the measurement is made in Chait and then the tenant must pay for the three instalments in Chait and for the fourth instalment in Jeth. This, I think, is the view of the lower Appellate Court, which says: "It seems to me only reasonable to suppose in the absence of express agreement that the rent for the year falls due at the close of the year, by which time the tenant has had the use of the land for the period for which he agreed to pay and the measurement has been done." Mr. Sheo Saran Lal on behalf of the appellant relies on this portion very strongly and he says that it is a clear finding of fact by the lower Appellate Court that the rent does not become due till the end of the year, and as the suit, so far as the rent for 1323 was concerned, was brought before the end of the year, the plaintiff was clearly not entitled to any interest for the rent due in respect of 1323. But the learned District Judge proceeds to say as follows:—"I hold, therefore, that the rent was in arrear when the suit was instituted and that the suit is not premature." In my view the lower Appellate Court really intended to find that the rent for the three quarters became due after measurement and that, therefore, the suit was not premature. In any case this is a question that depends purely upon the construction of a single document upon which the rights of the parties depend, and, on a construction of that document, I come to the conclusion that the rent became due to the plaintiff in Chait for three quarters and in Jeth for the fourth quarter. Clearly, therefore, the suit was not premature.

The next question, therefore, is how is the interest to be calculated. The lower Appellate Court has held that the plaintiff is entitled to interest at $12\frac{1}{2}$ per cent. The method of calculation in the decree is somewhat inartistic, if not incorrect. The proper method would be to calculate interest at $12\frac{1}{2}$ per cent. from the time when the rent actually fell in arrear, that is to say, the end of Chait and end of Jeth. I do not think that the lower Appellate Court really intended to come to a different conclusion but the decree has, in my opinion, been drawn up in a very inartistic manner. I would, therefore, send the case to the lower Appellate Court for drawing up the decree in accordance with my observations.

The appeals are disposed of in accordance with these observations. I make no order as to costs in this Court.

Case remanded.

MAUNG ON MYIT *v.* MAUNG SHWE PI.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 45 OF 1919.

June 30, 1919.

Present:—Pratt, J. C.

MAUNG ON MYIT—DECREE-HOLDER—APPELLANT

versus

MAUNG SHWE PI—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), s. 18, Sch. I, Art. 174—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Fraud—Person kept from exercise of right—Extension of time—Decree-holder failing fraudulently to certify payment—Application for certification by judgment-debtor—Limitation.

Section 18 of the Limitation Act applies only to those cases in which a person has been kept from a knowledge of his rights, and has no application where he has been kept from the exercise of his right. So, where a decree-holder fraudulently promises to certify an adjustment out of Court and fails to do so, the judgment-debtor cannot claim the benefit of section 18, in order to extend the time for an application under rule 2 (2) of Order XXI of the Civil Procedure Code, which, owing to the fraud of the decree-holder, is made after the time prescribed therefor.

Second appeal against the order of the Sub Divisional Court, Kyaukse, in Civil Regulation Suit No. 9 of 1915.

Mr. *D. Dutt*, for the Appellant.

Messrs. *Mya U* and *Chaudhury*, for the Respondent.

JUDGMENT.—In Civil Regular Suit No. 9 of 1915 in the Sub-Divisional Court, Kyaukse, the judgment-debtor, Maung Shwe Pi, obtained an order for record of an adjustment of the decree made out of Court.

The application falls within Order XXI, rule 2 (2), and ordinarily Article 174 of the First Schedule to the Limitation Act would apply.

The application was not made within the 90 days allowed by that Article, but both Courts have found that section 18 of the Limitation Act applies, because the decree-holder had fraudulently promised to certify the adjustment and had failed to do so.

It was held, therefore, that the date from which limitation began to run was the date on which the judgment-debtor became aware that the decree-holder had acted fraudulently.

Neither of the Courts, however, seems to have considered with sufficient care the actual wording of section 18.

It is quite clear that the section only refers to cases where the person having a right to make an application has by means of fraud been kept from the knowledge of such right or the title on which it is founded.

In the present instance it is equally clear that the judgment-debtor was not kept by the alleged fraud from the knowledge of his right to make the application, but *from the exercise* of his *right*, which is quite a different matter.

Section 18 does not apply to the facts in the present appeal.

This was the view taken in *Sayyid Muhammad Nur* v. *Ko Law Pan* (1).

As in *Biroo Gorain* v. *Jainurat Koer* (2), the grievance of the applicant was that he had been kept by fraud from the exercise of his right to apply to have the adjustment certified, consequently in order to accede to his contention it would be necessary to substitute "from the exercise of such right" for the phrase "from the knowledge of such right" in section 18.

As pointed out in the Upper Burma case quoted, the judgment-debtor will be at liberty to institute a regular suit, if through the decree-holder's failure to certify adjustment, he should have to pay a second time.

The Madras cases cited do not affect the present case, as one was a suit for damages against the decree holder for failure to certify satisfaction and the other related to a petition to set aside a sale on the ground of the decree holder's fraud.

I know of no authority for allowing the judgment-debtor to prove an adjustment out of Court in contravention of Article 179 of the First Schedule to the Limitation Act and Order XXI, rule 2.

The application was clearly time-barred and should have been dismissed.

The appeal will be allowed and the orders of the lower Court set aside and the application dismissed with all costs.

Appeal allowed.

(1) 22 Ind. Cas. 963; U. B. R. (1910-13), 191.

(2) 13 Ind. Cas. 63; 16 C. W. N. 923 at p. 927; 16 C. L. J. 174.

RAMCHARITA SAHU *v.* RAM NARAYAN SAHU.

PATNA HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 214 OF 1919.

August 1, 1919.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster.

RAMCHARITA SAHU—APPELLANT

versus

RAM NARAYAN SAHU—RESPONDENT.

Limitation Act (IX of 1908), s 5 Appeal filed beyond time—Appellant misled by practice of Court—Sufficient cause—Time spent in prosecuting petition for review, exclusion of—Diligence, proof of.

A petition under Order XXI, rule 90, of the Civil Procedure Code by a judgment-debtor was dismissed in default. He immediately instituted proceedings under Order IX, rule 9, of the Code asking that the case be reinstated and heard on the merits, but his application was rejected because, in the meantime, the High Court had held that Order IX, rule 9, did not apply to proceedings in execution of a decree, though before that decision the practice of the subordinate Courts had been to apply the provisions of the rule to proceedings in execution. The judgment debtor appealed to the High Court, and, under section 5 of the Limitation Act, applied that the time for appealing be extended:

Held, that, in the circumstances, the applicant was entitled to the extension, as he had been misled by the practice which had hitherto prevailed in the subordinate Courts but which had recently been held to be wrong. [p. 959, col 2.]

An appellant applying under section 5 of the Limitation Act ought ordinarily to be deemed to have acted with ordinary diligence when the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal, and his appeal should, in such a case, be admitted under the section. [p 960, col. 1.]

Appeal from a decision of the Subordinate Judge of Mozufferpore.

Mr. *T. B. Sahai*, for the Appellant.

Mr. *Rai Guru Saran Prasad*, for the Respondent.

JUDGMENT.—This is an application by the petitioner under section 5 of the Limitation Act, asking that the time for appealing from an order made in the course of execution proceedings dismissing his application under Order XXI, rule 90, of the Civil Procedure Code may be extended. The facts appear to be shortly these. The applicant was the judgment-debtor under a decree held by the opposite party. In execution of that decree for costs amounting to Rs. 1,300 certain property of the judgment-debtor was attached and advertised for sale. The petitioner thereupon filed a petition under Order XXI, rule 90, but owing to circumstances which he refers to in his present petition he was not present before the Subordinate Judge when the matter came up for hearing. He states in his petition that he had good grounds for not being present. However, owing to his absence his application under Order XXI, rule 90, was dismissed for default.

Immediately afterwards within a day or so he instituted proceedings under Order IX, rule 9, of the Civil Procedure Code asking that the case should be re instated and heard on the merits. That application came on for hearing on the 17th May 1919. In the meantime it appears that by a decision of a Full Bench of this Court it had been ruled that Order IX, rule 9, and other rules of the Civil Procedure Code which related to suits had no application to proceedings in execution and, therefore, the learned Judge rejected that application on the ground that he had no jurisdiction in the matter. Before the decision of this High Court referred to there can be no doubt that in the subordinate Courts Order IX, rule 9, and other rules of a similar kind had been applied to proceedings in execution and, therefore, the petitioner contends that owing to this practice which had hitherto prevailed to a large extent at all events in the Subordinate Courts he had been misled and lulled into security, because thinking that he could get all he wanted by an application under Order IX, rule 9, if he could show any merits, it was not necessary for him to file a memorandum of appeal from the order dismissing his application by which he was aggrieved.

Section 5 of the Limitation Act provides that any appeal or application for review of judgment or for leave to appeal or any other application to which the section may be made applicable by any enactment or rule for the time being in force, may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. Therefore it would appear, *prima facie*, in the circumstances of this case that the applicant was misled by the practice which had hitherto prevailed in the subordinate Courts but which has recently been held to be wrong. Therefore he contends

that under the provisions of section 5 of the Limitation Act indulgence ought to be extended to him because he made a *bona fide* mistake and he could not foresee the consequences. Therefore if the time which was occupied by the applicant in endeavouring to have his case re-instated under Order IX, rule 9, be deducted from the total period between the order appealed against and the filing of the memorandum of appeal, which was on the 26th June this year, he is clearly within time because on the 7th December his application under Order XXI, rule 90, was rejected and within a day or two of that he filed an application to have his previous application re-instated under Order IX, rule 9, and that was not heard until the 17th May 1919. Between the 17th May and the 2 th June is little more than a month, so that it would appear if an indulgence is granted under section 5 of the Limitation Act, that he was well within the time allowed for an appeal from such an order, which is 90 days.

It is contended, however, that he has not shown due diligence between the 17th May when his application was rejected and the 26th June when his memorandum of appeal was filed, and that no real reason has been assigned why he should have waited something rather over a month before filing his memorandum of appeal. This matter, however, has been dealt with more or less recently in a decision of their Lordships of the Privy Council in the case of *Brij Indar Singh* v. *Lala Kanshi Ram* (1), and the effect of that decision which is shortly described in the head-note is this: An appellant applying under section 5 of the Limitation Act ought ordinarily to be deemed to have acted with ordinary diligence, when the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal, and his appeal should in such a case be admitted under the section. It would appear, therefore, that in this case, excluding the time which was occupied in taking proceedings which proved infructuous owing to a change in the law as laid down by this Court, the time occupied by the applicant in filing his memorandum of appeal was only something very little over a month. It does not seem to me that where he is in fact allowed 90 days and excluding the time mentioned only takes slightly over a month, it can be said in any view of the case that he has not acted with due diligence in seeking the only remedy which was open to him. Therefore I think this application, so far as that objection is concerned, ought to be admitted.

It was further contended on the authority of the case of *Dwarka Singh* v. *Liyakat Ali Khan* (2) that it is not always a sufficient cause for presenting an appeal after time that the appellant was unsuccessfully prosecuting an application for review of the judgment appealed against. I quite agree that the fact that there was such an application is not in all circumstances a reasonable cause for not having presented an appeal, but in the particular circumstances of the case mentioned it appears that the classes of cases in which the Court would hold that the prosecution of an application for review is not sufficient cause for extending the time for an appeal, are those classes of cases in which the review is really only a small matter and does not necessarily cover the same class of relief as the applicant would get by an appeal. Of course in such a case it is quite obvious that if he were intending to seek the larger remedy which he could not get by a review, then he ought to show due diligence, notwithstanding his review in filing his appeal. If he does not do so, it can hardly be said in such circumstances that the application for review was a good reason for not filing his memorandum of appeal. Or again where it is obvious that his review application cannot be heard and determined before the time limited for an appeal expires, then in such a class of cases possibly that fact may be taken into consideration in weighing all the circumstances and seeing whether in the discretion of the Court section 5 of the Limitation Act may

(1) 42 Ind. Cas. 43; 22 C. W. N. 169: 33 M. L. J. 486; 42 M. L. T. 362 6 L. W 592; 126 P. W. R. 1917; 15 A. L. J. 717; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 127 P. L. R. 1917; 44 I. A. 218; 45 C. 94 (P. C.).

(2) 34 Ind. Cas. 44.

be taken advantage of. In the particular case before us I do not think that any ground has been made out why the application should not be granted either on the ground of laches on the part of the applicant or on the ground that his application under Order IX, rule 9, would not really grant him at least as much relief as he would get by the present appeal. In my opinion this application should be granted and the time for appealing should be extended until the 26th June 1919.

FOSTER, J.—I agree.

Application granted.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 217 OF 1918.

June 16, 1919.

Present:—Mr. Pratt, J. C.

MA NYUN—PLAINTIFF—APPELLANT

versus

MAUNG SHWE KAUNG AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when to be allowed—Cause of action, fresh, whether can be substituted.

A plaintiff ought not to be allowed to amend his plaint so as to substitute a plaint on a fresh cause of action or a separate cause of action for the plaint as originally framed.

Mr. *S. Mukerjee*, for the Appellant.

Mr. *J. C. Chatterjee*, for Respondent No. 2.

JUDGMENT.—Plaintiff sued for Rs. 270, alleged to be due on a promissory note for Rs. 125 executed about January 1914.

Subsequently he filed an amended plaint in which the cause of action was said to be on a mortgage for Rs. 125 of a house, bullocks and cart executed about the same date as the promissory note set forth in the original plaint.

The claim was for the same sum of Rs. 270.

Defendant denied executing any such mortgage or promissory note but admitted borrowing a distinct sum of Rs. 225 on a mortgage of land.

The Appellate Court set aside the decree against the second defendant on the ground

that the amendment of the plaint involved a fresh cause of action based on defendant's admission that he had borrowed Rs. 225 on a mortgage.

I consider the view of the lower Appellate Court was correct.

It was not suggested that the words promissory note were used by mistake for mortgage.

Plaintiff could not be allowed to substitute a plaint on a separate cause of action for the plaint as originally framed.

The appeal, so far as second defendant is concerned, will be dismissed with costs.

The first and third defendants confessed judgment and did not appeal. The Court had, therefore, no jurisdiction to set aside the decree against them. They have not appeared to contest the present appeal. So far as they are concerned, the appeal must be allowed and plaintiff will be given a decree against them for Rs. 270 with costs on the uncontested scale in the Court of first instance.

As they did not appeal, appellant plaintiff is not entitled to costs against them in the first Appellate and this Court.

Appeal partly allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1036 OF 1917.

July 28, 1919.

Present:—Mr. Justice Jwala Prasad.

RAGHUNATH KAHAR—DEFENDANT—APPELLANT

versus

RAMA RATAN PANDEY—PLAINTIFF—RESPONDENT.

Costs—Discretion of Court—Appeal, whether lies—Appeal, second, whether competent—Civil Procedure Code (Act V of 1903), s. 35 (2), applicability of—Final disposal of case on merits.

Section 35 (2) of the Civil Procedure Code does not apply where a suit is disposed of without adjudication upon the merits. [p. 963, col 1.]

Where there is no decision in a suit upon the merits of the case and the question to be decided by the trying Court relates only to the costs incurred in the suit, the Court, in deciding the matter as to

RAGHUNATH KAHAR *v.* RAMA RATAN PANDEY.

costs, exercises a judicial discretion based upon certain principles and, as such, its order is appealable. Similarly, as the order of the Court of Appeal as to costs involves matters of principle, it is subject to second appeal. [p. 963, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 30th May 1917.

Messrs. *N. C. Roy*, *Ragho Pershad* and *Shiveshwar Dayal*, for the Appellant.

Messrs. *Parmeshwar Dayal*, *Harnandan Sahay* and *Jadubans Sahay*, for the Respondent.

JUDGMENT.—This appeal comes before us from the decision of the Subordinate Judge of Shahabad, dated the 30th May 1917, and relates to a very small sum of costs awarded to the plaintiff in respect of a suit brought by the latter in the Court of the Munsif of Arrah on the 27th March 1916. In that suit the plaintiff claimed a declaration that a moiety of a house attached in execution of a decree, which had been obtained by defendant No. 1 against defendant No. 2 and advertised for sale, belonged to him and that the same was not liable for the decree of defendant No. 1.

Exhibit A, an order sheet of Execution Case No. 181 of 1915, shows that the house in question was advertised for sale to be held on the 3rd April 1916. After filing the suit the plaintiff obtained an order from the Court on 4th April directing the other half of the property, which was not claimed by the plaintiff, to be sold first and accordingly half the share in the house belonging to defendant No. 2 was sold on the 6th April 1916 and fetched a value which entirely satisfied the decree of the defendant No. 1. There was, therefore, no necessity of selling the share claimed by the plaintiff in the suit.

Accordingly, on the 27th April, defendant No. 1 filed a written statement stating that at that time no decree was under execution and that the property in suit, namely, half the house, was not at all advertised for sale in execution of any decree and hence the plaintiff's suit was premature and ought to be dismissed. The case was adjourned to 6th May for the plaintiff to prove service of summons upon defendant No. 2.

On the 6th May the defendant No. 2 took time to file a written statement but did not do so, nor did he since then appear in the suit.

The following issues were framed for trial as between the plaintiff and the defendant No. 1:—

(1) Has there been any attachment of the plaintiff's share in Execution Case No. 181 of 1916? If so, has the plaintiff any valid cause of action to bring the suit?

(2) Is the suit premature?

(3) To what relief, if any, is the plaintiff entitled?

But when the case was ultimately taken up on the 2nd January 1917, the Court discovered that there was no necessity of trying any of the aforesaid issues framed in the case, inasmuch as the share claimed by the plaintiff was not sold at all and the decree of defendant No. 1 was long before satisfied by the sale of the property of defendant No. 2 in Execution Case No. 181. The Court, therefore, went into the question of costs only, as to which it held that "this question should have been decided long ago had not the plaintiff taken several adjournments; and so a good many unnecessary costs could have been avoided. The plaintiff could have besides had this sale stayed by the simpler process of filing a claim in the execution case instead of filing a regular suit, and could have got this remedy by spending only a rupee if he liked.....Hence I think that the plaintiff is not entitled to the full Court fees he has spent as he did not try for the simpler procedure at first. In all fairness I think further that it will serve the ends of justice fully if we set off the costs of the defendant as awarded on 28th July 1916 with the costs of the plaintiff and hold that the two have been satisfied by being thus set off. If the plaintiff was harassed by the 1st attachment, the defendant too has been sufficiently harassed in return by the adjournments and subsequent delays caused by the plaintiff."

As the costs of both the parties were, as above indicated, set off one against the other, no decree for costs was prepared by the Munsif.

Against this order of the Munsif the plaintiff appealed to the District Judge and

the appeal was ultimately heard by Mr. Abdul Jabbar, Subordinate Judge. By his decision of the 30th of May the Subordinate Judge upset the order of the Munsif and held that the plaintiff was entitled to costs incurred by him in both the Courts, except that he should get Pleader's fee as in an *ex parte* suit. Defendant No. 1 has, therefore, appealed to this Court.

A preliminary objection was taken on behalf of the plaintiff-respondent that no second appeal lay to this Court against the order of the lower Appellate Court. Reference has been made to section 35 of the Code of Civil Procedure in support of this contention. That section gives full discretion to the Court in the matter of awarding costs in a suit. That discretion was exercised by the Munsif, who had the seizin of the case, in favour of the appellant, and if the contention of the respondent were good his appeal to the Court below was incompetent. The respondent cannot also rely upon clause (2) of section 35, which embodies the principle that a successful litigant is entitled to his costs, inasmuch as the suit was "disposed of without adjudicating upon the merits," as neither party pressed for that before the Munsif. There was no decision in the suit upon the merits of the case and the question to be decided by the trying Court related only to the costs incurred in the suit. The Court in determining the costs had to exercise the judicial discretion based upon certain principles and as such the order of the Munsif was appealable to the lower Appellate Court. Similarly, the order of the latter as to costs involves matters of principle and as such is subject to second appeal to this Court. This contention of the respondent is, therefore, overruled.

I agree with the Court below that the defendant No. 1 having attached the entire house, it was open to the plaintiff to bring the suit to have it declared that half the share in the house belonged to him and was in his possession and that the same was not liable to be attached or sold in execution of the decree of defendant No. 1 against defendant No. 2. The defendant No. 1 was, therefore, liable to the costs incurred by the plaintiff in instituting the suit.

The plaintiff obtained an order on the 4th of April that the share of defendant No. 2 in the moiety of the house should be sold first and that on the 6th of April that share, being sold, fetched a price whereby the entire decree was satisfied and the sale was confirmed on the 10th June. The defendant No. 1 in the written statement of the 27th April clearly stated that the decretal amount was realised by the auction-sale of half the share of the disputed property and that there was no necessity for the determination of the plaintiff's right. The issues in the case did not at all question the right of the plaintiff in the house, and the only question raised was whether the plaintiff had any cause of action on account of the result of the Execution Case No. 181 of 1916. It is, therefore, inconceivable why after this the plaintiff persisted in going to the trial of the case and not withdrawing from the suit. He went to the length of applying to the District Judge for the transfer of the case from the file of the Munsif and thus delayed the disposal of it and when the case came back from the District Judge, the plaintiff went on taking adjournment after adjournment although the defendant was ready, and the Munsif was perfectly right in holding that the question as to the costs could have been determined long before if the plaintiff had not taken these adjournments. The plaintiff is, therefore, responsible for the delay in the disposal of the case and he is thus not entitled to any costs subsequent to the filing of the written statement by the defendant. I may go further and hold that the Court itself ought to have disposed of the case at the time when the issues were framed in the case, inasmuch as it was clear to the Court at that time that the decree of the defendant No. 1 was satisfied and that the cause of action ceased to exist, particularly so when both the present Title Suit No. 67 and the Execution Case No. 181 were going on simultaneously in the very Court and the same Munsif by his order of the 4th April directed that the plaintiff's share was not to be sold in the first instance and on that very day sold the other half of the property whereby the entire decree was satisfied. At least at the time when the issues were framed the Court was cognizant of the facts of

both the cases and ought to have decided the title suit without so many adjournments extending over eight months. The adjournments appear to have been made automatically and the Munsif does not appear to have exercised his mind as to their reasonableness. The matter involved in this case is in itself not of great value, but is a sample of the procedure that is adopted by the Courts below in adjourning cases as a matter of course from month to month without looking into the requirements of the cases and the possibility of their being disposed of on the dates fixed for their hearing. Much of the harassment to the parties and the costs incurred in the case could have been saved if the Munsif were alive to what he was doing.

Now, whether the delay in the disposal of the case was due to the indifference of the Court or to the laches of the plaintiff, it is certain that the defendant is not liable for the costs incurred by the plaintiff on the adjourned dates, for he (the defendant) was ready on all the dates.

The plaintiff is, therefore, entitled to the costs of the suit incurred by him up to the time the issues were framed. Out of the costs, thus incurred, Rs. 6, which was due to defendant No. 1 from the plaintiff as costs of adjournment awarded by the Court to the latter by its order of the 28th July 1916, should be deducted. The plaintiff will be entitled to the balance of the costs incurred in the first Court and the decree of the Munsif is, therefore, varied accordingly.

The plaintiff was, therefore, entitled to prefer an appeal to the lower Appellate Court for recovery of the balance and the costs of the lower Appellate Court will be assessed upon the sum that the plaintiff was entitled to get in the Munsif's Court. The decree of the lower Appellate Court is also varied to that extent.

The appeal partially succeeds in this Court. Each party will, therefore, bear the costs of this appeal in proportion of its Costs. A decree will be prepared by this Court incorporating the costs of both the Courts below according to the aforesaid directions.

Appeal partly accepted.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 162 OF 1916.

August 8, 1919.

Present:—Mr. Justice Das and Mr. Justice Coutts.

PREM SUKH DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM BUJHAWAN MAHTO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 5—Plaint, averments in, not precise—Particulars, failure to apply for—Appeal, second—Objection, whether can be raised—Contract Act (IX of 1872), ss. 16, 74—Loan—Interest, high rate of, whether can be reduced—Undue influence—Unconscionable bargain—Penalty—Hindu Law—Joint family—Karta, *alienation by—Criminal charge, defence of, whether valid necessity—Consent of son, effect of—Necessity—Presumption.*

Where the averments in a plaint are not sufficiently precise, it is open to the defendant to apply for particulars under Order VI, rule 5, of the Civil Procedure Code, and, if such application is not made, he cannot, in second appeal, be permitted to refer to the matter. [p. 966, col. 2.]

In all cases relating to money-lending transactions, the Court will relieve the debtor by reducing the rate of interest only when it is satisfied that the lender was in a position to dominate the will of the borrower, and that the "bargain" was unconscionable within the meaning of section 16 of the Contract Act; but where neither of these elements is pleaded, it is not open to the Court to give relief to the defendant on the ground of undue influence. [p. 967, cols. 1 & 2.]

A member of a joint Mitakshara family is entitled to use the family funds in repelling a criminal charge made against him. [p. 966, col. 1.]

The *karta* of a joint family has undoubted power to alienate joint family property for a justifying family necessity, if the other members of the coparcenary assent to the transaction. An assent given by a son to a mortgage by his father subsequently to its completion is not, in any sense, a ratification of what was done by his father, but is presumptive proof of a justifying family necessity. [p. 969, cols. 1 & 2.]

Where a Hindu father raised a loan agreeing to pay interest at 3 per cent. per month with quarterly rests, and the transaction was assented to by his son, and there was no evidence that his consent was not a free consent, or that he did not give his consent with knowledge of actual facts of a family necessity justifying the raising of a loan on such onerous terms:

Held, that the rate of interest was not a penal rate, and that the lender was entitled to recover interest at the rate agreed upon. [p. 970, col. 1.]

In dealing with cases under the Hindu Law it is always dangerous to employ technical terms of English Law. [p. 969, col. 1.]

Appeal from a decision of the Subordinate Judge, Patna.

PREM SUKH DAS *v.* RAM BUJHAWAN MAHTO.

Messrs. *Kulwant Sahay*, *Rajendra Prasad* and *Shiveswardayal*, for the Appellants.

Messrs. *Manuk*, *Kailaspati*, *Bimola Charan Sinha*, *Sushil Madhab Mullick* and *Sunder Lal*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of a suit brought by the appellants to enforce a mortgage-bond executed by one Haricharan Mahto. Haricharan is now dead, and is represented in this action by defendants Nos. 1 and 2. Defendants Nos. 3, 4, 5, 6 and 8 are the sons of one Cheddami Lal, and they hold a mortgage on some of the properties included in the plaintiffs' mortgage, and the question between the plaintiffs and these defendants is whether the plaintiffs' document is entitled to priority over the document of these defendants. A similar question arises between the plaintiffs and defendant No. 9.

The plaintiffs' case is that Haricharan was the *karta* of the joint family and, as such *karta*, he borrowed from the plaintiffs Rs. 1,000 on the 16th July 1903 for the necessary expenses of the joint family, agreeing to pay interest thereon at 36 per cent. per annum with quarterly rests, and giving as security for the loan five specific items of properties. On the date on which they commenced the action, Rs. 50,158-12-7 had become due to them on the mortgage-bond. They, however, relinquished their claim to Rs. 18,158-12-7, and sought to recover Rs. 32,000 by the suit which they instituted on the 6th of October 1913.

Defendants Nos. 1 and 2 defended the suit on various grounds, but the substantial defences which they put forward were two in number, namely, first, that there was no legal necessity for the loan and that, therefore, the joint family property was not liable for it, and, secondly, that the contract as to interest and compound interest was hard and unconscionable and could not be given effect to by any Court.

Defendants Nos. 3 to 9 also entered appearance and they claimed to be prior mortgagees.

The learned Subordinate Judge who tried the case came to the conclusion that there was a legal necessity for the loan but that the stipulation as to interest was "penal." In the result, he gave a mortgage decree to the plaintiffs for Rs. 1,000 with simple interest at 12 per cent. per annum from 16th July 1903 up to the date of suit. He further gave the plaintiffs "furture interest" at six per cent. per annum. So far as defendants Nos. 3 to 8 are concerned, he held that they were prior mortgagees and he directed that properties Nos. 3 and 4, which were the subject-matter of the mortgage in favour of defendants Nos. 3 to 8, should be sold subject to that mortgage. So far as defendant No. 9 is concerned, he came to the conclusion that the plaintiffs must satisfy his claim before they can be allowed to sell property No. 2, which was mortgaged to defendant No. 9 and which defendant No. 9 has purchased in execution of his mortgage decree.

The plaintiffs appeal, and the substantial points that have been argued on their behalf are:—

First, that, so far as defendants Nos. 1 and 2 are concerned, the Court below had no power to make a new contract for the parties and reduce the rate of interest from thirty-six per cent., with quarterly rests to twelve per cent. secondly, that, so far as defendant Nos. 3 to 8 are concerned, these defendants are not entitled to priority over them, and thirdly, that so far as defendant No. 9 is concerned, that defendant is not entitled to priority over them and that, in any event, if they have to satisfy the claim of defendant No. 9, they are entitled to add that to their claim against defendants Nos. 1 and 2.

Defendants Nos. 1 and 2 have filed a cross-objection to the decree passed by the Court below, and the point that has been argued on their behalf at great length by Mr. Manuk is that the plaintiffs have not proved any legal necessity for the loan and that, therefore, the Court below should have dismissed the suit altogether.

Defendants Nos. 3 to 6 and 8 also object to the decree in so far as it has not awarded them costs against the plaintiffs.

Lastly, defendant No. 9 objects to the decree in so far as it has given an opportunity to the plaintiffs to redeem his mortgage.

It will be convenient first to deal with the cross-objection filed on behalf of defendants Nos. 1 and 2. The learned Subordinate Judge has come to the conclusion that there was legal necessity for the loan. His finding on this issue is as follows:—"It appears that there was a criminal case of rioting against the executant and others and the case lasted from 29th June 1903 to 14th December 1903.

The executant had to borrow this money to defend himself. I consider that this was a debt for legal necessity." The first point taken on behalf of defendants Nos. 1 and 2 by Mr. Manuk, but not very strenuously pressed, is that a person is not entitled to defend himself at the cost of the joint family property. I do not think that it is possible to lay down a rule which would apply to all cases, but I am of opinion that a member of a joint Mitakshara family is entitled to use the family funds for the purpose of repelling a false criminal charge against him. It must be remembered that a member of a joint Mitakshara family has no separate funds of his own, and if it were the law that he is not entitled to defend himself against a false criminal charge, it would be impossible for him to defend himself at all. In this case, as a result of his defence, Haricharan was acquitted by the Criminal Court. I hold, therefore, that in this case Haricharan was entitled to raise a loan for the purpose of defending himself.

Mr. Manuk next contends that there is no evidence that the loan was raised for the purpose of the criminal case, and he relies, first, on the mortgage bond itself, secondly, on the averment of legal necessity in the plaint, and thirdly, on the evidence in the case.

So far as the bond is concerned, Mr. Manuk's argument is that there is no recital that the money was required for the criminal case. The actual recital in the bond is, "At present I, the executant, badly require Rs. 1,000 more for impending necessary house-keeping expenses, etc.", and the criticism directed against this recital is that he does not say that he requires the money for meeting a criminal charge against him. In my view, legal necessity must in each case be established by evidence, and it is not necessary that the bond should contain a recital of the legal necessity. See *Womesh Chunder Sircar* v. *Digumburee Dossee* (1). But in this case there is a recital of legal necessity and, in my opinion, the recital amply covers the legal necessity sought to be proved.

Mr. Manuk's criticism regarding the averment in the plaint is equally unsubstantial. The translation of the fourth paragraph of the plaint is not quite accurate. It should run as follows: "That in this capacity as head and *karta* of the joint family, Haricharan Mahto borrowed from plaintiff No. 1 and Babu Ghansayam Das Rs. 1,000 of the Emperor's coins, bearing interest at Rs. 3 per cent. per mensem, under a registered bond, dated 16th July 1903, the basis of the suit, executed and delivered by him, for the necessary expenses of the joint family, and, taking the amount, he spent it in meeting the requirements of his joint family." Mr. Manuk says that the averment should have been more precise and should have given him notice as to the exact necessity for which the money was borrowed. Order VI, rule 2, of the Code lays down what every pleading shall contain. "Every pleading shall contain, and contain only, a statement in a concise form of the material facts, on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved." The "material fact" in this case upon which the plaintiffs rely for their claim is that the money was borrowed for the necessary expenses of the joint family. That material fact is pleaded. The evidence of the legal necessity is, of course, the criminal case against the *karta* of the family for which money was required. That is not pleaded; and Mr. Manuk's criticism is that the evidence in this case should have been pleaded. I do not agree with this contention at all. If indeed the defendants were embarrassed by the form of the averment of legal necessity in the plaint, it was open to them to apply for particulars under Order VI, rule 5, of the Code. That application was not made by them, and, in my view, they cannot be permitted now to argue that legal necessity has not been pleaded in this case with sufficient clearness.

I now come to the actual evidence of legal necessity. Exhibit 7 is the order-sheet of the criminal case, and it shows that a warrant was issued on, amongst others, Haricharan on the 19th June 1903 and that Haricharan was acquitted on the 9th December 1903. The mortgage-bond in suit was executed on the 16th July 1903. The account book produced by the plaintiffs shows that Rs. 684 out of the money borrowed was actually paid

(1) 3 W. R. 154.

in Court. There is, therefore, an inherent probability in the story set up by the defendants, especially when it is remembered that Haricharan was always in need of money. Mr. Manuk has critically examined the evidence of the witnesses examined on behalf of the plaintiffs, and has invited us to reject their evidence. In order to test the evidence which has been adduced in this case, we are bound to take into consideration the undoubted fact that Haricharan was always in need of money, as the several bonds admittedly executed by Haricharan and produced in this case amply prove. Secondly, we are bound to take into consideration the fact that at that time a criminal case was pending against Haricharan. Lastly, there is a clear admission by defendant No. 1 in Exhibits 5 and 6 that he is liable in respect of the mortgage-bond executed by his father on the 16th July 1903. Having anxiously considered all the evidence in this case, I am of opinion that the learned Subordinate Judge correctly decided this issue in favour of the plaintiffs. I would, therefore, dismiss the cross-objection filed on behalf of defendants Nos. 1 and 2.

I now come to the plaintiffs' appeal. The first point taken on behalf of the appellants is that the learned Subordinate Judge should not have rejected the plaintiffs' claim for interest. The learned Subordinate Judge considered that the agreement to pay interest at 3 per cent. per month with quarterly rests was "penal" and, being of opinion that he was at liberty to make a new contract between the parties, he allowed simple interest at one per cent per annum. I am of opinion that the view expressed by the learned Subordinate Judge cannot be supported at all. It will be noticed that the learned Subordinate Judge does not come to the conclusion that the lenders were in a position to dominate the will of Haricharan; in fact, it would not be open to him to consider a case of undue influence since none was pleaded. When all the cases relating to moneylending transactions are examined, it will appear that the Court has relieved the debtor by reducing the rate of interest only when it has been satisfied that the lender was in a position to dominate the will of the borrower and that the "bargain" was unconscionable within the meaning of section 16 of the Contract Act. It is only the concurrence of these two elements that can justify the Court in granting relief to the borrower. One of the elements necessary to bring the case within section 16 of the Indian Contract Act was not pleaded in this case, nor has it been found in favour of the defendants by the learned Subordinate Judge. In my view, therefore, it was not open to him to give relief to the defendants on the ground assigned by him.

Mr. Manuk, however, contends that the matter is really concluded by the latest decision of the Judicial Committee in the case of *Nawab Nazir Begam* v. *Rao Raghunath* (2). In that case it was held by the Judicial Committee that it is incumbent on those who support a mortgage to show not only that there was necessity to borrow but that it was not unreasonable to borrow at a high rate of interest and, if it is not shown that there was necessity to borrow at that high rate of interest, that rate cannot stand. Mr. Manuk argues that, assuming the plaintiffs have shown that there was necessity to borrow the money, they have not shown that there was any necessity to borrow the money at the rate of 3 per cent. per month with quarterly rests and that, therefore, he is entitled to ask the Court to reduce the rate of interest.

In the case cited by Mr. Manuk, the defendants by their written statement specifically denied that there was any necessity to borrow the money at the rate of interest mentioned in the bond. This will appear from the judgment of the Allahabad High Court reported as *Rao Raghunath Singh* v. *Nazir Begam* (3). With reference to this issue, specifically raised by the defendants, the High Court said as follows: "No evidence has been given on the point on behalf of the plaintiff, and it has not been shown, that Raonarain Singh could not raise a loan of Rs. 398 at a lower rate of interest."

Mr. Manuk, however, argues that whatever issue the defendants in that case may

(2) 50 Ind. Cas. 434; 23 C. W. N. 700; 36 M. L. J. 521; 17 A. L. J. 591; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49 (P. C.).

(3) 19 Ind. Cas. 639.

have raised by their written statement, the Judicial Committee proceeded on the document itself apart from any special plea put forward on behalf of the defendants. With this contention I do not agree. In the course of their judgment, the Judicial Committee said as follows: "In the written statement filed on behalf of the defendants, one of the points taken was that the property mortgaged was ancestral property, and that there was no legal necessity to execute the document sued upon." Stopping here for a moment, it is quite clear that the Judicial Committee did consider the written statement filed on behalf of the defendants. It could only be for the purpose of considering whether it was open to the defendants to argue that there was no legal necessity to borrow the money at the rate of interest mentioned in the bond. The Judicial Committee proceeded to say as follows: "In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the defendants to contend that though the necessity for borrowing the principal sum was accepted, there was no necessity to borrow on the very onerous terms of this mortgage."

The question, therefore, arises, what is the plea of the defendants in this case, and is it open to them to argue on their written statement that there was no necessity to borrow money on the very onerous terms of this mortgage? In the sixth paragraph of the written statement, defendant No. 1 says: "that the necessities mentioned in the bond in suit are wrong and baseless. This defendant's father never took a shell from the plaintiffs for the requirements and the benefit of the family, nor was there any necessity for the same." I am clearly of opinion that in this paragraph the defendant is putting in issue the question whether there was any necessity for the loan at all, and not the question whether there was any necessity to raise the loan on such onerous terms. Any doubt that there might be, as to the precise meaning of this paragraph, is removed as soon as we come to the tenth paragraph of the written statement; which contains the defendant's special plea as to interest. He objects to the rate of interest mentioned in the bond as it is by way of penalty, and it is this plea which the learned Subordinate Judge has tried. I am of opinion that it is not open to the defendants to argue on their written statement that, assuming there was legal necessity for the loan itself, there was no legal necessity for raising the loan on such onerous terms. The question of necessity is essentially a question of fact. That question was not raised by the defendants in their written statement. It was not put forward before the learned Subordinate Judge and was not considered by him. I hold, therefore, that this question does not arise before us for our consideration.

If, however, the question is open to us for our consideration, I am of opinion that the subsequent consent of defendant No. 1 is sufficient to validate the transaction so as to bind both defendants Nos. 1 and 2. I have already referred to the consent of defendant No. 1 as contained in Exhibits 5 and 6, but it is necessary to deal with this matter a little more in detail. It appears that on the 19th December 1903, Haricharan executed another mortgage-bond in favour of the plaintiffs and that the plaintiffs instituted a suit against Haricharn and his son, defendant No. 1, to enforce that mortgage-bond against them. The sum claimed in that suit was Rs. 12,771-9-6. Haricharan died soon after the institution of the suit, and his son, who is defendant No. 1 in this suit, promptly settled the matter with the plaintiffs. The terms of settlement were as follows: the plaintiffs would give up Rs. 3,596-9-6 and the costs of the suit, the defendant would sell to the plaintiffs a property of the value of Rs. 8,000 and pay in cash to the plaintiffs Rs. 1,175, for which time was given to the defendant till Baisakh 1318. This arrangement was embodied in a consent decree passed by the Court on the 12th February 1911 (Exhibit 6), and was partly carried out by the execution of a sale-deed dated the 10th February 1911 (Exhibit 5).

The consent decree upon which reliance is placed by Mr. Kulwant Sahay on behalf of the appellants provides as follows: "It is prayed that a decree may be awarded for Rs. 1,175 with interest thereon at 1 per cent. per mensem till the date of

realization. Besides the amount claimed, Rs. 1,000, as principal, and interest and compound interest due under the mortgage-bond, dated 16th July 1903, executed by Haricharan Mahto is due from me under the bond. Only Rs. 1,487, out of interest and compound interest entered on the back of the bond, has been realized. The bond is allowed to stand good as before, *i. e.*, the principal, interest and compound interest will remain due from me." In the sale-deed, there is a passage upon which Mr. Kulwant Sahay relies and which runs as follows: "Be it known that the bond, dated 16th July 1903, stands good as before, after payment of Rs. 1,000 as principal besides interest and compound interest."

There is a clear admission of liability on the part of defendant No. 1 in respect not only of the principal sum covered by the bond of 16th July 1903 but in respect also of the interest and compound interest, and Mr. Kulwant Sahay strongly argues that the subsequent assent on the part of defendant No. 1 validates the transaction so far as interest is concerned. Mr. Manuk contests this proposition of law and he relies upon the case of *Kandasami Asari* v. *Somaskunta Ela Nidhi Ltd.* (4) for the proposition that the manager of a joint family is not in any sense the agent of the family and that consequently no ratification of his act by the other members of the co parcenary is possible. His argument is that an alienation by the *karta* of the joint family without necessity is void in its inception and that consequently no amount of ratification will validate that which is void from the beginning.

It is, in my opinion, always dangerous to employ technical terms of English Law in dealing with cases under the Hindu Law. The question is not whether the *karta* of a joint family is the agent of the family, but what are his powers. He has undoubtd power to alienate joint family property for a justifying family necessity and the law will presume that there was a justifying family necessity, if the other members of the co-parcenary have assented to the transaction. In my opinion the subsequent "assent" of defendant No. 1 is not in any sense a ratification of what was done by his father involving a discussion of *Keighley, Maxsted & Co.* v. *Durant* (5), but is presumptive proof of a justifying family necessity. It is, of course, open to defendant No. 1 to show that his consent was not a free consent, or that he did not give his consent with knowledge of actual facts, but, in the absence of such evidence, his assent is proof of a family necessity justifying the raising of the loan on such onerous terms.

Defendant No. 1 was aware of the difficulty in his way created by Exhibits 4 and 5, and, therefore, in the eleventh paragraph of his written statement he pleaded that he was only 16 years of age when his signature to the two documents was taken, and that his signature was in fact procured by the deception practised on him by his uncle who acted in collusion with the plaintiffs. As regards his plea of minority, this is obviously false, as he entered appearance in the previous litigation and never suggested that he was a minor and could only be sued as such. As regards his plea of fraud, there is no evidence in support of it, except his own evidence which I am wholly unable to accept.

Mr. Manuk, however, strongly relies upon certain admitted facts. He says that Haricharan died on the 19th January, and Exhibits 4 and 5 are dated the 10th and 11th February respectively. The argument is that defendant No. 1, who, whether he was a minor or not, was undoubtedly of a tender age, was incapable so soon after his father's death of transacting a business of this nature, and Mr. Manuk points out that his assent to the transaction of the 16th July 1903 is wholly out of place in a transaction connected with a subsequent mortgage bond. The argument is not without force, but, having considered the evidence very carefully, I am unable to accept it. It seems to me that it is quite possible that the plaintiffs made a concession to the defendant in order to procure his assent to the earlier transaction, but, without speculating in the matter at all, it is sufficient to say that a plea of undue

(4) 5 Ind. Cas. 922; 35 M. 177; 7 M. L. T. 165; 20 M. L. J. 371; (1910) M. W. N. 580.

(5) (1901) A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R. 527.

influence must be supported by evidence which has not been produced in this case. If it were necessary, therefore, to come to a conclusion on the question whether there was any necessity to raise the loan on such onerous terms, it would be sufficient to say that the subsequent assent of defendant No. 1 to the transaction is evidence of such necessity, which evidence has not been rebutted in any way by defendant No. 1. So far as defendant No. 2 is concerned, he was not in existence either on the date when the transaction took place or on the date when his father, defendant No. 1, assented to that transaction. Therefore, the question does not arise so far as he is concerned.

I am of opinion, therefore, that the plaintiffs are entitled to interest at 3 per cent. per mensem with quarterly rests from the date of the execution of the bond up to the date which we shall fix for payment. They are also entitled to interest at 6 per cent. per annum on the decretal amount from the date fixed for payment up to the date of realization.

The next question is whether the plaintiffs are entitled to sell properties Nos. 3 and 4 mentioned in the mortgage bond free from the mortgage of defendants Nos. 3 to 6 and 8. These defendants are the heirs of one Chedami, who advanced Rs. 8,000 to Haricharan on the 29th July 1904 on the security of properties Nos. 3 and 4. Their case is that this money went to pay off Ghanshyam whose mortgage was dated the 12th January 1903. They say that they are entitled to be subrogated to the securities held by Ghanshyam and that, therefore, so far as these properties are concerned, they are entitled to priority over the plaintiffs.

There is no doubt that the intention of the parties was that the security created in favour of Ghansyam Das on the 12th January 1903 should be kept alive and not extinguished by the transaction of the 29th July 1904. This is conceded by Mr. Kulwant Sahay, but he argues that subrogation could only be by redemption, and that in this case the money found by Chedami Lal did not completely pay off Ghansyam Das and that consequently Chedami Lal was not entitled to be subrogated to the securities held by Ghansyam Das. This argument is based on the following facts which are admitted. The money actually due to Ghansyam Das on the foot of the mortgage dated the 12th January 1903 was Rs. 9,430. Chedami Lal actually paid Rs. 7,830 to Ghanshyam Das towards the satisfaction of the mortgage, and, for the balance due under the bond, Haricharan executed a *hundi* in favour of Ghansyam Das. Mr. Kulwant Sahay's argument is that at the time when Chedami Lal actually paid the money to Ghansayam Das, the mortgage security in favour of Ghansyam Das still remained in force and that Chedami Lal cannot get the benefit of a payment subsequently made by Haricharan. With this argument I do not agree. The transaction is one and entire and whether the money found by Chedami was paid to Ghanshyam Das before the *hundi* was executed by Haricharan or not, the result of the transaction was that the debt due to Ghansyam Das was completely wiped out. The bond was made over by Ghansyam Das to Chedami Lal and has been produced in the case by defendants Nos. 3 to 6 and 8. The case reported as *Swaminatha Pillai* v. *Krishna Iyer* (6) is directly in point. I hold that the learned Subordinate Judge rightly decided this issue in favour of defendants Nos. 3 to 6 and 8.

These defendants have filed a cross-objection on the question of costs. Costs are entirely at the discretion of the Court, and I am unable to say that the learned Subordinate Judge has exercised his discretion unreasonably. I would dismiss the cross objection filed on behalf of defendants Nos. 3 to 6 and 8.

There only remains the question as between the plaintiffs and defendant No. 9. The learned Subordinate Judge has allowed the plaintiffs to redeem the mortgage in favour of defendant No. 9. Both parties are dissatisfied with this portion of the decree. The plaintiffs contend that they are entitled to priority over defendant No. 9 and that, in any case, if they are compelled to redeem defendant No. 9, they are entitled to add what they have to pay to defendant No. 9 to their claim against defendants Nos. 1 and 2. It appears that the plaintiffs were parties to the suit in-

(6) 28 Ind. Cas. 966; 28 M. 548; 28 M. L. J. 484.

stituted by defendant No. 9 against defendant No. 1. It was established in that litigation that so far as plaintiff No. 2 is concerned, defendant No. 9's security was prior to that of the plaintiffs. The plaintiffs had an opportunity in that litigation to redeem defendant No. 9, but they did not avail themselves of that opportunity. The property was put up for sale and was purchased by defendant No. 9. It seems to me that the plaintiffs have lost their right of redemption for ever and that the purchase made by defendant No. 9 cannot now be disturbed. The plaintiffs' contention on this point must accordingly be overruled and the cross-objection filed by defendant No. 9 must be allowed.

I would accordingly allow this appeal, set aside the decree passed by the learned Subordinate Judge and, in lieu thereof, pass the following decree. Let an account be taken of what will be due to the plaintiffs under and by virtue of the mortgage dated the 16th July 1903 in the fourth paragraph of the plaint mentioned and for their costs in this Court and in the Court below six months from the date hereof; and it is ordered that upon the defendants Nos. 1 and 2 or either of them paying into Court what shall be found to be due to them on such account within six months from the date hereof, the plaintiffs do deliver up to defendants Nos. 1 and 2 or to such person as they appoint all documents in their possession or power relating to the mortgaged properties and do, if so required, retransfer the properties to the defendants Nos. 1 and 2 free from the mortgage and from all encumbrances created by the plaintiffs or any persons claiming under them, but that in default of the defendants Nos. 1 and 2 or any of them paying the plaintiffs what shall be found due to them as aforesaid by the time aforesaid, the properties mortgaged to the plaintiffs and specified in the mortgage bond, save and except property No. 2, namely, Chainpur, Sheikpur, Brohmpur being Touzi No. 28/5 or sufficient portion thereof be sold, but that the properties Nos. 3 and 4, namely, Mouza Kantichak, Pargana Haveli Azimabad, being Touzi No. 151/1 and Mouza Sobolpur Chipura, Pergana Fulwari, being Touzi No. 251, be sold subject to the mortgage dated the 29th July 1904 in favour of Chedami Lal, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is due to the plaintiffs as aforesaid together with subsequent interest at six per cent. per annum and subsequent costs, and that the balance, if any, be paid to defendants Nos. 1 and 2. It is further ordered that defendant No. 9 do get his costs of this appeal from the appellants.

COUTTS, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 31 AND 32 OF 1918.

March 13, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Justice Sir William Ayling, KT.

A. MADURAI CHETTY AND ANOTHER—APPELLANTS

versus

T. BABU SAHEB AND ANOTHER—RESPONDENTS.

Vendor and purchaser—Agreement to sell—Subsequent discovery of defect in vendor's title—Mortgage created by third party before date of agreement—Enquiry, claim for, by purchaser before completing sale—Rescission by vendor, legality of—Specific performance and enquiry into title, right of purchaser to—Contract Act (IX of 1872), ss. 39, 64—Specific Relief Act (I of 1877), ss. 12, 18, 35.

A purchaser, under a contract of sale, is entitled to a good and marketable title. If the title is found to be doubtful, so as to require investigation, he cannot be compelled either to rescind the contract or to accept without investigation, the doubtful title. He may sue for specific performance of the contract and ask for an enquiry into the title by the result of which he will be bound. [p. 974, col. 1.]

E. entered into an agreement to sell her house to Oosman Sait & Co. for consideration, towards which the latter paid her Rs. 500 as earnest-money. One of the conditions was, that the sale was subject to good title and the advance was to be refunded if the title was found not to be in order. Before the date fixed for completion of the sale, the purchasers discovered that the vendor's grandson, in whose favour the vendor had created an estate in remainder, had, prior to the date of the agreement created mortgages on the house. On the vendor's requiring the purchasers to complete the purchase, the latter replied that they deferred performance

pending an enquiry into the mortgages. Thereupon the vendor rescinded the contract, stating that the mortgagor had no title and offered to indemnify. Both parties brought suits, the purchasers for specific performance and the vendor for rescission of the contract:

Held, (1) that the vendor was not justified in rescinding the contract, or in calling on the purchasers to complete the contract within a stated time without further investigation; [p. 974, col. 2.]

(2) that the purchasers were entitled to sue for specific performance and an enquiry with a view to clearing up the question of title. [p. 974, col. 2.]

Bindeshri Prasad v. *Mahant Jairam*, 14 I. A. 173; 9 A. 705 (P. C.); 5 Sar. P. C. J. 61; 5 Ind. Dec. (N. S.) 906, distinguished.

Appeals from the judgment of Mr. Justice Coutts Trotter in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 169 of 1917.

FACTS.—Suits for specific performance of a contract for the sale of a house in pursuance of which a sum of Rs. 250 was paid as earnest money. When it came to the question of completing the contract, the would-be purchaser wanted the would-be vendors to get the property freed from an alleged mortgage, which the latter declined to do saying that there was no such charge at all and promising to indemnify in case the purchaser was caused loss thereby. The title-deeds had been given over to the would-be purchaser on the payment of the earnest money. The questions were whether the would-be vendors were entitled to treat the contract as repudiated by the other so as to resist the suit for specific performance.

Mr. *K. Srinivasa Aiyangar*, for the Appellants (would-be-vendors).—Where a contract is entered into and one of the parties thereto insists upon the performance of something not in the contract as a condition precedent to his performing his part of the contract when in fact no such thing or difficulty exists, such insistence entitles the other party to treat the contract as at an end and to resort to the remedies available to him on a breach of the contract. What the respondent requires is that I should file a suit for a declaration that a certain mortgage which does not bind the house in question is not binding. In fact the mortgagor, who is a daughter's son, has no manner of right or claim to the property and a mortgage by him is the same as if there was none. He is, therefore, not even a proper party to the present suit, for he has no interest in the purchase-money. As to who are proper parties to a suit for specific performance, see *Rangayya Reddy* v. *Subramanya Aiyar* (1).

In *Bindeshri Prasad* v. *Mahant Jairam* (2) the Privy Council dismissed a suit for specific performance because the plaintiff asked for a warranty of title as a condition precedent to his completing the contract. *Manik Chandra* v. *Abhoy Charan Gope* (3) also lays down the same rule. See also Dart's Vendors and Purchasers, page 341.

The respondent has not at any time expressed his willingness and readiness to perform his part of the contract and not having done so within a reasonable time, we were entitled to put an end to the contract.

The Hon'ble the Advocate-General (Mr. *S. Srinivasa Aiyangar*), for the Respondents.—What we have asked for is the contract *plus* something to which we may or may not be legally entitled. But that does not in any case amount to a repudiation of the contract. The appellants have obtained a release from the daughter's son in question. We asked that the release should be got registered. That is neither unreasonable nor impracticable.

The daughter's son is a necessary party, for he is apparently interested in the purchase-money and we ought to see that we get a title free from cloud. The title of the appellants was not free from cloud or there was no necessity for obtaining a release from their daughter's son. See also section 39 of the Indian Contract Act. I was under the circumstances entitled to refuse performance. See *Greaves* v. *Wilson* (4) and *Bennett* v. *Fowler* (5). The declaration for which we contended is quite necessary and reasonable. See section 18 of the Specific Relief Act. See also *Turpin* v. *Chambers* (6).

Mr. *E. Duraiswamy Aiyar*, in reply.—The daughter's son having no interest in the

(1) 40 Ind. Cas. 429; 40 M. 365; 32 M. L. J. 575; 5 L. W. 797; 21 M. L. T. 385 (F. B.).
(2) 9 A. 705 (P. C.); 14 I. A. 173; 5 Sar. P. C. J. 61; 5 Ind. Dec. (N. S.) 906.
(3) 37 Ind. Cas. 257; 24 C. L. J. 90.
(4) (1858) 25 Beav. 290; 27 L. J. Ch. 546; 4 Jur. (N. S.) 271; 5 W. R. 482; 53 E. R. 647; 119 R. R. 420.
(5) (1840) 2 Beav. 302 at p. 304; 48 E. R. 1197; 50 R. R. 184.
(6) (1861) 29 Beav. 104; 30 L. J. Ch. 470; 7 Jur. (N. S.) 459; 9 W. R. 363; 54 E. R. 566; 131 R. R. 473.

property, he cannot cloud our title by creating a mortgage over it. *Bennett* v. *Fowler* (5).

JUDGMENT.—In this case the purchasers sued for specific performance and the vendors for the rescission of the contract. Both suits were decided in favour of the purchasers, and the vendors appeal. The house in question stood in the name of Ellammal who, on 10th March 1916, executed in favour of her daughter's son Balasundara Chetti an unregistered document Exhibit I, reciting that she had promised to give his mother the house as a dowry and that the mother had paid Rs. 2,000 and providing that he was to have the house after her (Ellammal's) death. Then on 17th November 1916 she and her husband Madurai Chetty contracted in Exhibit B to sell the house to Melu T. C. Muhamad Oosman Sait & Co., the contract taking the form of a receipt for Rs. 500 which contained the stipulation that "the sale is subject to good title, if the title is found not in order this earnest of Rs. 500 is to be refunded, and they are to return the title-deeds."

On the 28th of December Ellammal got her grandson Balasundara Chetty to endorse on Exhibit I a release of all his rights under it, "In future my grandmother shall enjoy all rights in respect of the said house as before. I have no right whatever." It appears from the oral evidence that the purchasers under Exhibit B had come to know of Exhibit I and that the vendors in consequence had paid Balasundara Chetty to execute this release. It was not registered, nor was Exhibit I registered. The purchasers' subsequent letter Exhibit D shows that the purchasers in addition to the deposit of Rs. 500 made further payments of Rs. 250 and Rs. 750, and we were told that these sums were utilised to induce Balasundara Chetty to endorse a release on Exhibit I. The purchasers then discovered that even before the date of Exhibit I Balasundara Chetty had executed a mortgage of the suit house, and this fact coupled with the recital of Ellammal in Exhibit I that his mother had paid Rs. 2,000 opened up a possibility of a case being set up that the house had been purchased *benami* for his mother and had descended to him.

On 16th February 1917 the vendors' Vakil in Exhibit C called upon the purchasers to complete within a week, in default of which their clients would forfeit the deposit and sue for the return of the title-deeds. The purchasers' Vakil in Exhibit D, dated 21st February 1917, replied that the encumbrance certificate had disclosed the existence of the mortgage by Balasundara Chetty and an assignment of that mortgage, and that he had written to the mortgagor, the mortgagee and his assign to let him know what their claims were to the property. He said the delay was due to the vendors' not coming forward to set aside the mortgage, and refused to proceed further until they did.

To this the vendors' Vakil replied in Exhibit E, dated 7th March 1917, that the mortgage was executed without authority and could not affect the purchasers' rights and that his clients were willing to give an indemnity.

This was followed up by a letter from another Vakil on the vendors' behalf saying that, since no reply had been received to their Vakils' letter dated 21st February, the vendors cancelled the contract. The purchasers' Vakil replied in Exhibit G, dated 9th March 1917, that the letter dated 21st February 1917 had not been received, and that the purchasers were entitled to satisfactory assurances that the mortgages would not prejudice his clients and that they were entitled to discharge the mortgages out of the purchase-money if the vendors did not set them aside.

The vendors' Vakil replied in Exhibit H, dated 13th March 1917, that the purchasers were not entitled to this, and that his clients had directed him to give notice cancelling the contract because the purchasers were insisting on their bringing an unnecessary suit against the grandson who was a pauper and could not be made to pay costs. They gave the purchasers time until the 20th to pay the purchase-money and execute the sale-deed and stated that in the event of their failure to do so, the contract must be regarded as rescinded.

The purchasers' Vakil in Exhibit J, dated 15th March 1917, replied that the purchasers were entitled to have time to make inquiries

into the encumbrances created by Balasundara Chetty and could not accept the mere statements of the vendors and conclude the sale. They followed this up by a letter Exhibit K, dated 20th March 1917, enclosing a form of declaration which they required the vendors to sign before a Magistrate and repeated that the vendors were bound to see to the discharge of the mortgages. The declaration was one which Ellammal could not truly make owing to her having executed Exhibit I. The vendors' Vakil replied on 26th March 1917 that the contract was rescinded owing to the purchasers' failure to complete the contract and their insistence on the discharge of the encumbrances and the declaration, and this is the rescission on which they now rely. In their reply, Exhibit M, also dated 26th March 1917, the purchasers' Vakil again insisted on the contract being specifically performed, the mortgage discharged, and the declaration asked for given, and intimated that they would sue for specific performance of the contract.

In my opinion they were entitled to do so. A purchaser is entitled to a good and a marketable title. If the title is found to be doubtful so as to require investigation, he cannot be compelled either to rescind the contract or to accept without investigation the doubtful title. He may, it is well settled in England, sue for specific performance of the contract and ask for an enquiry into the title by the result of which he will be bound.

In the present case, before the agreement to sell, the property had been mortgaged by the vendors' grandson and one of the vendors by executing Exhibit I had created evidence that it had been purchased in her name *benami* for her daughter, the mother of the mortgagor. Her conduct in executing Exhibit I shortly before entering into the agreement to sell has not been explained, for the story told by her husband in the box that she signed Exhibit I to convert her grandson to a virtuous life is as unworthy of acceptance as his other story that his unwillingness to complete the contract was due to his wife having fallen out of a carriage. Whatever the motives with which Exhibit I was signed, it might have been used by the mortgagee and his assignee as evidence in support of the grandson's right to execute the mortgage on the suit property and the validity of that mortgage would not have been affected by his subsequent endorsement on Exhibit I renouncing his claims, even if that endorsement had been registered, as it was not.

In these circumstances the vendors were not entitled to call upon the purchasers to complete the contract within a stated time without further investigation and to rescind the contract for their failure to do so. On the other hand, the purchasers were entitled to sue for specific performance and an inquiry into title. The evidence in this case established the title to their satisfaction, and in these circumstances they were entitled to ask for the specific performance which the learned Judge has decreed. Reliance was placed on the decision of the Privy Council in *Bindeshri Prasad* v. *Mahant Jairam* (2). In that case, however, the whole trouble arose because the purchaser who sued for specific performance had insisted, both before suit and in his plaint, on the insertion of a covenant in the sale-deed to which he was not entitled. In this case the vendors were entitled to sue for specific performance with a view of clearing up the question of title, and the case is, therefore, distinguishable. The learned Judge was right in his conclusion and the appeals are dismissed with costs.

M. C. P.

Appeals dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 73 OF 1918.

October 23, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MAHADEO KORI—DEFENDANT—APPELLANT

versus

SHEORAJ RAM TELI—PLAINTIFF—RESPONDENT.

Stamp Act (II of 1899), s. 12, Sch. I, Arts. 1, 5—Cancellation of adhesive stamp, how to be effected—Memorandum of agreement, what is—Sarkhat *acknowledging debt and stipulating rate of interest payable, nature of—Stamp payable.*

A memorandum of the rate of interest to be payable in future, when appended to an acknowledgment of a debt, over the signature of the debtor,

for the express purpose of being used hereafter as evidence of an agreement to pay interest at the particular rate specified, must be regarded as a stipulation to pay interest within the meaning of the proviso to Article 5 of the First Schedule to the Stamp Act, so as to make the document a memorandum of an agreement within the meaning of Article 5 of the same Schedule, and a document, described as a *sarkhat*, which, in addition to acknowledging a debt, contains, over and above the said acknowledgment, a note of the rate of interest to be payable hereafter on the debt thus acknowledged, is a document of the foregoing description.

The question whether a particular adhesive stamp has or has not been cancelled in a sufficiently effectual manner, so that it cannot be used again, is one which must be considered with reference to the facts of each particular case. Where a person writes his name close to a stamp on its left side, and continues the line which forms the upper portion of the writing in the Hindi character across the face of the stamp, and immediately against the right hand edge thereof continues his writing by the insertion of words of formal acknowledgment, this is an effectual cancellation of the stamp within the meaning of section 12 of the Stamp Act.

First appeal from an order of the District Judge, Ghazipur, dated the 10th April 1918.

FACTS.—The plaintiff brought a suit on the basis of a *sarkhat* to recover a sum of money from the defendant. The terms of the *sarkhat* were:—"*Sri sarkhat likh dya Sheoraj Ram Teli sakin kaithaulia wale ke Mahadeo Ram koiri sakin kaithaulia wale ne, ogay rupiya liya anken do sau rupiya biaj dar derh rupiya saikrah mahwari, Miti Baisakh Sudi Ekum Sambat* 1971." A stamp was fixed to the document on the top of the paper and the paper to the left of the stamp bore the signature of the defendant with the words "*ba kalam khud*," and the paper to the right of the stamp bore the words "*sarkhat likha so sahi*." These words to the left and right of the stamp were joined together with a straight line drawn horizontally across the stamp. The defence raised the objection that inasmuch as the stamp had not been cancelled in accordance with the requirements of the law, the *sarkhat* was inadmissible in evidence The trial Court allowed the objection and dismissed the claim, holding that as the claim was based on the *sarkhat*, oral evidence could not be allowed.

The lower Appellate Court, however, took a different view of the *sarkhat*. The learned Judge held that it was an agreement and should have borne an eight-anna stamp, and that it was admissible in evidence on payment by the plaintiff of the requisite stamp and penalty, and remanded the case for trial on the merits.

Mr. *Kamalakant Varma*, for the Appellant.

Mr. *Lakshmi Narain*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—The suit out of which this appeal arises was brought by the plaintiff for the recovery of money lent with interest. As regards one portion of the claim the plaintiff did not profess to support it by documentary evidence. At the hearing he offered to be bound by the defendant's statement on oath. When thus examined, the defendant, although he had denied all liability in his written statement, admitted having borrowed a sum of Rs. 125 on a certain date. The first Court accordingly passed a decree for this sum, with interest by way of damages, and dismissed the rest of the claim. In respect of the portion of the claim thus dismissed, the plaintiff tendered in evidence a certain document described as a *sarkhat*. One of the matters in controversy which has not yet been tried out is the date on which this document was executed, there being a discrepancy between the year of execution as stated in the first part of the document and that stated in a later portion of the same. The defendant's case was that he had in fact incurred the liability referred to in this paper and had written his signature, and other words importing acknowledgment, upon the paper produced, but that this liability had been subsequently discharged by him. The learned Munsif, however, did not try out the case on this basis. It is a little difficult to understand how he purported to deal with this document described as a *sarkhat*. He must at one stage at least have treated the said paper as evidence in the case, for he examined the defendant Mahadeo upon it and recorded his admission as to his signature and other words in the Hindi character appearing thereon. In the end, however, he came to the conclusion that the document was not admissible in evidence at all. He did this upon an objection taken by the defendant regarding the cancellation of the adhesive stamp of one anna which appears on the face of the document. Referring to the provisions of section 12 of the Indian Stamp Act (No. II of 1899), he held that there had been no effective cancellation of this stamp, and it followed as a consequence

that the document must be treated as not stamped at all. The document itself might in its turn be regarded as a mere acknowledgment of the debt, within the meaning of those words as used in Article 1 of the First Schedule to the Stamp Act aforesaid. On this view the document was chargeable with a stamp duty of one anna and, if the learned Munsif was right in treating it as virtually unstamped, this was a defect which could not be cured by the imposition of any penalty. Having thus rejected the document as inadmissible, the learned Munsif went on to hold that the claim in respect of the debt therein referred to was not proved, and upon this he dismissed this part of the claim. He got rid of the defendant's admission of liability by accepting the defendant's statement in its entirety, according to which the written acknowledgment had been given on the earlier of the two dates appearing on the face of the document, with the result that the suit on the date on which it was filed would have been barred by limitation. The learned District Judge in appeal has held that the document in question is not a mere acknowledgment of a debt. It is that undoubtedly; but it contains, over and above the said acknowledgment, a note as to the rate of interest to be payable hereafter on the debt thus acknowledged. The learned District Judge holds that this amounts to a stipulation to pay interest at the specified rate, within the meaning of the proviso to Article 1 of the First Schedule already referred to. He holds, therefore, that the document, besides being an acknowledgment of a debt, is a memorandum of an agreement within the meaning of Article 5 of the Schedule and is, therefore, liable to pay a stamp duty of eight annas. He has ordered the duty and penalty to be levied and the document to be admitted in evidence subject to payment of the same. In consequence of this order the learned District Judge observes that there has been no real trial on the merits in respect of this part of the claim, the real question in issue being whether the debt was contracted, or formally acknowledged by the defendant, on the earlier or on the later of the two dates appearing on the face of the disputed document. It is certainly open to argument whether, on this view of the case, the learned District Judge would not have complied more strictly with the provisions of the Code of Civil Procedure by remitting an issue for the determination of the first Court, and then finally disposing of the appeal in accordance with the finding which might be arrived at on the issue so remitted. The learned District Judge, however, has preferred to deal with the case on the basis that the claim, so far as it related to the sum referred to in the *sarkhat*, had been disposed of by the first Court upon a preliminary point, and he has passed an order of remand under Order XLI, rule 23, of the Code of Civil Procedure. The appeal before us is against this order of remand, and as no exception is taken in the memorandum of appeal to the particular procedure adopted by the District Judge, it does not seem necessary for us to raise any question on the point. The points argued before us are two: first, whether the document in question is a mere acknowledgment of a debt, falling under Article 1 of the First Schedule to the Indian Stamp Act, or is also a memorandum of an agreement, liable to a duty of eight annas under Article 5 of the same Schedule; secondly, whether or not the adhesive stamp of one anna on this document has been effectually cancelled within the meaning of section 12 of the same Act. On the first of these points a number of authorities were cited to us. It may be remarked at once that all authorities anterior in date to the passing of Act No. II of 1899 require to be reconsidered in the light of the proviso to Article 1 of the First Schedule which was added by the enactment aforesaid. I would also remark further that, when all is said and done, each reported decision must be considered strictly with reference to its own circumstances and the precise terms of the particular document under consideration by the Court. There are decisions of at least of two High Courts, since the passing of Act II of 1899, which lend a great deal of support to the view taken by the learned District Judge. The cases are *Laxumibai* v. *Ganesh Raghunath* (1) and *Mulchand Lala* v. *Kashibullav Biswas* (2). Each of these decisions seems to turn upon the view that a memorandum of the rate of interest to be payable in future, when appended to an acknowledgment of debt over the signature

(1) 25 B. 373; 2 Bom. L. R. 1132.
(2) 35 C. 111; 11 C. W. N. 1120.

of the debtor, for the express purpose of being used hereafter as evidence of an agreement to pay interest at the particular rate so specified, must be regarded as involving a stipulation to pay interest within the meaning of the proviso to Article 1 of the Schedule, so as to make the document a memorandum of an agreement within the meaning of Article 5 of the same Schedule. If the matter came before this Court absolutely as *res integra*, I should feel no hesitation in expressing my own agreement with these decisions. There are, however, two cases of this Court upon which considerable stress has been laid on the other side. These are *Udit Upadhya* v. *Bhawani Din* (3) and *Dulmha Kunwar* v. *Mahadeo Prasad* (4). The documents dealt with by the learned Judges of this Court in the second of these two cases were so differently worded from the one now before us that it is doubtful how far the decision in that case throws any light on the question under consideration. The case was a peculiar one and the learned Judges based their decision upon a variety of circumstances, of which the question of the admissibility of the two documents concerned was only one. The conclusion which they came to, as a matter of fact, was that the documents in question were not liable to stamp duty at all; and in the present case, of course, if we found it possible to take the same view regarding the *sarkhat* now under consideration, the only result would be that we should affirm the order of remand. The earlier of the two Allahabad cases bears a closer resemblance to the one now before us. Taking the decision as a whole, I think it may be said that the learned Judges regarded the question as one not free from difficulty, but had formed so strong an opinion in favour of the plaintiff's case on the merits that they were most reluctant to come to any decision which would have the result of excluding from the consideration of the Court the document upon which the said plaintiff relied. Moreover, the contention raised before them on behalf of the defendants respondents was that the said document fell within the definition of a promissory note, and this was the contention which was repelled by the learned Judges in their decision. The question whether it amounted to a memorandum of an agreement, within the meaning of Article 5 of the First Schedule, does not seem to have been discussed or considered. It has been pressed upon us on behalf of the appellant in this case that a practice has grown up in these provinces, perhaps in consequence of the two decisions above referred to, of appending a memorandum as to the rate of interest payable to acknowledgments of liability signed by the debtor, and treating such documents as mere acknowledgments liable to no more than a stamp duty of one anna. There may be some force in this contention, and I feel that we ought to be reluctant to disturb any settled practice which may have grown up under previous decisions of this Court. At the same time, as a mere question of law considered with reference to the wording of Articles 1 and 5 of the Schedule already referred to, I am bound to say that the document which we are now considering does, in my opinion, contain a stipulation to pay interest at the rate therein specified, within the meaning of the proviso to the first of these Articles, and does amount to a memorandum of an agreement to pay interest at the said rate within the meaning of the fifth Article.

For myself, however, I should prefer to base my decision upon a clear finding that there has been an effective cancellation of the one anna adhesive stamp on this document within the meaning of section 12 of Act No. II of 1899. A similar question came before a Bench of the Oudh Court of which I was a member [*Mohammad Amir Mirza Beg* v. *Babu Kedar Nath* (5)]. Mr. Lindsay and I concurred in holding that the stamp produced before us, which had been cancelled by having three lines drawn across it in different directions, each of the said lines extending more or less beyond the edges of the stamp on to the paper on which the document was written, had been cancelled in a sufficiently effectual manner to satisfy the provisions of section 12 of Act No. II of 1899. We noticed at the time that there was a decision of the Bombay High Court in a different sense, namely, a case reported as *Virabhadrapa* v. *Bhimaji* (6). But we regarded the two

(3) 27 A. 84; A. W. N. (1904) 169; 1 A. L. J. 483.
(4) 28 A. 436; A. W. N. (1906) 80; 3 A. L. J. 242.
(5) 15 Ind. Cas. 202; 15 O. C. 58.
(6) 28 B. 432; 6 Bom. L. R. 436

cases as to some extent distinguishable, and as a matter of authority we preferred to follow a decision* of the Chief Court of the Punjab to which reference is made in our reported judgment. The question whether a particular adhesive stamp has or has not been cancelled in a sufficiently effectual manner, so that it cannot be used again, is one which must obviously be considered with reference to the facts of each particular case. In the case now before us the defendant-appellant has written his name close to the stamp on its left hand side. He has then continued the line which forms the upper portion of the writing in the Hindi character across the face of the stamp, and immediately against the right hand edge thereof has continued his writing by the insertion of words of formal acknowledgment. In all probability the only reason why he did not write across the face of the stamp was that he regarded it as unlucky, or improper, to deface the Royal image by such writing. That he intended to effect a definite cancellation of the stamp seems to me beyond question, and also that both parties at the time regarded the cancellation as sufficient. It seems to me impossible to treat the words of section 12 of the Indian Stamp Act as requiring such a degree of cancellation as would make it physically impossible for any dishonest person to make hereafter a fraudulent use of the stamp label. It must be a matter of common knowledge that, even the system of cancellation prescribed under the orders of the Government for Court-fee labels affixed to records and papers filed in the course of civil litigation, has been defeated by fraudulent practices entered into by collusion with members of the record-room staff; yet it could not be suggested that the system of punching prescribed by the Government orders for such labels was not *prima facie* an adequate cancellation of the stamp within the meaning of the law. I think a matter of this sort should be dealt with in a fair and equitable spirit and with a presumption in favour of honest dealing rather than of a deliberate intention to lay the basis for a subsequent fraud on the revenue. In my opinion the stamp on the document now before us has been sufficiently cancelled within the meaning of the law, and the question upon which the two Courts below have differed does not strictly arise for determination. Under the circumstances of the case, no objection having been taken by the plaintiff, and the order of the District Judge having presumably been complied with so far as the plaintiff is concerned, I think the proper course for us is simply to dismiss this appeal, and I would do so accordingly with costs.

WALSH, J.—I entirely agree. As the matter has been so fully discussed, I propose to add a word or two on both points. In my opinion this document is plainly a memorandum of agreement within the terms of Article 5 of the Schedule to the Stamp Act, and any other view is almost unarguable. It is true that it contains an acknowledgment of liability for a definite sum but it also contains a term to pay interest thereon, involving future liability. I agree with the view taken in the cases of *Mulchand Lala* v. *Kashibullav Biswas* (2) and *Enatullah Biswas* v. *Gajarudai Biswas* (7), each of which bears a similarity to this case. Without venturing to differ from the view taken in *Uait Upadhya* v. *Bhawani Din* (3), I note that the Chief Justice in that case described the document in the following language: "To us it appears to be nothing more than a mere memorandum or note drawn up between the parties as to a transaction which had just been settled between them." That is a description of a memorandum of agreement and would have brought the document within Article 5 if the point had been taken. I agree with my brother that it would appear from the report in *Uait Upadhya* v. *Bhawani Din* (3) that the point was not present to the Chief Justice's mind. On the other point I agree entirely with my brother Piggott's judgment in Oudh Cases, *Mohammad Amir Mirza Beg* v. *Babu Beaar Nath* (5). All that a Court has to look at, in my judgment, under section 12 is whether the adhesive stamp has been in any effectual manner cancelled so that it cannot be used again. I think that means so that it cannot lawfully or conscientiously be used again. My brother

*See *Piran Ditta* v. *Mangal Singh*, 108 P. R. 908; 207 P. W. R. 1908.—*Ed.*

(7) 11 C. W. N. 1122.

has pointed out in a passage which I cannot do better than quote: "It is difficult to see how any one without destroying an adhesive stamp altogether can so cancel it as to make it absolutely impossible for an expert forger to remove the mark and make use of it elsewhere." It is not everybody who can write with success upon a recently affixed adhesive stamp. A stamp may be almost entirely defaced by accidentally upsetting ink all over it. That would not be a cancellation. On the other hand a line deliberately drawn through it with the object of cancelling it is, in my opinion, as effectual a cancellation as writing part of a signature or of a date upon it. It is the method adopted by some Banks for cancelling the name on a cheque which has been paid. In this case the writer chose to sign his name on one side of the stamp, to add certain requisite particulars on the other side of the stamp and to unite the two pieces of writing by a continuous line drawn across the stamp I think that was an effectual cancellation and I agree with the Oudh case that whether the requirement of the law as to the cancellation of the stamp has or has not been sufficiently met is a question to be determined upon examination of the document in each particular case. The result in this case is that the plaintiff must treat this document as covered by Article 5 and pay the additional duty.

BY THE COURT.—We dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.
ORIGINAL SIDE APPEAL NO. 2 OF 1919.
July 31, 1919.
Present:—Sir Abdur Rahim, KT.,
Officiating Chief Justice, and
Mr. Justice Moore.
BRIJI KESSOOR LAUL AND ANOTHER
—PETITIONERS—APPELLANTS
versus
THE OFFICIAL ASSIGNEE OF MADRAS—
COUNTER-PETITIONER—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 21—"Payment in full," meaning of—Discharge of debts, whether payment—Annulment of adjudication.

The payment by an insolvent to his creditors of four annas in the rupee and obtaining a full discharge of their debts is not a "payment in full" within the meaning of section 21 of the Presidency Towns Insolvency Act, and such payment is not sufficient in law to entitle him to an order annulling the order of adjudication.

Appeal from the order of Mr. Justice Coutts Trotter, dated the 26th November 1918, in the exercise of the Ordinary Original Civil Insolvency Jurisdiction of the High Court in Insolvency Petition No. 235 of 1917.

Mr *K. Ramanath Shenai* (with him Mr. *O. Vijayaragavalu Naidu*), for the Appellants.

The Official Assignee, for the Respondent.

JUDGMENT.—The insolvent arranged with his creditors by paying them four annas in the rupee that they should give him a receipt in full discharge of their debts. It has been ruled both in England and India that such a payment is not "payment in full" within the meaning of section 21 of the Presidency Towns Insolvency Act corresponding to section 35 of the English Bankruptcy Act [see *Subrati Jan Mahomed, In re* (1), *Shivlal Rathi, In re* (2), *Flatau, In re, Official Receiver, Ex parte* (3), *Izod, In re, Official Receiver, Ex parte* (4), *Hester, In re, Hester, Ex parte* (5) and *Keet, In re, Official Receiver, Ex parte* (6)]. This cannot be said to be a case in which the debtor ought not to have been adjudged insolvent, for the adjudication was made on his own application and clearly he was unable to pay his debts. But then it is urged that we must treat it as a composition under section 28 and pass an order annulling the adjudication under section 30. Clearly, however, it is not a case of composition within the meaning of the Act. There was no proposal, so far as we can gather, from the materials placed before us, for a composition to be submitted to the Court and we do not find that the Court, proceeding as directed by sections 28 and 29, approved of any such proposal. It is only when the Court has

(1) 20 Ind. Cas. 859; 15 Bom. L. R. 748; 38 B. 200.
(2) 40 Ind. Cas. 207; 19 Bom. L. R. 365.
(3) (1893) 2 Q. B. 219; 62 L. J. Q. B. 569; 4 R. 414; 68 L. T. 740; 41 W. R. 529; 10 Morrell 151.
(4) (1898) 1 Q. B. 241; 67 L. J. Q. B. 111; 77 L. T. 640; 46 W. R. 304; 4 Manson 343; 14 T. L R. 115.
(5) (1889) 22 Q. B. D. 632; 60 L. T. 943; 6 Morrell 85.
(6) (1905) 2 K. B. 666; 74 L. J. K. B. 694; 93 L. T. 259; 54 W. R. 20; 12 Manson 235; 21 T. L. R. 615.

approved of a proposal for composition properly submitted to it that it may annul the adjudication. Then it is said that we have a sort of general discretion to annul an order of adjudication if we are satisfied that the conduct of insolvent has not been in any way fraudulent or dishonest. But even supposing there was such a general discretion, on which question we have not been referred to any decision, the Court had no opportunity of examining the insolvent in this connection so as to form a proper conclusion as to his conduct. The petitioner seems to have misconceived his remedy, for he proceeded to present an application for withdrawal of the petition, and he also seems to have been under the impression that it was enough for his purpose if he could get his creditors to give him a discharge for their debts. That is not sufficient in law, as has been pointed out in all the cases referred to.

We must, therefore, dismiss the insolvent's appeal. It will be open to him to make a proper application before the Insolvency Court.

The Official Assignee will be entitled to the costs of the appeal out of the estate.

M.C.P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 269 OF 1912 WITH RULE No. 3999 OF 1912.

May 15, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

DWARKA NATH DAS—PETITIONER—APPELLANT

versus

KANGALI CHARAN SAHU—OPPOSITE PARTY—RESPONDENT.

Bengal Tenancy Act (VIII B C. of 1885), s. 171—Civil Procedure Code (Act V of 1908), s. 47—Execution of rent decree—Question between mortgagees, decision of—Appeal, whether lies—Procedure, summary, applicability of.

Where in execution of a decree against a tenant for arrears of rent the Court decides a controversy between a usufructuary mortgagee and a simple mortgagee as to their respective rights under their mortgages, the decision of the Court is not appealable, as the questions in controversy are not questions relating to the execution, satisfaction or discharge of the decree and do not arise between the parties to the suit or their representatives-in-interest within the meaning of section 47 of the Civil Procedure Code, nor are the matters in difference between the mortgagees such as ought to be summarily determined in a proceeding under section 171 of the Bengal Tenancy Act. [p. 981, cols. 1 & 2]

Appeal against an order of the Subordinate Judge, Midnapore, dated the 10th February 1912, confirming that of the Munsif, Contai, dated the 4th September 1911.

Babus *Biraj Mohan Majumdar* and *Hari Bhusan Mookerjee*, for the Appellant.

Babu *Bejoy Kumar Bhattacharjee* (for Babu *Khirode Narain Bhuia*), for the Respondent.

JUDGMENT.—We are invited in this Rule to set aside an order made by the Court of first instance under sub-section (1) (*c*) of section 171 of the Bengal Tenancy Act. The circumstances under which the order has been made are not disputed. The Maharaja of Burdwan obtained a decree for arrears of rent against one of his tenants. In execution of this decree the holding was advertised for sale. It appears that the tenant had executed a simple mortgage of the holding on the 27th May 1900 and a usufructuary mortgage on the 9th July 1903. On the 17th January 1911, the simple mortgagee made an application under sub section (3) of section 170 for leave to deposit the judgment-debt on the allegation that he had, in the holding advertised for sale, an interest voidable on the sale. This application was granted without notice to the decree-holder or the judgment debtor. On the 11th April 1911, the simple mortgagee who had made the deposit, applied to the Court to be put in possession of the holding as first mortgagee thereof under section 171, sub-section (1) (*c*). Notices were thereupon issued to the persons interested in the holding. On the 17th May 1911, the judgment debtor appeared and objected to the grant of the application. He stated that the simple mortgage had been satisfied, that the mortgagee had no subsisting interest such as would entitle him to make an application under sub-section 3 of section 170, and that, in reality, the money deposited by the mortgagee was his own money, which he had entrusted

to the mortgagee to be put into Court on his behalf. He added that his usufructuary mortgagee and not he himself was in possession of the holding. On the same day, the usufructuary mortgagee also appeared in Court and resisted the application of the simple mortgagee on the same grounds as urged by the judgment-debtor. The Court thereupon took evidence and came to the conclusion that the usufructuary mortgage had not been acted upon and that the judgment-debtor was still in possession. The Court consequently directed the simple mortgagee to be placed in possession. The usufructuary mortgagee appealed to the Subordinate Judge, who held that the appeal was incompetent, because the questions in controversy between the two mortgagees did not fall within the scope of section 47 of the Code of Civil Procedure of 1908. The Subordinate Judge, however, proceeded to express an opinion on the merits of the case, namely, that the usufructuary mortgage was not collusive and that the usufructuary mortgagee was in possession of the holding. We are now invited by the usufructuary mortgagee to set aside the order of the Court of first instance, on the ground that the Court had no jurisdiction under sub-section (1) (*c*) of section 171 to make an order for delivery of possession as against a stranger to the proceeding. The order of the Subordinate Judge has also been assailed on the ground that the appeal before him was competent, and, on the facts found, should have been allowed.

In so far as the competency of the appeal before the Subordinate Judge is concerned, we are of opinion that the view taken by him is unquestionably sound. The questions in controversy between the mortgagees are not questions relating to the execution, satisfaction or discharge of the decree, nor do they arise between the parties to the suit or their representatives-in-interest. Consequently the appeal to the Subordinate Judge was incompetent and the appeal preferred to this Court is equally open to the same objection.

In so far as the propriety of the order of the Court of the first instance is concerned, we are of opinion that the case falls within the principle laid down in the case of *Ram Narain Routh* v. *Lal Dis Routh* (1) It was pointed out in that case that there is a noticeable difference between the expressions used by the Legislature in sub-section (*c*) of section 170 of the Bengal Tenancy Act and clause (4) of section 13 of Regulation VIII of 1819, which deals with similar matters. Under the Patni Regulation, the person who makes the deposit to avert the intended sale not only obtains the position of a mortgagee but is also entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter. On the other hand, sub-section (1) (*c*) of section 171 of the Bengal Tenancy Act does not explicitly state that the depositor is entitled to be placed in possession of the holding upon an application made to the Court. It is not necessary for us to determine on the present occasion whether, even as between the depositor and the judgment-debtor, this clause may not be construed as embodying merely a statement of the rights of the parties and not prescribing also the procedure for enforcement of those rights. It is plain that in so far as two strangers to the proceeding are concerned, it could never have been intended that the matters in difference between them should be summarily determined in a proceeding under section 171.

The result is that the appeal presented to this Court is dismissed, but the Rule is made absolute and the order of the Court below is discharged as against the petitioner, the usufructuary mortgagee. The order of the lower Court, in so far as it makes the petitioner liable for costs, is also discharged. There will be no order for costs either in the appeal or in the Rule.

Appeal dismissed; Rule made absolute.

(1) 6 C. L. J. 595; 12 C. W. N. 55.

PAHALAD SINGH *v.* SAJIWAN RAI.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 488 OF 1918.

July 18, 1919.

Present:—Mr. Justice Das.

PAHALAD SINGH—DEFENDANT No. 2—APPELLANT

versus

SAJIWAN RAI AND OTHERS—PLAINTIFFS AND PHUL LAL—DEFENDANT—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 174—Civil Procedure Code (Act V of 1908), s. 151—Execution of rent decree Sale—Deposit of decretal amount within 30 days—Failure of Court to set aside sale—Suit to set aside sale, maintainability of—Court, duty of—Inherent power, exercise of.

In execution of a rent decree certain property was sold and was purchased by *P.*, who was not a party to the suit. Within 30 days of the sale the judgment-debtor deposited the decretal money with the usual penalty and *talbana* for notices, under section 174, Bengal Tenancy Act, and asked that the sale be set aside. Notices were not served and as the judgment-debtor took no further steps, the Court confirmed the sale. The judgment-debtor then brought the present suit to set aside the sale and to obtain possession. The Appellate Court held that the suit was not maintainable, but that complete relief could be given under section 151 of the Civil Procedure Code by treating the suit as an application under that section. The auction-purchaser appealed:

Held, (1) that the suit was maintainable and the plaintiff was entitled to the relief he claimed, but that section 151 of the Code did not apply as an application under that section could only be made in a pending suit and as the Court had held that a suit did not lie there was no suit pending: [p. 982, col. 2.]

(2) that section 174 of the Bengal Tenancy Act did not make it necessary for any notice to be served on the persons affected by an application under that section, and on the conditions imposed by the section being complied with, it was obligatory on the Court to set aside the sale. [p. 982, col. 1; p. 984, col. 1.]

Appeal from a decision of the Subordinate Judge of Saran.

Messrs. *S. C. Mitter* and *S. K. Mitter*, for the Appellant.

Mr. *Ram Pershad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the respondent for setting aside the sale held on 7th January 1913. It appears that a rent decree was obtained against the respondent and in execution of that rent decree the property, namely, Khasra Plots Nos. 121 to 127, were purchased by the appellant who, it will be useful to remember, is not the decree-holder. Within 30 days from the date of sale, the plaintiffs against whom the rent decree was passed deposited the decretal amount with the usual penalty and *talbana* for notices under section 174 of the Bengal Tenancy Act, and they asked in terms of that section that the sale may be set aside.

It has been found by the lower Appellate Court that the plaintiffs did deposit the decretal amount with the usual penalty. Notices, however, were not served, and as the plaintiffs took no further steps in the matter, the learned Munsif confirmed the sale. I have gone through the order-sheet of the execution case and I do not find that the learned Munsif refused the application of the plaintiffs for setting aside the sale under section 174 of the Bengal Tenancy Act, but he does say this: "No steps taken by the judgment-debtor for service of notice on the auction-purchaser. The sale is, therefore, confirmed and the case is dismissed on full satisfaction."

The plaintiff has accordingly brought this suit for determination of his title to Khasra Plots Nos. 121 to 127, for setting aside the sale in execution of the rent decree obtained against him and for possession of the property.

The lower Appellate Court was of opinion that no suit was maintainable for obtaining the reliefs which the plaintiffs did claim in their suit, but it thought that the suit could be treated as an application under section 151 of the Civil Procedure Code and complete relief could be given to the plaintiffs under section 151 of the Code. This is erroneous. An application can only be made in a pending suit, and if the lower Appellate Court was of opinion that the suit did not lie, it is clear that an application could not be made in such a suit. But I am of opinion that a suit is maintainable and that the plaintiffs are entitled to the reliefs claimed by them.

The question which has been argued before me at great length is this: Were the auction-purchasers entitled to any notice of the deposit made under section 174 of the Bengal Tenancy Act? If they were not entitled to such a notice, then the Court had no option but to set aside the sale and further the Court had no power at all to confirm the sale, seeing that all the conditions laid down by section 174 of the Bengal Tenancy Act had been

satisfied. The learned Vakil on behalf of the appellant urges that section 174 of the Bengal Tenancy Act must be read along with Order XXI, rule 92, of the Code of Civil Procedure and when so read, it isclear that an order cannot be made under section 174 of the Bengal Tenancy Act unless notice of the application has been given to all persons affected by such an application.

The question is one of importance and I desire to deal with this matter as fully as I am able to do.

Section 174 of the Bengal Tenancy Act provides that "Where a tenure or holding is sold for an arrear of rent due thereon, then, at any time within thirty days from the date of sale, the judgment-debtor may apply to have the sale set aside, on his depositing in Court, for payment to the decree-holder, the amount recoverable under the decree with costs, and, for payment to the purchaser, a sum equal to five per centum of the purchase-money," and then the section proceeds to say that 'If such deposit is made within the thirty days, the Court shall pass an order setting aside the sale, and the provisions of section 315 (Order XXI, rule 93) of the Code of Civil Procedure shall apply in the case of a sale so set aside."

It will be noticed that there is no provision at all in section 174 for any notice to be served on the persons affected by an application under section 174 of the Bengal Tenancy Act, and I am not prepared to hold in the face of the clear and precise language employed in section 174 of the Bengal Tenancy Act that such a notice is necessary. The learned Vakil on behalf of the appellant has referred me first of all to two cases, *Janardhan Ganguli* v. *Kali Kristo Thakur* (1) and *Bungshidhar Haldar* v. *Kedar Nath Mondal* (2). The case of *Janardhan Ganguli* v. *Kali Kristo Thakur* (1) was a case where the application to set aside the sale was made expressly under section 310A of the Code of Civil Procedure and was made by a person not the judgment debtor, and the whole controversy in that case was whether an application under section 310A at all lay, because it was contended that in a case between landlord and tenant the only application that could be made to set aside the sale would be under section 174 of the Bengal Tenancy Act and as the applicant was not the judgment debtor, therefore there was no remedy at all. The Court after a full discussion on the subject came to the conclusion that there was nothing to indicate that section 310A was intended not to apply to sales in execution of rent decrees. I do not read this case as laying down that the proviso laid down in Order XXI, rule 92, of the Code of Civil Procedure must be read as a part of section 174 of the Bengal Tenancy Act.

The next case relied upon is the case of *Bungshidhar Haldar* v. *Kedar Nath Mondal* (2). In that case one *N* obtained a decree against *R* for arrears of rent. On the 13th February 1895 the holding was sold in execution of the rent decree and was purchased by *K*. On the 13th March 1895, one *B*, who, it will be noticed, was not the judgment-debtor, applied to have the sale set aside under section 310A, alleging that he had acquired an interest in the property sold many years before the rent decree. No notice was served on the persons affected by that application. It was held that the provisions of section 310A may be applicable to sales of tenures held under the provisions of the Tenancy Act and that persons other than the judgment-debtor, whose immoveable property has been sold, may apply under that section to have the sale set aside on complying with the conditions prescribed by the section. This case is no authority for the proposition that if the application was made under section 174 of the Bengal Tenancy Act it would be necessary to serve notice on persons affected by such an application.

In my opinion the cases relied upon by the learned Vakil on behalf of the appellant do not establish that the proviso to rule 92 applies to section 174 of the Bengal Tenancy Act and I am not prepared to hold that the proviso does apply. But it has been argued by the learned Vakil that at any rate section 143 of the Bengal Tenancy Act provides in express terms that subject to any rules made by the Court and subject also to the other provisions

(1) 23 C. 393; 12 Ind. Dec. (N. S.) 261.
(2) 1 C. W. N. 114.

of the Bengal Tenancy Act, the Code of Civil Procedure shall apply to all such suits.

The argument is that if there is nothing in the Bengal Tenancy Act, which is the incorporating Act, to show that any particular provision of the Civil Procedure Code does not apply to the Bengal Tenancy Act, then that particular provision of the Civil Procedure Code must apply to the Bengal Tenancy Act by incorporation. I quite agree that if the Bengal Tenancy Act does not lay down any procedure for any particular matter, and if there is a complete procedure for that matter in the Civil Procedure Code, then, unless there is something to the contrary in the Bengal Tenancy Act, the procedure laid down in the Civil Procedure Code must apply to that particular matter. But there is neither principle nor authority for the proposition that where there is a procedure for that particular matter in the Bengal Tenancy Act itself, still it is necessary to go to the Code because the Code requires something more to be done than is necessary under the Tenancy Act. "If the incorporating Act", said Lord Westbury in *St. Sepulchre (Vicar & Church-Wardens of), In re* (3), "gives itself a complete rule on the subject, the expression of that rule will undoubtedly amount to an exception of the subject-matter of the general rule contained in the incorporated Act." In this case, section 174 of the Bengal Tenancy Act contains a complete rule on the subject, and I am of opinion that the expression of that rule undoubtedly amounts to an exception of the subject-matter of the general rule contained in Order XXI, rule 92, of the Code.

In my opinion the proviso to Order XXI, rule 92, does not apply to section 174 of the Bengal Tenancy Act, and that, therefore, under sub-clause (2) of section 174 it was obligatory on the Court to set aside the sale as soon as the deposit was made within the thirty days. In support of the procedure laid down in sub-clause (2) of section 174 of the Bengal Tenancy Act it may be urged that the question is between landlord and tenant, and if there is no question at all that the deposit has been made within thirty days, there is no reason why any notice should be served on any person. The Court must of course, be satisfied that the conditions laid down in section 174 have been complied with. It is not a question of law but is a question of arithmetic, that is to say, purely a question of calculation whether the amount recoverable under the decree, with costs, and, for payment to the purchaser, a sum equal to five per centum of the purchase-money, has been deposited by the judgment-debtor. In my opinion the Court should have set aside the sale as soon as the deposit was made by the judgment-debtor within thirty days from the date of sale,

The next question is, what is the remedy of the judgment-debtor now. The learned Vakil on behalf of the appellant argues first of all that if rule 92 applies, then, of course, the Court has no jurisdiction at all to set aside the sale, because rule 92 expressly provides that "No suit to set aside an order made under this rule shall be brought by any person against whom such order is made." I have held that rule 92 is not applicable and, therefore, in my opinion, sub-section (3) of rule 92 does not apply at all. But it is further contended by the learned Vakil that even if rule 92 does not apply, the order passed by the Court in the application under section 174 was an order under section 47 of the Code of Civil Procedure, and that, therefore, the only remedy available to the judgment debtor was to appeal from that order and to come to this Court in second appeal, and he relies upon two cases as *Mahomed Akbar Jamon Khan* v. *Sukhdeo Panday* (4) and *Raghubar Dayal Sukul* v. *Jadu Nandan Missir* (5). Both these cases were between the decree-holder and the judgment-debtor. The auction-purchasers in both these cases were the decree-holders and it was expressly laid down in the case reported as *Mahomed Akbar Jaman Khan* v. *Sukhdeo Panday* (4) that the question being between the decree-holder and the judgment-debtor, the application came expressly within section 47 of the Code of Civil Procedure and, therefore, the order was appealable. The learned Judges were very careful to say as follows: "It

(3) (1864) 33 L. J. Ch. 372; 4 De G. J. & S. 232; 9 L. T. 819; 3 N. R. 594; 10 Jur. (N. S.) 298; 12 W. R. 499; 46 E. R. 907; 146 R. R. 288.

(4) 10 Ind. Cas. 51; 13 C. L. J. 467.

(5) 13 Ind. Cas. 365; 16 C. W. N. 736; 15 C. L. J 89.

is not necessary to lay down an inflexible rule that every order made upon an application under rule 29 falls within the scope of section 47. The true nature of the order must be examined, and the character of the parties affected thereby ascertained, before it can be determined whether the order does or does not fall within the scope of section 47." In my view the opinion expressed by the learned Judges in the case reported as *Mahomed Akbar Jaman Khan* v. *Sukhdeo Panday* (4) is destructive of the argument advanced by the learned Vakil. The case before me is not a case between the decree-holder and the judgment debtor and, therefore, certainly so far as the cases reported as *Mahomed Akbar Jaman Khan* v. *Sukhdeo Panday* (4) and *Raghubar Dayal Sukul* v. *Jada Nandan Missir* (5) are concerned, it was not a matter within section 47 at all and therefore there could not be an appeal from that order passed under section 174 of the Bengal Tenancy Act.

It is next urged by the learned Vakil that if rule 92 and section 47 do not apply, then the only other remedy available to the judgment-debtor is to proceed by way of review of the order passed by the lower Appellate Court. In my opinion there is no substance at all in this argument. I am of opinion that there being an infringement of the right of the judgment-debtor, the judgment-debtor was entitled to maintain a suit and that the Courts below had jurisdiction to grant complete relief to the plaintiff in such a suit. They have given complete relief to the plaintiff, although they were of opinion that such a suit did not lie. In my opinion the view taken by the Courts below that relief could be given only under section 151 of the Code of Civil Procedure is erroneous. The Court had power to give complete relief in the suit itself. As the relief has been granted, there is nothing further to be said.

I would, therefore, dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1280 OF 1910.

January 2, 1912.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Carnduff.

MISRI SAHU—PLAINTIFF—APPELLANT

versus

VISHU NATH SAHU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 23—Remand—Appellate Court, power of, to remand case for re-trial—Minor—Appeal by minor not represented by guardian, whether competent—Procedure—Inherent power of Court, exercise of.

A Court of Appeal is competent to remand a case for re-trial under circumstances not mentioned in rule 23, Order XLI of the Code, where the ends of justice require this to be done. [p. 986, cols. 1 & 2.]

An appeal preferred by an infant not represented by a guardian *ad litem* cannot be entertained, but in such a case the High Court will exercise its powers under section 151 of the Civil Procedure Code and make such order as is necessary for the ends of justice. [p. 986, col. 1.]

Appeal against the decree of the District Judge, Durbhanga, dated the 12th February 1910, reversing that of the Munsif, Madhubani, dated the 14th June 1909.

Babu *Lakshminarayan Singh*, for the Appellant.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit to enforce a mortgage security alleged to have been executed by the defendant in his favour on the 14th May 1907. The suit was commenced on the 15th June 1908. Amongst other defences the defendant urged that he was an infant at the time when the transaction took place. The Court found upon the evidence that the defendant was born on the 17th August 1892 and that a guardian of his person and property had been appointed under the Guardians and Wards Act so that the defendant could not attain majority till the 17th August 1913. Notwithstanding this finding, the Court heard the case on the merits and made a decree against the defendant though he was not represented by a guardian *ad litem*. The defendant appealed to the District Judge and although according to his own contention which had been accepted as well-founded by the original Court he was an infant, he preferred the appeal himself as if he was *sui juris*. No objection was taken by the

plaintiff-respondent that the appeal was not properly constituted; on the other hand the plaintiff attacked the finding of the primary Court as to the date of birth of the defendant. Upon that point his contention failed and the District Judge affirmed the finding of the first Court. The District Judge then proceeded to hold that the suit was improperly constituted because the defendant, an infant, was not represented by a guardian *ad litem*; but he held that he had no authority to remand the case under rule 23 of Order XLI of the Code of 1908, inasmuch as the suit had not been decided in the Court of first instance upon a preliminary point. The Judge thereupon allowed the appeal and dismissed the suit.

The plaintiff has now appealed to this Court and on his behalf it has been contended that the appeal before the District Judge was incompetent because it had been preferred by an infant not represented by a guardian *ad litem*. The learned Vakil for the appellant has, however, conceded that if his contention is well-founded, the present appeal must also be treated as incompetent because he has not taken any steps to have the respondent represented by a guardian for the purposes of his appeal, though according to the concurrent findings of the Courts below the defendant-respondent is still an infant. Under these circumstances we have to exercise our powers under section 151 of the Code and to make such order as is necessary for the ends of justice. It is clear, in our opinion, that the learned Judge took a restricted view of his powers as a Court of Appeal. No doubt it has been held by this Court in the case of *Abdul Karim* v. *Fayez Buksh* (1) that a Court of Appeal is competent to make an order of remand only when the conditions mentioned in rule 23, Order XLI, are fulfilled. We are, however, not prepared to accept that view as sound. Section 564 of the Code of 1882, which restricted the powers of an Appellate Court to remand a case, is not reproduced in the Code of 1908 and as already explained by this Court in the case of *Tohra Bibi* v. *Zabeda Khatoon* (2), it is competent to a Court of Appeal to remand a case under circumstances not mentioned in rule 23 of Order XLI where the ends of justice require that the case should be retried. In the case before us the proceedings have been throughout irregular, and the only course which the Court can possibly pursue is to discharge the decrees of both the Courts below and to remand the case to the Court of first instance. The plaintiff will be at liberty to take steps for the appointment of a guardian *ad litem* for the defendant. When he has done so, the suit will be tried out on the merits. There will be no order for costs as the respondent is not represented before us.

Case remanded.

(1) 9 Ind. Cas. 224; 15 C. W. N. 575.
(2) 7 Ind. Cas. 75; 12 C. L. J. 368.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 803 OF 1913.
March 10, 1919.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

AIYAPPA NAICKER, MINOR, BY HIS MATERNAL UNCLE AND NEXT FRIEND GURUSWAMI NAICKER—DEFENDANT No. 2—APPELLANT

versus

MEDAI THALAVOI THIRUMALAYAPPA MUDALIAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 4 AND 5—RESPONDENTS.

Landlord and tenant in ryotwari *land—Occupancy right, acquisition of—Burden of proof.*

The Government, in adopting the *ryotwari* system, must be deemed to have made their settlement with the cultivating *ryot* whom the Government found on the land and treated him as the cultivating owner and intended him to remain as such. [p. 988, col. 1.]

Where, therefore, a tenant under a *ryotwari pattadar* sets up a permanent right of occupancy, the burden of proving such right lies on him. [p. 988, cols. 1 & 2.]

Ponniah Nadan v. *Deivanai Ammal*, 52 Ind. Cas. 247: 36 M. L. J. 463; 9 L. W. 453, *Chidambara Pillai* v. *Thiruvengadathiengar*, 7 M. L. J. 1 and *Cheekati Zamindar* v. *Ranasooru Dhora*, 23 M. 318 at p. 327, followed.

Venkatachala Goundan v. *Rangaratnam Aiyar*, 20 Ind. Cas. 374; 24 M. L. J. 571; 13 M. L. T. 450; (1913) M. W. N. 434, *Veeranan Ambalam* v. *Annasawmi Iyar*, 12 Ind. Cas. 1; 21 M. L. J. 845; 10 M. L. T. 185; (1911) 2 M. W. N. 162 and *Muthusami Aiyar* v. *Nainar Ammal*, 43 Ind. Cas. 977; 7 L. W. 194; (1918) M. W. N. 219, dissented from.

AIYAPPA NAICKER v. MEDAI THALAVAI THIRUMALAYAPPA MUDALIAR.

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 23 of 1917, preferred against the decree of the Court of the District Munsif, Tuticorin, in Original Suit No. 352 of 1914.

Messrs. *A. Krishnaswami Aiyar* and *S. Ramaswami Aiyar*, for the Appellant.

Messrs. *K. Srinivasa Aiyangar* and *C. V. Rajagopalachariar*, for the Respondents.

JUDGMENT.

NAPIER, J.—This is an appeal from the District Court of Tinnevelly in a suit brought by the plaintiff to recover possession of certain property from the 1st defendant, the suit being based on a lease granted to the 1st defendant and on title. The present 2nd defendant applied to be made a party, alleging that neither the plaintiff nor the 1st defendant had ever any right to the land. This defendant alleged further that he was the owner, and that he was in possession and pleaded adverse possession from enjoyment by his ancestors. The 1st defendant remained *ex parte* and the suit proceeded between the plaintiff and the 2nd defendant and some supplementary parties

The issues framed were "whether the plaint mentioned lease is true and valid, whether the plaint mentioned land belongs to plaintiff and whether plaintiff has been in possession within the statutory period"

The plaintiff has all along denied that the 2nd defendant was his tenant and, as far as he is concerned, sought to recover the land on his title. The contention of the 2nd defendant before the lower Appellate Court was that the plaintiff was only a farmer of the revenue of the land, that the 1st defendant never had any interest and that he had a permanent right of occupancy in it. This contention was negatived by the Court, which held that the plaintiff was the sole owner of the land and the 2nd defendant, although he had shown possession, had not established a permanent right of occupancy.

Before us the appellant (2nd defendant) put forward the contention that the plaintiff was a mere Melvaramdar and that the ownership of the land was in him. The land being Government *ryotwari*, this contention would entail the proposition that, in addition to the position of the Government as owning the Melvaram, there can be another Melvaramdar introduced between Government and the owner of the land. Speaking for myself, I was surprised to hear such an argument put forward. But I find that the same contention was advanced in the well known case of *Veeranan Ambalam* v. *Annasawmi Iyer* (1). Whatever else was decided in that case, however, this contention was negatived, and it does not require serious consideration. There is not a trace anywhere in the Law Reports of the view that Government in granting a *patta* was only granting a portion of its share in the revenue as in some cases of *inams*. The real substantial argument before us was that, although the plaintiff was the owner of the land, the 2nd defendant should be held, on the evidence, to be entitled to permanent rights of occupancy on the analogy of a Zemindari tenant prior to the Madras Estates Land Act. It must be conceded at once that the decisions in *Veeranan Ambalam* v. *Annasawmi Iyer* (1) and *Venkatachala Goundan* v. *Rangaratnam Aiyar* (2) go some way to support the appellant's contention. The decision in *Veeranan Ambalam* v. *Annasawmi Iyer* (1) seems to treat one particular question as of great importance, namely, whether it has been shown that the defendants' possession commenced under the plaintiff, while the decision in *Venkatachalla Goundan* v. *Rangaratnam Aiyar* (2) seems to be founded on the proposition that a *pattador* must show that he let the tenant into possession and that he was in fact a tenant from year to year. The learned Judges in the latter case also seem to hold that the fact that a *patta* was granted by Government is no indication that another person found in possession has not permanent occupancy rights, but that a *pattadar* must show that the customary mode of holding land in that place justifies the presumption that the tenant has no permanent rights of occupancy. This question has been argued before me on two previous occasions, once in Second Appeal No. 684 of 1917 sitting with my learned brother and once in *Anantha Padmanabha* v. *Gopalakrishnaier* (3)

(1) 12 Ind. Cas. 1; 21 M. L. J. 845; 10 M. L. T. 185; (1911) 2 M. W. N. 162.

(2) 20 Ind. Cas. 374; 24 M. L. J. 571; 13 M. L. T. 450; (1913) M. W. N. 434.

(3) 28 Ind Cas. 916; (1915) M. W. N. 277.

sitting with Mr. Justice Seshagiri Aiyar. On both occasions I declined to follow *Veeranan Ambalam* v. *Annasawmi Iyer* (1) and *Venkatachala Goundan* v. *Rangaratnam Aiyar* (2) to the extent to which the *divta* in those cases commit the learned Judges.

I am relieved from the necessity of considering the present case at any great length, because my attention has been drawn to an elaborate decision of Mr. Justice Seshagiri Aiyar sitting with the learned Chief Justice, *Ponniah Nadan* v. *Deivanai Ammal* (4), with which I am in entire accord. My learned brother in that case, has, if I may venture to say so, applied what I think the most valuable test. He has treated the matter historically and has shown that Government in adopting the *ryotwari* system made their settlement with the cultivating *ryot* whom Government found on the land and treated him as the cultivating owner and intended him to remain as such. The system was intended to be in direct contrast with the Zemindari settlement, under which a number of persons who were in fact mere farmers of revenue were for the first time given an interest in the land but an interest subject to the existing rights of persons then cultivating the lands. I entirely agree with Mr. Justice Seshagiri Aiyar that it is not open to us to raise presumptions against this history, and I agree with him that wherever we find that a permanent right of occupancy is claimed by a cultivating tenant, the burden should be cast on him to show how he became entitled to this right.

I do not propose to pursue the matter further but simply to say that after a careful examination of all the cases and a careful re hearing in this case, I adopt the views expressed by Mr. Justice Seshagiri Aiyar in their entirety and would found my judgment on the reasons given by him in that case. It follows therefore that, in my opinion, the decision of Mr. Justice Spencer and Mr. Justice Krishnan in *Muthusami Ayar* v. *Nainar Ammal* (5) is incorrect and should not be followed. In the present case there is some small evidence of alienations by the 2nd defendant's predecessor, and also some evidence that rent has been received by the plaintiff from the 2nd defendant or his predecessors, which would indicate that although the plaintiff was at that time granting leases to persons in the position of the 1st defendant, he recognised the position of the 2nd defendant. Mr. Srinivasa Aiyangar has argued that this evidence does not conclusively prove the above facts, but I do not think it necessary to examine this; for, even if the evidence is to be accepted in its entirety, it falls far short of evidence of a grant of permanent right of occupancy by the plaintiff or his predecessors.

At the last moment, the contention was put forward that no notice had been given to the 2nd defendant and that, therefore, the plaintiff was not entitled to eject him. Mr. Srinivasa Aiyangar has met this by saying that his suit was brought against the 1st defendant, that he has never recognised any rights as tenant in the 2nd defendant and that if the 2nd defendant had set up that he was a tenant under the plaintiff which he did not, the plaintiff would have offered evidence of a previous denial of the plaintiff's title as far back as 1911, when the 2nd defendant demanded a *patta* from the Revenue authorities. In my opinion the 2nd defendant cannot be allowed to change his case at the last moment, after having pleaded absolute ownership in himself and denied the plaintiff's right of ownership as *pattadar*. I would, therefore, dismiss the second appeal with costs.

SADASIVA AIYAR, J.—I agree that where a tenant *under a ryotwari pattadar* sets up a permanent right of occupancy, the burden of proving such right lies on him [see *Chidambara Pillai* v. *Thiruvengadathiengar* (6)]. As stated about the above decision by Subramania Aiyar, J., in *Cheekati Zamindar* v. *Ranasooru Dhora* (7): "The view of the learned Judges was that permanent holdings under *ryotwari* proprietors being *unusual and exceptional*, the onus is on the party setting up such a special kind of holding." I do not think that the circumstance that the *pattadar* figures as the plaintiff in the suit and seeks to eject the

(4) 52 Ind. Cas. 247; 36 M. L. J. 463; 9 L. W. 453.
(5) 43 Ind. Cas. 977; 7 L. W. 194; (1918) M. W. N. 219.
(6) 7 M. L. J. 1.
(7) 23 M. 318 at p. 327.

tenant places the onus of proof as regards the *particular fact* upon the plaintiff, that is, that he should prove the negative, that the tenant under him has not got the exceptional rights set up by the tenant. I respectfully dissent from those observations in *Venkatachala Goundan* v. *Rangaratnam Aiyar* (2) and *Veeranan Ambalam* v. *Annasawmi Iyer* (1) which are relied on by the appellant's learned Vakil Mr. S. Ramaswami Aiyar in support of his contention on this point.

As regards the question of notice to quit, the contesting 2nd defendant (the appellant) was allowed to intervene in the suit which was originally brought against the 1st defendant alone. The 2nd defendant was added in September 1914 (the suit having been brought in August 1914). The District Munsif ought to have then allowed and directed the plaintiff to amend the plaint (*a*) by the addition of the necessary allegations indicating the plaintiff's title to eject the newly added 2nd defendant, (*b*) by amending the relief paragraph (10) by adding the necessary reliefs prayed for against the 2nd defendant. Both sides, however, seem to have treated the plaint as so amended, and it was evidently understood between all parties and the Court that if the plaintiff established his proprietary right to the land and if the 2nd defendant's alleged permanent occupancy right was found against by the Court, the plaintiff's suit in ejectment against the 2nd defendant should be decreed on the basis that the amended plaint contained all the necessary allegations such as the service of a proper notice (to quit on the 2nd defendant if he was lessee or on the real lessee, if he was sub-lessee or a denial of the landlord's title before suit by the 2nd defendant or by the intermediate lessee, such allegations, if established, entitling the plaintiff to eject the 2nd defendant, even supposing that the 2nd defendant was a tenant from year to year or a sub-lessee from a lessee for years and not a mere trespasser. The 2nd defendant did not apply to the Munsif to raise any issue on the question of notice. This view is strengthened by the fact that the plea of absence of notice to quit was not raised in either of the Courts below and was not evidently thought of when the memorandum of second appeal was drafted in the first instance, as the ground has been inserted as an afterthought between the grounds Nos. 6 and 7 and marked 6 (*a*) in the memorandum of appeal.

In the result, I agree that the second appeal should be dismissed with the plaintiff's costs.

M. C. P.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 377 OF 1918.

March 7, 1919.

Present:—Mr. Justice Phillips.

SANKUNNI—DEFENDANT—PETITIONER

versus

IKKORA KUTTI—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 30—Wagering contract —"Kuri," *whether wagering contract—Suit to recover money paid towards* "kuri," *whether maintainble.*

Though a "*kuri*" as ordinarily conducted in Malabar is not a lottery, yet if some subscribes obtain as prizes amounts which are in excess of the amounts subscribed by them, it comes within the definition of lottery and a suit to recover money paid for such lottery is not enforceable. [p. 990, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Chowghat, in Small Cause Suit No. 607 of 1917.

FACTS appear from the judgment.

Mr. *C. Madhavan Nair*, for the Petitioner.

—Ordinarily, in a Malabar *kuri* a subscriber gets back only what he subscribed. Here, one subscriber got more. It becomes a lottery or distribution by chance. The fact that other subscribers only got back the amounts subscribed without interest does not affect the question.

JUDGMENT.—It has been held in *Kamakshi Achari* v. *Appavu Pillai* (1) that a "*kuri*" as ordinarily conducted is not a lottery, inasmuch as each subscriber merely gets back his subscriptions in the form of

(1) 1 M. H. C. R. 448.

a loan, and the only thing which is dependent on chance is the order in which the loans are received. In the present case, however, one subscriber at each of the first 99 drawings received something more than what he subscribed, the amounts varying from 4 annas to Rs. 24 12 0. No doubt all the other subscribers eventually got back their money without interest but that does not affect the case of those subscribers who got prizes in excess of their subscriptions.

The fact that the promoter of the *kuri* was liable to the remaining subscribers for the future subscriptions of the prize-winners does not alter the nature of the business, for the prize-winners themselves were under no such liability Although, therefore, it has been consistently held in this Court that a *kuri* as ordinarily conducted does not amount to a lottery, the present form of *kuri* appears to me to come within the definition of lottery (*i. e.*,) a distribution of prizes by lot, or chances, and I may refer to the English cases on the point [*Taylor* v. *Smetten* (2), *Reg.* v. *Harris* (3) and *Willis* v. *Young* (4)]. The prizes may by actuarial calculation be found to be approximately equivalent to the interest that might have been earned by the prize-winner in the ordinary form of *kuri*, but in the present case he is absolved from all risks attendant on earning such interest but gets his prize in ready cash. I, therefore, hold that the plaint *kuri* is a lottery in which some subscribers obtain prizes by lot and consequently plaintiff's suit to recover money paid for such lottery is not maintainable.

The petition is allowed and plaintiff's suit dismissed with costs throughout.

M.C.P.

Petition allowed.

(2) (1883) 11 Q. B. D. 207; 52 L. J. M. C. 101; 48 J. P. 36.
(3) 10 Cox C. C. 352.
(4) (1907) 1 K. B. 448; 76 L. J. K. B. 390; 96 L. T. 155; 71 J. P. 6; 23 T. L. R. 23.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 647 OF 1918.

August 8, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Babu CHHAKOWRI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), ss 25, 26—Commissioner, power of, to annul sale—Jurisdiction—Sale, when there are no arrears, validity of—Specific Relief Act (I of 1877), s. 42—Relief—Discretion of Court—Substantial injury.

Under section 25 of the Bengal Land Revenue Sales Act the Commissioner has jurisdiction to annul a sale which may appear to him not to have been conducted according to the provisions of the Act. [p. 991, col. 2.]

A sale of an estate for arrears of revenue where no such arrears exist is null and void [p. 991, col. 1]

In a suit under section 42 of the Specific Relief Act, the granting of relief is discretionary with the Court, and the Court will not grant relief unless there is substantial injury. [p. 992, col. 1.]

Second appeal from a decision of the District Judge, Gaya.

Messrs. *P. C. Manuk*, *Rajendra Prasad* and *S. Saran*, for the Appellant.

Messrs. *Fakhruddin* and *Ragho Prasad*, for the Respondents.

JUDGMENT.

COUTTS, J.—This is a second appeal against the decision of the District Judge of Gaya, dismissing an appeal against a decree of the Subordinate Judge. The facts are shortly as follows:—

In a certain revenue-paying estate there were three separate accounts Nos. 33, 26 and 31 and also a residuary share. When the March *kist* of 1915 became due, account No. 33 was in arrear to the extent of Rs. 3-10-0 and the residuary share was in arrear to the extent of Rs. 6 8 6. There was an excess, however, in respect of separate account Nos. 26 and 31 of Rs. 1-15-0 and 5 2 0 respectively. Sometimes in the month of April 1915 the arrear of Rs. 3-10-0 in respect of separate account No. 33 was paid with the permission of the Collector and this separate account was exempted from sale on the 1st of May 1915. When this payment of Rs. 3 10 0 was made and taking into account the excess which was in deposit in respect of separate accounts Nos. 26 and 31, there was no arrear in respect of the whole

estate. In spite of this, however, the proceedings for sale of the residuary share went on and, eventually, it was sold and purchased by the plaintiff in this suit, Chhakowri Singh. After the sale, the proprietors of the estate applied to the Commissioner for annulment of the sale and he, on the ground that, at the time of the sale, the general account was not in arrears, set aside the sale. The auction-purchaser then brought this suit for a declaration that the *ijmali* share was sold for its own arrears of Government revenue and that a good title passed by the purchase; and further, he asked for a declaration that the plaintiff was entitled to obtain a certificate of title from the Collector of Gaya.

The suit was dismissed in the Court of the Subordinate Judge; on appeal this decision was confirmed and the plaintiffs have now preferred this second appeal.

Two points are urged before us: (1) that there was, in fact, an arrear and (2) that the Commissioner had no jurisdiction to set aside the sale

With regard to the first of these points, the argument on behalf of the appellant is that the crucial point of time for determining whether an estate is in arrears or not, is the *kist* day and that if payment is not made on that day the estate must be sold, unless there is an express order of exemption by the Collector. In this case the payment of Rs. 3-10 0 was made after sale proclamation in respect of the *ijmali* share had issued, there was no application for exemption of the *ijmali* share and no exemption was granted and, consequently, it is contended, even although the whole of the estate was not in arrears after the payment, the *ijmali* share not having been specially exempted, the estate was bound to be sold. I am unable to accept this contention. As soon as the Collector expressly exempted the separate account No. 33 from sale on payment of Rs. 3-10 0, this payment had the effect of clearing off the arrears in respect of the whole estate and, consequently, of the *ijmali* share. There was, therefore, in fact no arrear due on the whole estate and the *ijmali* share was no longer liable to be sold. For another reason also, the estate was not liable to sale. Although on the *kist* day there was a default, it did not, under section 2 of Act XI of 1859, become an arrear of revenue until the 1st of the following month and, under section 3 of the Act, the estate did not become liable to sale until the date fixed by the Board of Revenue. Now, the dates fixed by the Board of Revenue under section 3 of the Act are 28th June, 28th September, 12th January and 28th March. The present case is one of default at the time of the March *kist*. Under section 2 of the Act, therefore, there was no arrear of revenue until the 1st of April. This being so, the property did not become liable to sale until the next date fixed by the Board of Revenue under section 3 of the Act. The next date is the 28th June. Consequently, the estate did not become liable to sale until that date and the sale by the Collector before that date was illegal. I am supported in this view by *Harkhoo Singh* v. *Bunsidhur Singh* (1), a decision which, so far as I know, has never been dissented from.

This brings us to the next question, whether the Commissioner had jurisdiction to annul the sale. Under section 25 of the Act, the Commissioner has power to annul a sale, "which shall appear to him not to have been conducted according to the provisions of the said Acts," *i.e.*, Act II (B. C.) of 1868 and Act XI of 1859; and under section 26 it is "competent to the Commissioner of Revenue on the ground of hardship or injustice to suspend the passing of final orders in any case of appeal from a sale and to represent the case to the Board of Revenue who, if they see cause, may recommend to the Local Government to annul the sale."

It is contended that the Commissioner can only act under section 25 when there has been a mistake in procedure and that in all other cases he must act under section 26 of the Act. I am not prepared to accept this argument, for it seems to me that the power given to the Commissioner under section 25 goes beyond procedure, but it is unnecessary to discuss this because this is a case of error in procedure. What happened was that the Mohurrir in charge of the register omitted to enter in the

(1) 25 C. 876; 2 C. W. N. 360; 13 Ind. Dec. (N. S.) 572.

general account, as he should have done, that the payment of Rs. 3 10 0 had been made and the estate was consequently no longer in arrear. There can, therefore, be no question that the Commissioner had jurisdiction in this case.

In this view of the case the appeal must fail, but in any case it must have failed. The suit is one under section 42 of the Specific Relief Act and relief in such a case is discretionary with the Court. The Court will not grant relief, unless there is substantial injury and in this case there is no substantial injury. The appeal, therefore, fails and I would dismiss it with costs.

DAS, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2025 OF 1917.

February 17, 1919.

Present:—Mr. Justice Bakewell and Mr. Justice Phillips.

VENKATA LAKSHMI NARASAYYA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MEENAKSHI AMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 43, applicability of—Vendor and purchaser—Sale by widow of her own and her co-widow's interest—Purchaser, knowledge of, of co-widow's interest—Vendor's acquisition of co-widow's interest, effect of.

Section 43 of the Transfer of Property Act does not apply to the case of a purchaser who knew, at the date of the sale, that the sale did not convey to him the whole interest which it purported to convey.

Where a Hindu widow sold properties belonging to her and her co-widow and the purchaser knew of the co-widow's interest in the property:

Held, that the purchase would not operate on the interest which the vendor subsequently acquired in her co-widow's share.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Appeal Suit No. 106 of 1916, preferred against the decree of the Court of the Additional District Munsif, Chingleput, in Original Suit No. 275 of 1913 (Original Suit No. 136 of 1913 on the file of the Principal District Munsif's Court, Poonammallee).

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Messrs. *A. Krishnaswamy Aiyar* and *B. Somayya*, for the Respondents.

JUDGMENT.—It is found by the lower Appellate Court that the purchaser was fully aware of the interest of the co-widow of his vendor at the time of the purchase and that, accordingly, there was no erroneous representation to the purchaser that his vendor was authorized to transfer the interest of her co-widow.

The purchaser, therefore, accepted a sale-deed which he was aware did not transfer the interest which it purported to deal with. He was, therefore, not misled in any way and section 43 of the Transfer of Property Act, which is founded on the principles of estoppel, does not apply. *Pandiri Bangaram* v. *Karumoory Subbaraju* (1). The decision in *Adikesavan Naidu* v. *Gurunatha Chetti* (2) does not in any way affect *Jandir Bangaram* v. *Karumoory Subbraju* (1).

The second appeal is dismissed with costs.

M.C.P.

Appeal dismissed.

(1) 8 Ind. Cas. 388; 34 M. 159 at p. 161; 8 M L T. 285.

(2) 39 Ind. Cas. 355; 40 M. 338; 32 M. L. J. 180; (1917) M. W. N. 171; 5 L W. 425; 22 M. L. T. 300.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 295 AND 297 OF 1918.

March 6, 1919.

Present:—Mr. Justice Kumaraswami Sastri.

A. VEDAJI BASKARA TIRUMAL RAO SAHIB REPRESENTED BY THE MANAGER, COURT OF WARDS, AND OTHERS—DEFENDANTS—PETITIONERS IN BOTH

versus

SUBRAMANIA GURUKKAL—PLAINTIFF—RESPONDENT IN C. R. P. No. 296 OF 1918.

SESHA GURUKKAL MINOR, BY GUARDIAN MATHURAMBAL—PLAINTIFF—RESPONDENT IN C. R. P. No. 297 OF 1918.

Suits Valuation Act (VII of 1887), s. 11, object of—

VEDAJI BASKARA TIRUMALRAOD v. SUBRAMANIA GURUKKAL.

Over-valuation or under-valuation of suit—Decision by Court not having pecuniary jurisdiction—Appellate Court, interference by, limits of—Absence of findings on points raised, effect of—Prejudice.

The object of section 11 of the Suits Valuation Act is to prevent the operation of the general rule that neither consent nor waiver can confer jurisdiction on Courts which have under law only a limited pecuniary jurisdiction, in cases where there has been no prejudice on the merits. [p. 996, col. 1.]

In cases of over-valuation or under-valuation, the Appellate Court should not interfere with the decision given by the lower Court on the merits unless the disposal of the suit has been prejudicially affected. [p. 996, col. 1.]

Govinda Menon v. *Karunakara Menon*, 24 M. 43, followed.

Where a lower Court fails to determine material questions specifically raised before it, such failure amounts to a disposal prejudicially affecting the party, and the decree will be set aside. [p. 996, col. 1.]

Petitions under section 115 of Act V of 1908, praying the High Court to revise the decrees of the Court of the District Munsif, Ranipet, dated the 1st November 1917, in Original Suits Nos. 220 and 221 of 1917.

These petitions coming on for hearing on 30th October 1918, the Court (Krishnan, J.,) delivered the following

JUDGMENT.—The first point taken by the petitioners in this civil revision petition is that the lower Court had no jurisdiction to try the suit as it was beyond its pecuniary jurisdiction.

The point was taken in the lower Court but the Munsif rejected it, holding that for purposes of valuation the suit fell under section 7, clause 5 (*a*), of the Court Fees Act. In Madras, in the absence of rules under section 3 of the Suits Valuation Act, section 14 of the Madras Civil Courts Act, which says the value for Court-fees and for jurisdiction is the same, is in force as, under section 6 of the Suits Valuation Act, section 14 gets repealed only on the rules under section 3 taking effect. It is, therefore, necessary to decide under what part of section 7, clause 5, this suit falls. It seems to me quite clear that it really falls under clause (*d*) and not under clause (*a*). See *Godavarthy Sundaramma* v. *Godavarthy Mangamma* (1). It seems to me to be, therefore, desirable that there should be a finding on the question what the market-value of the suit property is, before disposing of this petition.

The other questions raised in the case, including the one raised by the respondents' Counsel under section 11 of the Suits Valuation Act will be held over for consideration after the finding is returned.

The District Munsif will return a finding as to the market-value of the suit property. Parties will be allowed to adduce fresh evidence on the point.

Eight weeks are allowed for the submission of findings and seven days for filing objections.

In compliance with the order contained in the above judgment, the District Munsif of Ranipet submitted the following

FINDING.—I am directed to submit a finding as regards the market-value of the lands comprised in the two suits, Original Suits Nos. 220 and 221 of 1917, now before the High Court At the re-hearing the plaintiffs (respondents) did not adduce any oral evidence but merely filed Exhibit J, which is a copy of the plaint filed by the 1st defendant in the Temporary Sub-Court, Vellore. The defendants (petitioners) examined seven witnesses in addition—Defendants' witnesses Nos. 7 to 13, and filed Exhibits I to XIV.

2. Both the suits were heard together with the consent of parties. There are nine items comprised in Original Suit No. 220 of 1917, and there are eight items in Original Suit No. 221 of 1917. In Original Suit No. 220 of 1917, items Nos. 1 and 2 are dry lands and are 0-3-0 *cawnie* in extent; items Nos. 3 to 8 are wet, and the wet lands are of a total extent of 3-0-14 *cawnies*. Item No. 9 consists of tamarind trees, and the plaintiff Subrahmanya Gurukkal claims an undivided moiety therein. In Original Suit No. 221 of 1917, item No. 7 is dry and is 0-4-8 *cawnie* in extent; item No. 8 like item No. 9 in Original Suit No. 220 of 1917 is a moiety of the plaintiffs' right to the said tamarind trees; and items Nos. 1 to 6 are wet lands and are of a total extent of 3-2-6 *cawnies*.

3. The petitioners (defendants) have filed a number of sale-deeds, Exhibits I to VII and X to XIV; Exhibits V to VII are of recent dates, of the year 1918; but the other documents are between the years 1910 to 1917; and they show that a *cawnie* has been selling at not less than Rs. 1,000 nearly. The plaintiffs have not produced any sale-deed on their side; on the other hand Exhibit IV is a sale-deed by plaintiff Subrahmanya Gurukkal himself; that is dated 24th February 1916, under

(1) 47 Ind. Cas. 543; 34 M. L. J. 558; 8 L. W. 88.

which document 0 3-0 *cawnie* has been sold for Rs. 187 8-0, thus working out a value of Rs. 1,000 a *cawnie*. Exhibit VIII is a rough sketch prepared by the petitioners (defendants) showing the lands comprised in the suits, and the lands comprised in some of the registered documents exhibited in the case. The lands covered by the sale deeds filed in the case are situate close to the plaint lands.

4. As regards the dry lands, the oral evidence is that they are worth Rs. 300 to Rs. 400 a *cawnie*; and as regards item No 9 in Original Suit No. 220 of 1917, and item No. 8 in Original Suit No. 221 of 1917, there are ten tamarind trees included therein; there are three other trees in common, included in item No. 3 in Original Suit No. 220 and item No. 1 in Original Suit No. 221; the latter also will have to be taken into account and valued, and the defendants' witnesses would give their value to be between Rs. 700 and Rs. 800; it is not clear whether all the trees are all big ones, or some are big and some not. On an average the value of each tamarind tree may be fixed at Rs. 30 and the value of these thirteen trees will thus be Rs. 390.

5. To turn to the oral evidence, defendants' 7th witness, Manikka Udayan, is a vendee under Exhibit I, and he proves his sale. Under Exhibit I, $\frac{3}{4}$th of a *cawnie* was purchased at Rs. 750. The son-in law of defendants' 8th witness is the vendee under Exhibit II, and he swears that the plaint lands are superior in quality, and the land "Rajagambheeram" is irrigated by a river channel. Defendants' 9th witness, Krishnappa Udayan, is a purchaser under Exhibit III, and the price he has paid works out at Rs. 1,422 a *cawnie*. The witness further swears that each *cawnie* of dry land would be worth Rs. 300 or Rs. 400. Defendants' 10th witness is the Revenue Inspector of Kamakur *firka*, and defendants' 11th witness has been the *monigar* of Kamakur for the past 19 years. Defendants' 10th witness proves Exhibit VIII, and would swear that the plaint wet lands in both the suits would be worth Rs. 7,000, and the dry lands would be worth Rs. 400 a *cawnie*, and he estimates the ten tamarind trees at Rs. 80 a tree. Defendants' 10th witness, Srinivasa Mudali, further swears that in Kamakur, where the plaint lands are situate, it is difficult to purchase a *cawnie* for less than Rs. 1,000 and that the price ranges from Rs. 1,000 to Rs. 1,300 a *cawnie*, but the witness has been in Kamakur only for the past two years and his knowledge of the value of the lands, he says, is based upon an inspection of the title-deeds of the parties, which the *ryots* would produce before him when they request for transfer of *patta* in their names. The *monigar* Krishnappa Udayan, defendants' 11th witness, pays an assessment of Rs. 100 and has got landed property in Kamakur. There is no reason suggested by plaintiffs why his evidence should not be given its full weight and accepted; he has attested the sales Exhibits II, VI and X. His evidence is that the wet lands are worth Rs. 1,200 and Rs. 1,500 if irrigated by a river channel, and the dry lands are worth Rs. 400 a *cawnie*. Defendants' 12th witness is another *ryot* of Kamakur paying also an assessment of Rs. 100. It is to him, we find, plaintiff sold under Exhibit IV. It was suggested in the course of cross examination of defendants' witnesses Nos. 7 to 9, that owing to competition, and for other considerations, a heavy price was paid for the sales Exhibits I to III, but we found that plaintiff himself sold under Exhibit IV 0-3-0 *cawnie* for Rs. 187-8 0, and Exhibits X to XIV are of the years 1910, 1911, 1913 and 1914; and they all show that lands have been sold for not less than Rs. 1,000 a *cawnie*, and defendants' witnesses Nos 11 and 12, two respectable *ryots* of Kamakur, swear that generally there is no keen competition for the purchase of lands in the village.

6. The plaintiffs, Subrahmanya Gurukkal and Sesha Gurukkal, do not enter into the witness-box, and adduce no evidence in rebuttal of the oral and documentary evidence adduced for the defendants (petitioners). The plaintiffs would content themselves with producing, as already observed, a copy of Exhibit J. Exhibit J is a copy of plaint filed by the present 1st defendant through the Manager of the Court of Wards on 31st August 1918, *i. e*, after the present civil revision petitions were filed in the High Court. That suit was filed by 1st defendant for a declaration that he is the trustee of the Temple at Kamakur, and the lands in question are the property of the temple, and for an injunction to restrain the plaintiffs in the present suits, Original Suits Nos. 220 and 221 of 1917, from taking possession of

he plaint lands by virtue of the decree passed by this Court therein, and dated 1st November 1917. In the schedule of properties attached to the said plaint, the value of the lands in question including the tamarind tope is given as Rs. 2,500. The defendants say that the valuation is a mistake, and is due to oversight. That plaint was prepared by a Vakil at Vellore, and has been signed both by the Manager of the Court of Wards and by the Vakil. From a perusal of Exhibit J and the plaints and decrees in the two suits Original Suits Nos. 220 and 221 of 1917, we find that the valuation in Exhibit J, as sworn to by the defendants' 13th witness, has been taken, item for item, from the decrees in those cases. Defendants' 13th witness is a clerk under the Vakil who filed the plaint in Original Suit No. 45 of 1918, and he explains the mistake by stating that his Vakil, after the body of the plaint was drafted and approved by him, asked him (the clerk) to copy out the schedule of properties, from out of the decrees in Original Suits Nos. 220 and 221 of 1917, and he accordingly literally copied the valuation as given therein, and the valuation thus was due to a mistake and does not correctly represent the actual market-value of the lands. In the circumstances, the explanation furnished by defendants' 13th witness seems not improbable, and I accept the same. Exhibit J cannot thus be construed as favouring the plaintiffs.

7. Thus taking the several registered documents filed in the case, and all the circumstances into consideration, I should fix the market-value of each *cawnie* of wet land at Rs. 1,000 a *cawnie*, dry lands at Rs. 300 a *cawnie*, and the tamarind trees at Rs. 30 a tree. Calculating at the above rate, the market-value of items Nos. 1 and 2 in Original Suit No. 220 of 1917 comes to Rs. 55-4-0, items Nos. 3 to 8 to Rs. 3,054 11-0; and the value of a moiety of ten tamarind trees item No. 9 and a moiety of three tamarind trees in item No. 3 comes to Rs. 195. In all it coma to Rs. 3,305-15-0. In Original Suit No. 221 of 1917, items Nos. 1 to 6 are wet lands and the total extent is 3-2-6 *cawnies*; their value comes to Rs. 3,143-7-0 item No. 7 is dry land and its value at Rs. 300 a *cawnie* comes to Rs. 84-6-0. The value of item 8 tope—a moiety of the trees therein, and of a moiety of the three trees in item No. 1 comes to Rs. 195. Thus the market-value of items Nos. 1 to 8 in Original Suit No. 221 of 1917 comes to Rs. 3,427-13-0. My finding will thus be that the market value of the lands in Original Suit No. 220 of 1917 is Rs. 3,305 15-0, and of the lands comprised in Original Suit No. 221 of 1917 is Rs. 3,427-13-0. The connected records are herewith re submitted.

This petition came on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial.

Dr. *Swaminathan*, for the Petitioners.—The lower Court has fairly and correctly decided the case on the merits. Under section 11 of the Suits Valuation Act a mere wrong valuation ousting its jurisdiction is not a good ground for upsetting the decree.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondents.—Section 11 of the Suits Valuation Act does not apply. The section applies only where, having an option as to valuation, the plaintiff gives an incorrect valuation. Here a wrong principle has been followed and there is only one mode of valuation. See *Ghulam Akbar Khan* v. *Bakhat Bibi* (2).

JUDGMENT.—The finding of the lower Court is that the property is worth Rs. 3,305 15 0 and Rs. 3,427-13 0 No objections have been filed. The suit is, therefore, clearly beyond the jurisdiction of the District Munsif.

It is argued by Dr. Swaminathan that under section 11 of the Suits Valuation Act the Court ought not to interfere unless it is of opinion that in addition to the suit being beyond the pecuniary limits of the jurisdiction of the lower Court there has been prejudice on the merits and that in the present case the District Munsif has gone fully into the question and decided the case rightly. Mr. Govindaraghava Aiyar contends that section 11 can only apply to cases where the plaintiff having an option as to valuation gives an incorrect valuation, and not to cases where the principle of valuation is incorrect and a wrong principle has been followed in cases where there is only one method by

(2) 29 Ind. Cas. 796; 116 P. L. R. 1915; 229 P. W. R. 1915.

which the suit is to be valued. He refers to *Ghulam Akbar Khan* v. *Bakhat Bibi* (2).

I do not think there is anything in section 11 of the Suits Valuation Act which suggests the difference sought to be made by Mr. Govindaraghava Aiyar. The words are general and the section refers to over-valuation and under-valuation. It does not matter how the same arises. The very object of section 11 is to prevent the operation of the general rule that neither consent nor waiver can confer jurisdiction on Courts which have under law only a limited pecuniary jurisdiction in cases where there has been no prejudice on the merits. In *Govinda Menon* v. *Karunakara Menon* (3) it was held that in cases of over-valuation or under-valuation the Appellate Court should not interfere unless the disposal of the suit has been prejudicially affected.

As regards the question of prejudice I am of opinion that the lower Court ought to have determined the question as to how far Original Suit No. 214 of 1917 on the file of the Ranipet Court rendered the present suit *res judicata* as regards the question of the date of dispossession and how far the present suit is barred by Order II. The affidavit of the defendants' Vakil in the lower Court, which has not been contradicted, shows that these points were raised in the course of the argument and noted by the Judge who, however, makes no reference to it in his judgment. I think the petitioner has been prejudiced by the Munsif not having dealt with all the questions raised which fairly arose out of the pleadings. The portion of the decree declaring plaintiffs' title to the land is clearly wrong as the suit was under section 9 of the Specific Relief Act.

I set aside the decree of the District Munsif and direct him to return the plaint for presentation to the proper Court. Costs will abide and follow the result.

M. C. P.

Decree set aside.

(3) 24 M. 43.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 622 OF 1918.

August 8, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

GOPALJI SAH—PLAINTIFF—APPELLANT

versus

Musammat MANBIRTI KUER AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, power of, to gift property for benefit of husband's soul—Reversioner, right of objection of—Burden of proof.

A gift of family property by a Hindu widow for the benefit of her husband's soul is permissible and is just as valid and binding on the reversioners as if the gift had been made for purposes of legal necessity. But a gift for such a purpose must not amount to an exorbitant or excessive portion of the whole property. [p. 997, col. 2]

Where in such a case the donor adduces evidence showing a *prima facie* case which would justify such a gift, it is for the objecting reversioner to prove that the property alienated was excessive and that, therefore, the gift was not justified. [p. 998, col 1.]

Appeal from a decision of the District Judge, Saran, dated the 4th February 1918, affirming that of the Sub-Judge, Saran, dated the 4th September 1916.

Mr. *Harihar Prasad Singh*, for the Appellant.

Mr. *Ganesh Dutt Singh*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal by the plaintiff from a decision of the District Judge of Saran, dated the 4th February 1918, affirming a decision of the Subordinate Judge.

The plaintiff, who is described by the District Judge as a fairly well-to-do man with several houses of his own, is the next reversionary heir of the late Lalchand Ram, who died some years ago leaving a widow, the defendant No. 1, but no male issue, and who appears to have been a devout Hindu. During his lifetime he gave away much of his property for religious purposes. On the 7th May 1909 some 10 years after her husband's death, the defendant No. 1 executed a deed of gift of a house, part of the property inherited from her husband, in favour of Sheodip Misra, the defendant No. 2. A few years later, on the 10th November 1914, the defendant No. 2 executed a *zarpeshgi* deed in respect to the said house in favour of the defendant No. 3 for the sum of Rs. 1,000. It appears from the evidence that the defendant No. 2, the original donee, had spent money in

repairing the house, amounting to some Rs. 200 or Rs. 300, before the *zarpeshgi* deed was effected. Shortly afterwards, on the 12th January 1915, the plaintiff, although up to that time he appears to have taken no steps to get the deed of gift set aside, instituted the present suit claiming a declaration that the deed of gift of the 7th May 1909 executed by the widow in favour of the defendant No. 2 was without legal necessity and fraudulently executed and not binding upon him as reversioner of Lalchand Ram. The defence to the action was that the gift was made on the anniversary of her husband's *sradh* and was for his spiritual benefit and that a gift of such a nature was, according to Hindu Law, justifiable on the part of the widow.

The District Judge found that the widow gave the house in question to the defendant, No. 2 who is a Brahmin, on the anniversary of her husband's death and that she did so with religious motives. It is not disputed that it is competent to a Hindu widow to alienate portions of the family property for religious purposes and more particularly if the gift should be conducive to the spiritual welfare of her late husband. The plaintiff by his plaint alleged that the resources of the family were not such as to justify the gift of property of such value. The intrinsic value of the property itself is not great and according to the finding of the lower Court there was no evidence on the record to show that, at the time of the gift in question, the widow had no other property which she inherited from her husband than the disputed house, and, as far as can be gathered from the judgments of both the lower Courts, there does not appear to have been any direct evidence as to the actual extent of the family property held by the widow at the time of the gift. In dealing with this aspect of the case, the District Judge said that, apparently, all that passed to the widow from her late husband was this house. If, as a fact, there was no evidence on the record to show that the widow at that time had no other property inherited from her husband than the house in question, it is difficult to see how the District Judge arrived at this conclusion. It is not a distinct finding of fact that the widow had no other property and I think it was, in all probability, a view taken by him as to the probable state of affairs owing to the absence of any evidence upon the subject. Both the Subordinate Judge and the District Judge dismissed the suit. The former held that the gift in question was for the benefit of the soul of the late Lalchand Ram and as such was properly made by his widow on the day of the first *barkhi sradh* of her deceased husband. He, however, thought that, even if it was the only property in her possession, she would, even then, be justified in alienating it for such a purpose. The District Judge also found that the alienation was a religious one made by the widow to benefit the soul of her deceased husband and that such an alienation was valid. He did not decide the question of whether the gift would be valid if it were a gift of an unreasonable and excessive portion of the estate, although he mentions the point as having been raised and adds, as already stated, that the house was apparently all that passed into the widow's hands at the date of her husband's death. He thought, however, that the plaintiff's only object in bringing the suit was to give vent to his annoyance at the fact that the defendant No. 3 had acquired the *zarpeshgi* interest in the property. The judgment is not altogether satisfactory. There can be no doubt that a gift of family property by a Hindu widow for the benefit of her husband's soul is permissible and is just as valid and binding on the reversioners as if the gift had been made for the purposes of legal necessity. This, however, is subject to the rule discussed in the case of *Pannachand Chhotalal* v. *Manoharlal Nandlal* (1) that the gift for such purposes must not amount to an exorbitant or excessive portion of the whole property. In the present case it is stated by the Subordinate Judge that there was no evidence as to whether the widow possessed other property in addition to the house in question and the District Judge has not, in terms, found otherwise. In this state of affairs, as I have already indicated, I think it must be taken that when he says there was apparently no other property which passed to the widow, all

(1) 43 Ind. Cas. 729; 42 B. 136; 20 Bom. L. R. 1.

he meant was that, so far as the evidence went, there was nothing to show that she had any other property.

The question which then arises is, whether, in the absence of any evidence upon this matter, the plaintiff or the defendants ought to succeed. The onus was certainly upon the defendants in the first instance to adduce evidence showing a *prima facie* case which would justify the gift. This, I think, they did when they proved that the gift was for the spiritual benefit of the deceased. It then lay upon the plaintiff to make out that the property alienated for such a purpose was excessive and, therefore, not justified. In this respect it would appear that the plaintiff failed to establish the case which he set up in his pleadings that the resources of the family were not such as to justify the gift of property of the value of that in question. For this reason I think this appeal fails and must be dismissed with costs.

FOSTER, J.—I agree.

Appeal dismissed.

S. N. Das
Advocate High Court
Jammu & Kashmir

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 106 OF 1919

AND

CIVIL REVISIONS Nos. 87, 96 AND 97 OF 1919.

July 22, 1919.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

IN M. A. No. 106 OF 1919

Musammat ABBASI BEGUM—APPELLANT

versus

Musammat MUSTAFA BEGUM—RESPONDENT.

IN C. R. Nos. 87, 96 AND 97 OF 1919

Musammat ABBASI BEGUM—PETITIONER

versus

Musammat UMATUS SOGRA AND ANOTHER—OPPOSITE PARTY.

Guardians and Wards Act (VIII of 1890), s. 24—Muhammadan Law—Shia Law—Minor girl—Guardian appointed of person and property—Marriage of minor—Sanction of Court, whether necessary—Right of minor to select bridegroom.

Where a guardian has been appointed by the Court of the property and person of a minor girl, it is within the competency of the District Judge to sanction her marriage with a particular bridegroom. Such sanction is not only ordinarily desirable, but is necessary for the purpose of determining the suitability of the proposed bridegroom. Under the Shia law such a minor girl, who has attained puberty and the age of discretion, has an absolute right to marry the man of her choice, subject always to the superintendence, and, if necessary, the veto of the District Judge in his capacity of *parens patriæ* by delegation from the Sovereign. [p. 999, cols. 1 & 2.]

Appeal from a decision of the District Judge, Muzafferpur.

Mr. *Kurshed Husnain*, for the Appellant-Petitioner.

Messrs. *Sultan Ahmad* and *Hasan Jan*, for the Respondent and the Opposite Party.

JUDGMENT.—This matter arises out of a proposal of marriage made by *Musammat* Mustafa Begum in respect of Umatus Sogra, her grand-daughter by her daughter *Musammat* Kaniz Fatima.

The application was made on the 8th of January 1918 before the District Judge of Muzafferpur.

It appears that *Musammat* Umatus Sogra's father and mother are dead, and that in 1914 the District Judge appointed as the guardian of her person and property her paternal grandmother *Musammat* Abbasi Begum in conformity with the directions contained in the Will of the minor's father. It is alleged on behalf of *Musammat* Mustafa Begum that notwithstanding the appointment of a Court guardian the girl has never been in the custody of *Musammat* Abbasi Begum, that she has since her father's death continuously resided in the house of Mustafa Begum at Muzafferpur, that she has been educated by her and that she is desirous of marrying one Mohammad Hussain who is connected with the family of *Musammat* Mustafa Begum.

When the application of the 8th January 1918 was filed by *Musammat* Mustafa Begum, *Musammat* Abbasi Begum filed a counter-application before the District Judge objecting to the marriage and suggesting that the girl should be married to Akhtar Hussain, the son of one Nazir Husain, residing at Muzafferpur.

The District Judge on the 17th February 1919 disposed of both applications by an order in which he held that neither the paternal nor the maternal grandmother could be a guardian for marriage under the Shia Law to which the minor is subject.

At this time he also had before him a petition purporting to come from *Musamma*

Umatus Sogra herself and alleging that she had attained the age of puberty and discretion and that she desired to marry Mohammad Hussain.

In regard to this petition the District Judge ordered an enquiry for the purpose of definitely ascertaining the wishes of the minor, and appointed Khan Bahadur Ahmad Hussain and Moulvi Muhammad Shafi, two Pleaders of the Muzafferpur Bar, to make the necessary inquiries. The report of these gentlemen was submitted on the 27th February 1919.

On the 19th March 1919 in consequence of an application made on the 15th of March by *Musammat* Abbasi Begum, the District Judge recorded an order refusing to allow *Musammat* Abbasi Begum permission to cross-examine the two Commissioners, and to adduce evidence for the purpose of showing that their statements of the wishes of the minor were incorrect.

On the 31st March 1919 the District Judge disposed of the application of *Musammat* Umatus Sogra by an order granting sanction to her proposed marriage with Mohammad Hussain. On the same day he passed an order refusing the prayer of Abbasi Begum for the delivery of the body of *Musammat* Umatus Sogra to her care and custody.

Against this part of the learned District Judge's order which purports to have been made under section 25 of the Guardians and Wards Act, *Musammat* Abbasi Begum has filed Appeal No. 106 of 1919. Against the order of the 31st March 1919 she has preferred a motion which has been numbered as No 87 of 1919. Against the orders of the 17th February and 19th March 1919 she has preferred the motions which have been numbered 96 and 97 of 1919.

Now the first question to be considered is what are the powers of *Musammat* Umatus Sogra in the matter.

It has been found as a fact by the learned District Judge that she has attained puberty and the age of discretion. She has, therefore, under the Shia Law an absolute right to marry the man of her choice, subject always to the superintendence, and, if necessary, the veto of the District Judge in his capacity as *parens patriæ* by delegation from the Sovereign.

It is contended by Mr. Khurshed Husnain that the Judge has no power to sanction a marriage, though he may always restrain a ward from marking an unsuitable choice. In my opinion the Court has not only jurisdiction but it is its bounden duty, when apprised of a proposed marriage, to examine the fitness of the bridegroom and to advise the ward to the best of his ability. The power to veto the marriage implies necessarily the power to approve, and by recording the order of sanction in the present case he has done nothing whatsoever which can justify our interference under section 115, Civil Procedure Code. The case is still stronger where the minor herself, although she has made her choice, seeks the advice of the Court as a matter of courtesy, and I take it that the law contemplates that the welfare of the minor demands that no marriage should be performed without previous notice to the Court.

On the point of jurisdiction, therefore, it seems to me that the contention of Mr. Khurshed Husnain is not well-founded and must fail.

The next question is, whether it is a fact that the lady has arrived at the age of puberty and discretion.

Now in revision it is not ordinarily our practice to go into questions of fact; but a very strenuous argument has been addressed to us as to the various irregularities committed by the learned District Judge in appointing the two Vakils as Commissioners and in accepting their statement without any cross-examination in Court.

It has also been suggested that the proper course was for the Judge himself to have ordered the production of the minor in Court so that he might ascertain her wishes at first hand.

Now having regard to the customs of this part of the country and the status of the family to which the parties belong, we take it that it would have been impossible to secure the attendance of the minor in Court or to arrange that she should have been seen by the presiding officer himself. The Court adopted under the circumstances the procedure best suited to the object in view. He appointed two most respectable gentlemen who were personally known to him, one of them being a Khan Bahadur and a

member of the Legislative Council. From the record of their proceedings I am quite satisfied that there can be no shadow of reason for suspecting that they were actuated by any improper motives in the matter. It appears from the record that Syed Ahmad Hussain, who though not a relation has known the girl from her childhood and is addressed as *dada* or grandfather, took the girl into a room by herself and put questions to her; the answers being recorded by Moulvi Muhammad Shafi who was sitting at the door. Nobody who reads these answers can fail to draw the inference that they give an accurate statement of what she said and that they represent her own views with regard to the choice of a husband. A certificate to this effect has also been appended by the two gentlemen themselves. In the statement the girl says that she is sixteen years of age, and on being asked whether she wishes to marry the eldest son of Qasim Mian or the youngest son of Nazir Mian and on being warned that her choice would affect her whole future and was to be made after the most anxious consideration, she answered, "I would like to make a marriage with Qasim Mian's eldest son." She was then asked whether she had spoken under the influence of any one else, that is to say, her paternal or maternal grandmother, and her answer again was, "No. I have said so of my own free will."

Under these circumstances it is impossible to hold that the learned Judge was not right in believing that the considered decision of *Musammat* Umatus Sogra was to marry Mohammad Hussain and to refuse the proposal of Akhtar Hussain.

As to her age and as to the fact of her having attained puberty, the report gives adequate grounds for holding that the finding of the District Judge was correct.

Under these circumstances the suggestion that we should remit the case for the examination of witnesses in Court is one which we cannot accept.

It has been stated by Mr. Khurshed Husnain that Syed Ali Nawab, the husband of *Musammat* Mustafa Begum, is opposed to the marriage, and that he being the nearest and eldest male relative on either side the omission of the learned District Judge to consult him vitiates his finding.

We have no definite information of the wishes of this gentleman in the matter. If any reliance is to be placed upon the affidavit furnished by *Musammat* Mustafa Begum, it would seem that he in 1916 was in favour of the marriage. However, we do not attach any importance to his wishes, because the District Judge had jurisdiction to decide upon the suitability of Mohammad Hussain and in the absence of anything to the contrary he has, in our opinion, given a very proper decision. The proposed bridegroom is a B. A. and is reading for the B. L. degree. There is a disparity of about ten years between him and his bride, but this, in the circumstances, is not a very great disadvantage.

We have been asked by Mr. Khurshed Husnain to prescribe directions as to the procedure which should be followed in regard to proposals for the marriage of wards of Court. We consider it unnecessary to lay down any hard and fast procedure, but we may say that we approve generally of the procedure laid down by their Lordships of the Calcutta High Court in the case of *Monijan Bibi* v. *District Judge of Birbhoom* (1). We have given effect to the principles followed in that case in holding that ordinarily the sanction of the Court is desirable, if not necessary, for the purpose of determining the suitability of the proposed bridegroom. The procedure suggested by their Lordships is one which commends itself to reason and is not contrary to law and consequently, in our opinion, it should, wherever possible, be followed.

In this view of the case the applications for revision in Cases Nos. 87, 96 and 97 of 1919 must be dismissed.

With regard to Appeal No. 106 of 1919, no doubt under ordinary circumstances the guardian appointed by the Court would have the right to the custody of the person of the minor; but as she has attained puberty and is of the age of discretion, her marriage with Mohammad Hussain will immediately make Mohammad Hussain the lawful guardian of her person and that being so, it is undesirable that we should direct her to be delivered into the custody of *Musammat* Abbasi Begum.

(1) 25 Ind. Cas. 229; 42 C. 351; 20 C. L. J. 91; 19 C. W. N. 290.

There is also the further ground that according to the finding of the learned Judge the girl has for a long time been in the custody of *Musammat* Mustafa. The petition of *Musammat* Abbasi Begum does not disclose how or when the girl was removed from her custody, and we think that there is ground for the suggestion of the opposite party that she has not for many years been in the custody of the guardian appointed by the Court.

Taking all the circumstances into consideration we do not think that we should, under section 25 of the Guardians and Wards Act, compel the minor to reside at present with *Musammat* Abbasi Begum.

The appeal and the motions are dismissed with costs. There will be one hearing fee in all these matters, assessed at five gold *mohurs*.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 567 OF 1918.

March 7, 1919.

Present:—Mr. Justice Kumaraswami Sastri.

CHILUKURI NARASIMHACHARYULU GARU—PLAINTIFF—PETITIONER

versus

ZAMINDAR OF BOBBILI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 12, applicability of—Civil Procedure Code (Act V of 1908), O VII, r. 10, O XLIII, r. 1 (a)—Valuation, decision as to, to determine jurisdiction—Plaint, return of, for presentation to proper Court—Appeal, whether lies.

Section 12 of the Court Fees Act has no application where the valuation is made by the Court for the purpose of determining the question whether the suit is within the pecuniary limits of the Court's jurisdiction.

Where, on the basis of such valuation, a plaint is returned for presentation to the proper Court, an appeal lies against the order under Order XLIII, rule 1 (*a*), Civil Procedure Code.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Vizagapatam, in Civil Miscellaneous Appeal No. 14 of 1917, preferred against the decree of the Court of the District Munsif, Rajam, in Original Suit No. 2 of 1917.

Mr. *V. Suryanarayana*, for the Petitioner.

Messrs. *T. V. Venkataroma Aiyar* and *Y. Suryanarayana*, for the Respondents.

JUDGMENT.—The plaintiff, who is the appellant, valued the lands referred to in the plaint at Rs. 100 and filed the suit in the District Munsif's Court. Objection was taken as to jurisdiction on the ground that the lands were greatly undervalued and that their proper value was beyond the Court's pecuniary jurisdiction. The District Munsif found on the evidence that the lands were worth Rs. 4,000 and ordered the plaint to be returned for presentation to the proper Court.

This order returning the plaint is appealable under Order XLIII, rule 1, clause (*a*), and an appeal was filed in the District Court. The District Judge, relying on section 12, clause 1, of the Court Fees Act, held that no appeal lay as the decision of the District Munsif as to the valuation was final.

I am of opinion that the decision of the District Judge cannot be supported. As was pointed in *Peari Shah* v. *Surja Mal* (1), section 12 of the Court Fees Act has no application where the valuation is made by the Court for the purpose of determining the question whether the suit is within the pecuniary limits of the Court's jurisdiction. All the authorities have been reviewed by Mookerjee and Holmwood, JJ., and I entirely agree with the decision, which is in accordance with the view taken by this Court in *Annamalai Chetti* v. *Cloete* (2) and *Kanaran* v. *Komappan* (3).

I set aside the decree of the lower Court and direct it to dispose of the appeal according to law. Respondents will pay appellant's costs.

M. C. P.

Decree set aside.

(1) 16 Ind. Cas. 575; 17 C. W. N. 503; 16 C. L. J. 371.
(2) 4 M. 204; 1 Ind. Dec. (N. S.) 977.
(3) 14 M. 169; 5 Ind. Dec. (N. S.) 120.

SATDEO NARAIN *v.* RAMAYAN TEWARI.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 59 OF 1919.

June 26, 1919.

Present:—Mr. Justice Coutts.

Pande SATDEO NARAIN—APPELLANT

versus

RAMAYAN TEWARI—RESPONDENT.

Court-fees—Cross-objection, value of—Declaration in respect of mortgage sought to be set aside—Ad valorem *fee.*

Where the object of a cross-objection is to have a declaration in respect to a mortgage set aside, the proper value of the cross-objection, for the purpose of Court-fees, is the value of the mortgage.

FACTS.—The plaintiff, who was a Hindu presumptive reversioner, brought the suit for possession of the property in dispute with a declaration that the mortgage executed by the widow of the deceased owner of the property was not binding on him and that the mortgage decree obtained on the mortgage and the subsequent sale thereunder was invalid and infructuous so far as he was concerned. The defendants Nos. 3, 4 and 5 were the transferees from the auction-purchaser in execution of the mortgage-decree. They contended, among other things, that the mortgage executed by the widow was binding on the plaintiff. The first Court disallowed the plaintiff's suit for possession but gave a declaration that the mortgage was not binding on him. The plaintiff appealed and the defendants Nos. 3, 4 and 5 filed a cross-objection on the ground that the mortgage-bond was binding on the plaintiff as reversioner. The property involved was worth Rs. 13,300. Defendants Nos. 3, 4 and 5 were *zarpeshgidars* on behalf of the auction-purchaser and their *zarpeshgi* was Rs. 12,300. The original mortgage of 1896 executed by the widow, which the plaintiff wanted to have declared as not binding on him, was for Rs. 1,900 only. Defendants Nos. 3, 4 and 5 paid a Court-fee of Rs. 10 only on the cross-objection. The Stamp Reporter submitted that if the declaration given by the Court of first instance would be set aside, the defendants Nos. 3, 4 and 5 would be benefited by Rs. 12,300, and, therefore, they should pay *ad valorem* Court-fees on that amount. The Taxing Officer considering the case of some importance referred it to the Taxing Judge.

Messrs. *Susil Madhab Mullick, Jitendra Nath Sen Gupta* and *Narendra Nath Sen*, for the Appellant.

Messrs. *Rajendra Prasad, Sambhu Saran* and *Nirsu Narayan Sinha*, for the Respondent.

JUDGMENT.—This is a reference by the Taxing Officer. A Hindu widow mortgaged two properties. A suit was brought by the mortgagee who obtained a decree and in execution purchased the mortgaged properties. We are in this case concerned with only one of these properties, which was purchased for Rs. 826. After the auction sale the decree-holder auction-purchaser sold this property to one Baldeo Sahai, who in his turn mortgaged it to Sri Kishun Sahu, Sitaram Sahu and Durga Prasad (defendants-respondents Nos. 3, 4 and 5). The present suit was then instituted by the presumptive reversioners for possession of the property and also for a declaration that the mortgage by the widow and all subsequent transactions were invalid. The prayer for possession has been disallowed in the Court of first instance, the only relief granted being a declaration that the mortgage by the widow was not binding on the plaintiffs. Against this decree the plaintiffs have appealed and a cross-objection has been filed by the defendants-respondents Nos. 3, 4 and 5 in regard to the declaration. It is with the Court-fee to be paid on the cross-objection that we are concerned, and the point for consideration is whether the value of the cross-objection should be the value of the mortgage in regard to which the declaration was obtained, or whether it should be the value of the cross-objectors' mortgage which was for a sum very much greater than the mortgage by the widow. It is true that if the declaration is set aside, the cross-objectors may be benefited to a much greater extent than the value of the declaration, but this is not a matter with which we are concerned. All that is asked for is that the declaration in regard to the widow's mortgage should be set aside and the value of this mortgage, in my opinion, is the proper value of the cross-objection.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 139 OF 1917.

May 2, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

OVULA KONDAMA NAICKEN AIYEN AVERGAL AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

APARANJI AMMA AND OTHERS—DEFENDANTS NOS. 1 TO 6—RESPONDENTS.

Compromise—Good faith, want of—Advantage secured by one party—Trust—Transferee in good faith, position of—Trusts Act (II of 1882), ss. 89, 96.

Where a compromise is entered into as between persons, one of whom could not have in good faith believed in the claim put forward by him and the latter secures an undue advantage to the prejudice of the other party, such advantage must be deemed to be held in trust for the benefit of the person prejudiced or his representative and should be restored to the latter. [p. 1007, col. 2; p. 1008, col. 1.]

Gunjeshwar Kunwar v. *Durga Prashad Singh*, 42 Ind. Cas. 849; 45 C. 17; 22 M. L. T. 403; 22 C. W. N. 74; 26 C. L. J. 557; 16 A. L J. 1; 34 M. L. J. 1; 20 Bom. L. R. 38; (1918) M. W. N. 16; 7 L. W. 94; 4 P. L. W. 1; 44 I. A. 229 (P. C.), followed.

An alienee in good faith and for consideration from the party who has secured such advantage is not, however, affected by the infirmities affecting his alienor's title. [p. 1008, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Madura, in Original Suit No. 9 of 1916 (Original Suit No. 29 of 1915 on the file of the Court of the Subordinate Judge of Madura).

Messrs. *T. R. Venkatarama Sastri* and *T. S. Ramaswami Aiyar*, for the Appellants.

The Hon'ble Mr. *T. Rangachariar*, Messrs. *S. Srinivasa Aiyangar* and *B. Sitarama Row*, for the Respondents.

This appeal coming on for hearing on the 8th and 9th August 1918, the Court delivered the following

JUDGMENT.—We are not satisfied that the learned Subordinate Judge has sufficiently considered the bearing of all the material evidence in this case on the questions whether there was a *bona fide* dispute which was settled by the compromise embodied in Exhibit A and the partition deed Exhibit C or a fair family settlement. He has not considered the effect of the evidence as to the property, which is the subject of the present suit and in the hands of the alienee, having been the separate property of Mailchamy and his branch, having come to them from their grandmother's father, the Zemindar of Ayakudi. He has also not considered with reference to the question of *bona fides* the evidence as to whether the two branches were divided or not. This evidence must be taken into account in order to arrive at a conclusion whether the compromise now in question was really a *bona fide* compromise of doubtful claims or a fair family settlement. Before disposing of the case, we must call for a fresh finding on these questions. We leave it to the discretion of the learned Subordinate Judge to decide whether fresh evidence should be taken.

We direct the Subordinate Judge to return findings on the following issues:—

1. Was the property in dispute the separate property of Mailchamy?

2. Were Mailchamy and Mandalathipathi undivided?

3. Was there a *bona fide* dispute which was settled by Exhibits A and C or did they amount to a fair family arrangement? In considering this question the evidence as to the existence of a Will by Mailchamy leaving property to be divided into three shares, will also have to be considered.

Two months will be allowed for the submission of the finding and seven days for objections.

In compliance with the order contained in the above judgment the Temporary Subordinate Judge of Madura submitted the following

FINDINGS.—The High Court having remanded the case for finding on the following issues, *viz* :—

(*i*) Whether the property in dispute is the separate property of Mailchamy and his branch, having come to them from their grandmother's father the Zemindar of Ayakudi?

(*ii*) Were Mailchamy and Mandalathipathi undivided?

(*iii*) Was there a *bona fide* dispute which was settled by Exhibits A and C or did they amount to any family arrangement?

I submit the following findings :—

1. *issue* 1.—The suit properties consist of 8 items. Of these, items Nos. 6 and 8 are house properties and the rest are lands. It is not clearly stated in the plaint how the suit properties are the separate pro-

perties of Mailchamy and his branch. Plaintiffs' Vakil says that it is never the plaintiffs' case that the properties are Manjakkani properties of Mailchamy's grandmother Madamma, but their case is that they are the self-acquisition of Mailchamy in his own lifetime, having been given to him by the Zamindar of Ayakudi on account of love and affection towards him. I shall, therefore, consider whether the properties were the self-acquisition of Mailchamy in his own lifetime. In support of their contention, plaintiffs examined Sivaswami Pillai (plaintiff witness No. 10), who was Karnam of Ayakudi. They also rely on the statement, Exhibit LL, filed by the 3rd defendant in the criminal proceedings and on the descriptions contained in the documents Exhibits CC, DD, G and E executed by Mailchamy. Sivaswami Pillai (plaintiff witness No. 10) says in his chief examination that items Nos. 1, 2 and 7 (which are situate in the block called Panchanthangi and irrigated by Papan channel) and also items Nos. 4 and 5 (which are Combai Punjai) were given to Mailchamy by the Zemindar. Third defendant also in her statement (Exhibit LL) stated that the suit properties were given to her father-in law Mailchamy by the Zemindar. But the statement of these two witnesses is worthless. Plaintiffs' witness No. 10 admitted in his cross-examination that he had no personal knowledge of the alleged gift to Mailchamy by the Zemindar. Third defendant also had no personal knowledge, and in the plaint, Exhibit M, which she subsequently filed, she ceased to mention that the suit properties were her father-in-law's self-acquisition. As regards items Nos. 2 to 6 and 8, Mailchamy himself nowhere described them as his self-acquisition. He was describing as his self-acquisition only items Nos. 1 and 7 (for the description of item No. 1, see Exhibits CC, DD, G and for description of item No. 7; see Exhibit C). To consider that at least these two items Nos. 1 and 7 were his self-acquisition, I do not think that the mere recitals in the above said documents are sufficient in the absence of any other corroborating evidence. I, therefore, hold that none of the suit properties are the self-acquisition of Mailchamy in his lifetime. They are not either Manjakkani properties (Streedhanam) of Mailchamy's grandmother according to the plaintiffs' Vakil's own admission.

2. *Issue* 2.—Then with regard to the second question, there is no direct evidence, either oral or documentary, on the point of division set up by the plaintiffs. The matter is to be judged merely from circumstantial evidence. It is conceded on all hands that Mandalathipathi's father and grandfather lived at Balasamudram and remained in possession of the properties there, while Mailchamy and his father lived at Ayakudi and remained in possession of the properties situate in that village. It is also in evidence that the *patta* for Ayakudi lands stood in the name of Mailchamy (*vide pattas* T series) and that he alone was paying the taxes on those lands and also on the houses situate in that village (*vide* receipts Exhibits U, W, Y series), while the *patta* for Balasamudram lands stood in the name of Mandalathipathi's father (*vide* receipts Exhibit L) and after his death in the name of Mandalathipathi (*vide patta* Exhibit SS). Also each branch was alienating the properties in its separate possession as its own. To begin with the alienations of Balasamudram properties by Mandalathipathi's branch alone, Mandalathipathi's father executed in 1865 two mortgages of some ancestral lands at Balasamudram as if they belonged to him exclusively, and died in 1868 (*vide* recitals in Exhibit L). Afterwards Mandalathipathi's mother as guardian of Mandalathipathi discharged these two debts by selling away the mortgaged lands for Rs. 8,000 (*vide* sale-deed Exhibit L). Mandalathipathi's mother as his guardian sold away also one ancestral house in 1873 under sale-deed Exhibit H, as if it belonged to Mandalathipathi's branch alone. Mandalathipathi himself after he attained majority executed a mortgage of all the remaining ancestral lands at Balasamudram as if they were his own (*vide* mortgage-deed Exhibit M) and lent the money so raised on that mortgage to a certain Muhammadan, Kadir Lebbai (*vide* Exhibit AA), without the concern of Mailchamy. Similarly from 1881, Mailchamy alone commenced to make alienations of the ancestral properties at Ayakudi in his possession as if they were his own (*vide* mortgages and sale-deed—Exhibits Q, R, NN, OO, and CC). All these circumstances—the separate living of the two

families from the time of Mandalathipathi's grandfather, separate possession and enjoyment of separate properties by each branch, separate *pattas* and separate payment of *kists* and separate dealings with the separate properties in their respective possessions as if they were their own properties—all these clearly indicate that the two branches must have become divided both in status and estate at least so far back as 1865.

3 It is argued by the defendants' Vakil that the two branches might be joint and the alienations made by Mandalathipathi's father in his time and those made after his death by Mailchamy might be in their capacity as the then family managers. But the subsequent conduct of Mandalathipathi and his mother leaves no room for any such supposition. If the two families were undivided, Mailchamy as the senior member and manager would be the proper person to execute Exhibits L and H either singly or jointly with Mandalathipathi's mother. But instead of that we find Mandalathipathi's mother alone executing those deeds as guardian of Mandalathipathi and treating him as the absolute owner of Balasamudram properties. As above pointed out, Mandalathipathi also after attaining majority considered himself to be the absolute owner of the properties situate at Balsamudram. He got the *patta* for Balasamudram lands issued in his name and he sold away some of those properties and mortgaged some, without reference to Mailchamy. Such cannot be the case if the two families were joint and Mailchamy was the manager after the death of Mandalathipathi's father.

4. Defendants' Vakil next argues that the properties described as ancestral and dealt with under Exhibits H, L, K and M might have been the self acquisition of either Mandalathipathi's grandfather or father, and not derived from the common ancestor, and that Mandalathipathi and his parents, therefore, rightly dealt with those properties without reference to Mailchamy. But there is no proof that the properties so dealt with were the self-acquisition of Mandalathipathi's grandfather or father.

5. Then with regard to the evidence on the defence side, defendants have absolutely no evidence whatever to show that the income from the lands of the two villages was ever mixed together and used by both families for common purposes during the lifetime of Mandalathipathi's father and grandfather. To prove jointness defendants rely mainly on the fact that during his minority Mandalathipathi lived with Mailchamy and that the latter then managed the properties in the two villages. Mandalathipathi lost his father in 1869 and mother in 1876. At the time of the death of his mother he was about $7\frac{1}{2}$ years old. Defence witnesses Viswanatha Monigar (defence witness No. 1), Suppiah Chetti (defence witness No. 3), Sankaralingam Pillai (defence witness No. 4), Venkatagiri Nainavaru (defence witness No. 6) and also 3rd defendant (defence witness No. 7) say that since his mother's death and until 1896 Mandalathipathi lived at Ayakudi with Mailchamy. Defence witnesses Nos. 1 and 2 further say that Mailchamy then managed also the lands at Balasamudram and received the paddy from those lands. That Mandalathipathi lived with Mailchamy for sometime after his mother's death is admitted also by plaintiffs' eleventh witness (Chithanaha Vadhiar) and by Mailchamy himself in his written statement Exhibit KK-1. But I do not attach any special importance to this circumstance. It may be that Mailchamy took Mandalathipathi into his protection and looked also after his lands, seeing that he lost both his parents and there was no other to take care of him. This was what Mailchamy stated in Exhibit KK 1. There is not a single document to show that Mailchamy treated Balasamudram properties as his own even during that period.

6. During the time Mandalathipathi lived with Mailchamy, Mailchamy attested two sale-deeds (Exhibits J and K) executed by Mandalathipathi in respect of the ancestral houses at Balasamudram. Similarly Mandalathipathi attested usufructuary mortgage (Exhibit BB) and a sale deed (Exhibit Z) of Ayakudi lands executed by Mailchamy. Further Mandalathipathi having owed some rent to the mortgagee under Exhibit BB, Mailchamy undertook to pay it on Mailchamy's behalf (*vide* Exhibit XV). Defendants contend that these acts indicate that Mailchamy and Mandalathipathi had joint interest in all the properties situate in both the villages. But mere attestations alone of each other's documents do not signify any such thing.

At no time they executed or took any document in their joint names. Then about Mailchamy's undertaking to pay the rent due by Mandalathipathi, it is not known under what circumstances he had so undertaken. The above circumstances are, therefore, not sufficient to warrant an inference of jointness.

7. Defendants rely also on the written statement Exhibit KK-1 put in by Mailchamy in answer to Mandalathipathi's plaint Exhibit KK. But I do not think that statement helps them in any way. No doubt Mailchamy has not expressly stated in Exhibit KK-1 that there was any regular partition between the two families. But he openly denied that the two families were joint and alleged that the sole and independent enjoyment by each branch of the properties in their respective possession from several years operated as a virtual or *de facto* division. That appears to be his plea by reading together paragraphs 4 and 5 of that statement.

8. Such is the evidence on both sides. In my opinion, the whole evidence and inferences from facts proved are consistent only with the hypothesis of separation of the two branches in estate also long before the death of Mandalathipathi's father. My finding then is that Mailchamy and Mandalathipathi were not joint.

9. Coming now to the question whether the Will set up by the 3rd defendant is true, Viswanatha Monigar (defence witness No. 1), Suppiah Chetti (defence witness No. 2), Sankaralingam Pillai (defence witness No. 4) and the 3rd defendant (defence witness No. 7) say that Mailchamy died on 14th May 1901, that four days before his death, *i.e.*, on 10th May he executed a Will by which he bequeathed all his properties equally to his daughter (the 1st defendant), daughter-in-law (the 3rd defendant) and nephew (Mandalathipathi) and that the said Will was written by one Perumalswami Naicken and attested by defendants witnesses Nos. 1, 2 and 4 and 15 others. Venkatagiri Nainavaru (defendant witness No. 6) says that he came to Ayakudi on the next day after the execution of the Will, that Mailchamy then mentioned the Will to him and that it was also read over to the witness. But the evidence of these witnesses is interested and conflicting. Defendant witnesses Nos. 1 and 2 hold decrees against the 2nd defendant and it is, therefore, their interest to see that the 2nd defendant is not deprived of the plaint properties. Defendant witness No. 4 is indebted to the 4th defendant. Defendant witness No. 6 is a near relation of the 3rd defendant, and it was he who conducted all the criminal proceedings on behalf of the 3rd defendant and also the suit of 1902. Defendant witness No. 4 says that Mailchamy divided his properties among the three legatees and that three lists showing the properties given to each legatee were prepared along with the Will. But defendant witness No. 1 does not say that any such division was made and lists were prepared. In her plaint, Exhibit MM, 3rd defendant set up that her father-in-law made another Will previously on the 7th May 1901, by which he bequeathed all his properties equally to her and her daughter alone. But that prior Will is now denied. The first mention of the Will now in question was made by the 3rd defendant only in her plaint (Exhibit MM) filed in February 1902 after a long interval of nine months. It was never put forward before. The reason given by the defendant's witnesses for its non registration is that at the instigation of Mandilathipathi, Perumalswami Naicken duped the defendants Nos. 1 and 3 by saying that the Registrar would come. But it is not a satisfactory reason. Mailchamy would not have allowed Perumalswami Naicken to make any delay.

10. On the plaintiffs' side plaintiff witness No. 1 (1st defendant) denies that any Will was executed by her father. Also plaintiff and plaintiff witness No. 11 (Palace Tutor) say that Mailchamy did not execute any Will before his death. For the above reasons I find that the alleged Will is not true.

11. *Issue* 3.—I have found that the two branches were divided. Neither the 1st defendant nor Mandalathipathi could have been in ignorance or in doubt as to that fact. After he had attained majority, Mandalathipathi got the *patta* for Balasamudram lands issued in his name and mortgaged those lands as if they were his own. He thus considered himself to be a divided member. Third defendant also cannot be said to have any honest and *bona fide* belief in the claim she was making. I, therefore, hold that the compromise (Exhibit A) and the subsequent partition deed (Exhibit C) were not *bona fide*, nor can they be properly called a family settlement.

This appeal came on for final hearing after the return of the finding of the lower Court on the 28th April 1919.

JUDGMENT.

SESHAGIRI AIYAR, J.—The property in suit was last in the possession of one Mailchamy who died in May 1901. He left behind him a daughter, a daughter-in-law of a predeceased son and one Mandalathipathi, a distant cousin. This cousin was living with the deceased for some years before his death. After his death disputes arose regarding succession to his property. The daughter-in-law put forward a Will alleged to have been executed by Mailchamy, under which she claimed that she was entitled to a third of his property. The Magistrate who enquired into the claim as to possession decided against her. Thereupon she sued to establish her one-third share in the properties. The daughter of Mailchamy, who is the 1st defendant in the suit, denied that the property was the separate property of Mailchamy and also the genuineness of the Will. Mandalathipathi on the other hand claimed the property to have come to him by survivorship as he and Mailchamy were undivided. During the course of the trial, the parties entered into a compromise which is Exhibit C in this case. By the compromise the daughter-in-law was given considerably less than the one-third which she claimed, and the rest of the property was directed to be divided practically half and half between the 1st defendant and Mandalathipathi. The property was enjoyed jointly by the 1st defendant and Mandalathipathi until 1907, when there was an actual division by metes and bounds between the two people. In 1910 Mandalathipathi mortgaged these and other properties not comprised in the suit to the present 4th defendant, who brought a suit on the mortgage and obtained a decree. The present suit is by the sons of the 1st defendant to set aside *inter alia* the mortgage in favour of the 4th defendant.

On the last occasion the Subordinate Judge found, without deciding whether the Will was genuine and whether Mailchamy and Mandalathipathi were divided or not, that the compromise was *bona fide* and should be enforced. We pointed out in our order that the *bona fides* of the compromise must be determined with reference to the facts whether the Will was genuine and whether Mailchamy and Mandalathipathi were divided. The present Subordinate Judge has returned findings to the effect that the two branches were divided and that the Will was not genuine. He has also found that the compromise is not binding, inasmuch as Mandalathipathi could not have honestly believed in the claim he put forward as being entitled to the property by survivorship. On the first two questions, we are satisfied that his findings are supported by the evidence he has referred to. It is true that the question has to be considered with reference to the state of affairs that existed at the time of the compromise and although Mandalathipathi filed a suit, which he subsequently withdrew, to set aside an alienation by Mailchamy on the ground that the property was undivided, the course of dealing by the two branches of family, their long separate residence and the absence of reliable evidence regarding common enjoyment far outweigh the absence of a regular deed of partition. I am not, therefore, prepared to differ from the Subordinate Judge on this question. As regards the Will, both the first Subordinate Judge and the present Subordinate Judge have agreed in holding that the evidence is insufficient to support its genuineness and I see no reason to differ from them.

At the same time, I must point out that there is no evidence that the 1st defendant, with full knowledge that there was no truth in the claim put forward by the daughter-in-law and Mandalathipathi agreed to the compromise from ulterior motives. There is not sufficient evidence to lead us to the conclusion that in assenting to the terms of the compromise she was not acting *bona fide* in the light of the circumstances then brought to her notice.

I have now to deal with the last of the findings of the Subordinate Judge. It may be, if the question arose between the plaintiffs and Mandalathipathi having regard to the decision of the Judicial Committee in *Gunjeshwar Kunwar* v. *Durga Prashad Singh*(1), the plaintiffs would be entitled to a decree, but the question is whether an alienee from

(1) 42 Ind. Cas. 849; 45 C. 17; 22 M. L. T. 403; 22 C. W. N. 74; 26 C. L. J. 557; 16 A. L. J. 1; 34 M. L. J. 1; 20 Bom. L. R. 38; (1918) M. W. N. 16; 7 L. W 94 4 P. L. W. 1; 44 I. A. 229 (P. C.).

a party who had not *bona fide* believed in the claim put forward by him is in the same position as the party himself. Our attention was drawn by the learned Vakil for the respondents to sections 89 and 96 of the Trusts Act. The former section provides that where any advantage is gained by the exercise of undue influence in derogation of the interests of another, the person gaining such without consideration must hold the advantage for the benefit of the person whose interests have been so prejudiced. Section 95 protects the right of transferees in good faith for consideration from persons who have gained an undue advantage. In my opinion, Mandalathipathi was in the position of a joint trustee within the meaning of section 89 of the Trusts Act. Therefore, the principle enunciated in these two sections is applicable to the present case. It is the principle of equity recognized in the Trusts Act and in other legislative enactments that a purchaser for value without notice of any defect of title in his transferor is entitled to protection, if he obtained the transfer *bona fide*.

Then it was said that the 1st defendant did not really represent the reversioners in the previous litigation. There is some justification for this contention in the language of the written statement; but having regard to the fact that the object of the statement was to defeat the claim of the person who set up the Will, too much importance should not be attached to the order in which the denials occur. In the written statement two alternative pleas were put forward, the one denying the Will and the other suggesting a *jus tertii*. Further this question of the 1st defendant not representing the estate was not put forward in the present case in the pleadings. Moreover, before the suit which ended in the compromise was filed and also on the very same day on which the compromise was entered into, and afterwards, the 1st defendant made statements about the property claiming it on behalf of her sons. *Vide* Exhibits LL and V. Therefore I am of opinion that she must be taken to have entered into the compromise as representing the estate.

The further question is whether the 4th defendant is a *bona fide* transferee for value without notice of any infirmities in the title of the transferor. On this question there is the evidence that he paid full consideration and that he was not aware of the defect in the title of Mandalathipathi. There is no evidence on the other side that he was aware that Mandalathipathi had practised any fraud upon the 1st defendant and that he had no right to the property which he purported to mortgage. I must, therefore, hold that the 4th defendant is a *bona fide* transferee for value. The result is that the suit against the 4th defendant must be dismissed with costs, and the decree of the Subordinate Judge will be confirmed in that respect. As regards properties in the possession of the other defendants, having regard to *Gunjeshwar Kunwar* v. *Durga Prashad Singh* (1), plaintiff is entitled to recover possession including the properties in the possession of the 3rd defendant, whose rights to maintenance will not be affected by this judgment. The decree, so far as these defendants are concerned, is reversed. Plaintiffs are entitled to their costs against these defendants and must pay the costs of the 4th defendant in this Court.

WALLIS, C. J.—I agree.

M.C.P.

Decree modified.

END OF VOLUME LII.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

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Witness, *statement of, as to age—Note made by Court, whether evidence.*

A witness examined before the Munsif stated his age to be 24 years but the Munsif made a note on his deposition that his age appeared to be 18 or 19 years:

Held, that the Appellate Court could not come to a finding as to the age of the witness on the note of the Munsif, which was not evidence in the case. **C** MUHAMMAD HASAN MIA *v.* ABDUL HAMID **431**

Words and phrases:—

Putra putradi, meaning of **I**

Workman's Breach of Contract Act (XIII of 1859), s. 2—*Criminal Procedure Code (Act V of 1898), ss. 435, 439—Contract to cart logs of wood from one place to another, nature of—Order under first part of section 2 of Workman's Breach of Contract Act—Revision, whether competent—High Court, power of interference of.*

Workman's Breach of Contract Act—concld.

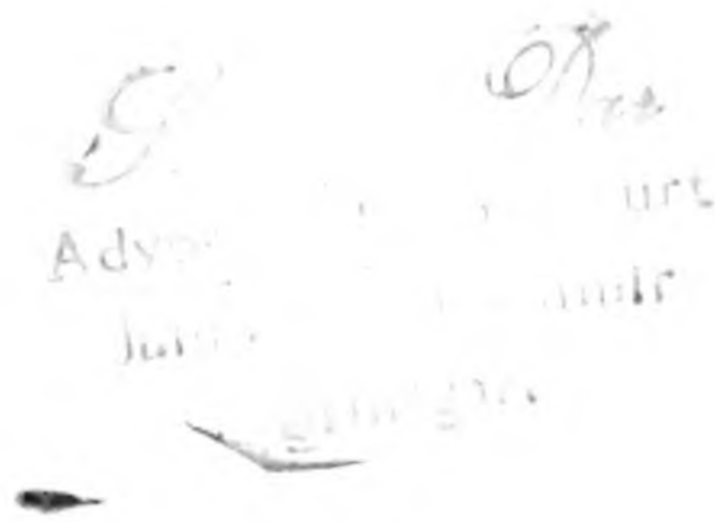
A contract to cart logs of wood from a forest to a forest depôt is not a contract of an artificer, workman or labourer within the meaning of the Workman's Breach of Contract Act.

The High Court has power to revise an order made by a Magistrate under the first part of section 2 of the Workman's Breach of Contract Act, directing either return of the advance or specific performance of the contract. The power of revision of the High Court under sections 435 and 439 of the Criminal Procedure Code extends to all proceedings before any inferior Court situate within the local limits of its jurisdiction. The test is not the nature of the proceeding held by the Court, but the nature of the Court in which that proceeding is held. **B** DEVAPPA RAMAPPA NAIK *v.* EMPEROR, 21 BOM. L. R. 277; 20 CR. L. J. 316 **492**

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

G. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

Advoc



S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.